

The Current Index of Indian Cases
1910

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Accomplice.

(1) *Accomplice—Spy or detective—Difference between—Evidence of spy—Corroboration.*

One, who, as a spy or a detective, associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose and without any criminal intent, is not an accomplice, and it is immaterial that he encouraged or aided the commission of the crime.

If a witness has made himself an agent for the prosecution before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice, and his evidence does not stand in need of corroboration; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed (a).

An Excise Deputy Collector deputed B to purchase cocaine from the accused, and B

Accomplice—(Concluded).

purchased it with money supplied by the Excise Sub-Inspector and handed the same over to the Deputy Collector. The accused was tried for illicit sale of cocaine. B in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector, who stated that he gave such instructions, and received the cocaine from him. The accused was convicted upon the uncorroborated testimony of B:

Held, that B was not an accomplice and the conviction was good.

Although the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of facts to decide in each particular case what weight he will attach to this kind of evidence, the question depending upon the character of each individual witness. **Emperor v. Chaturbhuj Sahu**, 8 Ind. Cas. 119 (Cr.).

HOLMWOOD and DOSS, JJ.

Reference :—(a) 19 B. 362, R.

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I.—Imperial Acts.**Act XVIII of 1850 (Judicial Officer's Protection).**

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Act XIII of 1859 (Workman's Breach of Contract).

(1) *Inquiry under the Act—Terms of contract should be ascertained.*

In a proceeding under the Workman's Breach of Contract Act, 1859, the first thing to be ascertained is, whether the artificer, workman or labourer entered into a valid contract, and if so, has, wilfully and without lawful or reasonable excuse, neglected or refused to perform work according to the terms of the contract.

In order that this may be ascertained, it is quite clear that the terms and circumstances of the contract must be accurately ascertained. **Emperor v. Namdeo Sakharam**, 12 Bom. L. R. 135=5 Ind. Cas. 863=11 Cr. L.J. 273.

CHANDAVARKAR and HEATON, JJ.

I.—Imperial Acts—(Continued).**Act XIII of 1859 (Workman's Breach of Contract)—(Continued).**

(2) *S. 1—Applicability of—Advance made to workman by way of loan, but not on account of any work—Act of penal nature—Construction of.*

The provisions of the Act in question can only apply to the case of a workman, who has received from his employer an advance of money on account of any work which he has contracted to perform; they do not apply to a case, in which the workman has only received a loan from his master or employer without any reference to his wages for the work which he has agreed to do, and the loan has to be repaid by monthly instalments extending over a certain period, without any deductions being made from the wages in respect of those instalments (a).

The Act (XIII of 1859) which is of a penal nature has to be construed very strictly. **Ganeshi Lal v. Shugan Chand**, 9 P.R. 1910 (Cr.)=12 P.W.R. 1910 (Cr.)=5 Ind. Cas. 914=11 Cr. L.J. 329.

SHAH DIN, J.

References :—(a) 3 A. 744 and 16 B. 368, F.; 17 P.R. 1890 (Cr.), R.

(3) *S. 1—Jurisdiction of Magistrate—Conditions—Labourer's failure to perform—Work finished through others—Effect.*

In order to give jurisdiction to a Magistrate under Act XIII of 1859, there are only two conditions required by the Act, namely, an advance of money and a wilful failure to perform the work. If these conditions are fulfilled, the Magistrate is bound either to order the repayment of the advance or so much of it as remains due, or to order the work to be performed. The only effect of the work having been performed by the agency of others is to leave open the one alternative of recovering the advance or so much as is still due, because the work cannot be ordered to be done over again and the law will not compel the performance of the impossible. **Habibullah v. Sumar wd. Usman**, 3 S.L.R. 223=6 Ind. Cas. 879=11 Cr. L.J. 414.

HAYWARD and LEGGATT, A.J.CS.

Reference :—(1) 28 M. 37, dissented from.

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1.—Imperial Acts—(Continued).

Act XIII of 1859 (Workman's Breach of Contract)—(Concluded).

- (4) *S. 1—Jurisdiction—S. 177 of Act V of 1896.*

The proceedings under Act XIII of 1859 can be instituted either in the Court of the Magistrate within the limits of whose local jurisdiction the defendant resides, or in a Court within whose local limits the refusal to perform the contract has taken place, and not where the contract has been actually made and money received. **Ganesha Singh v. Karm Din and Sharaf Din**, 13 P.W.R. 1910 (Cr.)=12 P.R. 1910 (Cr.)=6 Ind. Cas. 618=11 Cr. L. J. 380.

ARTHUR REID, C.J., and RATTIGAN, J.

References :—Cr. 17 P.R. 1896; 10 M. 21, F. & appr.; 25 C. 637; 24 M. 660; 28 M. 37; 4 C.W.N. 253, D.

- (5) *Ss. 1, 2, 4—Accused bound himself to work until re-payment of amount advanced—No advance on account of any work—Advance as loan.*

Where the accused, in consideration of an advance received from the complainant, bound himself to work for the complainant until the re-payment of the amount advanced: *Held* that the advance was made, not on account of any work contracted to be performed, but as a loan, and that the accused could not be proceeded against under the Workman's Breach of Contract Act for breach of the contract. **Gobinda Rajwar v. H.J. Apkar**, 8 Ind. Cas. 123.

HOLMWOOD and DOSS, JJ.

References :—Proceedings of Madras High Court, 12th December 1873, 7 M.H.C.R. 30, F.

- (6) *S. 2—Order directing performance of work after period fixed in the contract—Illegality.*

A Magistrate cannot, under S. 2 of Act XIII of 1859, order work to be performed after the expiry of the term fixed in the contract of the parties. **Balla v. The District Magistrate of South Canara**, 8 Ind. Cas. 163 (Cr.).

MUNRO and SANKARAN NAIR, JJ.

Act XLV of 1860.

See PENAL CODE.

Act V of 1861 (Police).

- (1) *S. 4—False complaint to Police—Sanction for prosecution by Dt. Magistrate. See CRIM. PRO. CODE, No. 89, 6 P.R. 1910 (Cr.).*

A—Imperial Acts—(Continued).

Act V of 1861 (Police)—(Concluded).

- (2) *Ss. 4, 7, 24, 42—See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).*

- (3) *S. 7—See No. 2, supra.*

- (4) *S. 24—See No. 2, supra.*

- (5) *S. 42—See No. 2, supra.*

Act III of 1867 (Gambling).

- (1) *Application of—Seizure of money found on person of gambler.*

The Gambling Act of 1867 does not draw a distinction between moneys found on the person of the gambler and those found in the gaming house. **Mahadeya v. King-Emperor**, 7 A.L.J. 404=6 Ind. Cas. 586=11 Cr. L. J. 373.

KNOX, J.

- (2) *Ss. 3, 4—Misjoinder of charges—Discretion of Chief Court to hear pleader in revision.*

Held, that a person accused under S. 3 of the Gambling Act cannot be tried together with the persons accused under S. 4 of the Act, on the ground of misjoinder of charges.

Obiter :—When the District Magistrate has refused to appoint a legal practitioner to represent the Crown in revision, the Chief Court must decline to hear him. **Makhan v. The Crown**, 5 P.W.R. 1910 (Cr.)=5 Ind. Cas. 720=11 Cr. L. J. 211.

JOHNSTONE, J.

- (2-a) *S. 4. See No. 2, supra.*

- (3) *S. 5—Search warrant issued without affixing Court seal—Warrant signed by Magistrate outside his jurisdiction—Legality—Ss. 75, 537, Crim. Pro. Code.*

Even granting that the law required that a search warrant issued under the Gambling Act should be sealed with the seal of the Court, the omission to affix the seal is a mere irregularity cured by S. 537, Crim. Pro. Code. But the search warrant, having been signed by the Magistrate at a place outside the local limits of his jurisdiction, is illegal. A warrant that is not legal warrant is no warrant at all for the purposes of the Gambling Act (a). **Girdhari Lal v. The Crown**, 23 P.R. 1910 (Cr.).

ARTHUR REID, C.J., and CHEVIS, J.

References :—(a) 11 P.R. 1895 (Cr.), F.

1.—Imperial Acts—(Continued).**Act XXV of 1867 (Press).**

(1) S. 4—*Declaration made under the Act—Effect of the declaration—The declarant taking no part in the management of the press—Publication of a seditious book at the press—The declarant having no knowledge of the sedition and having no intention to publish it—Penal Code (Act XLV of 1860), S. 124-A—Sedition—Intention.*

The accused had made a declaration, under S. 4 of the Press Act (XXV of 1867), that he was the owner of a certain press called the "Atmaram Press." The management of the press was carried on by another person who looked after the whole concern. At this press was printed a bulky book which purported to be one devoted to metaphysics and philosophy and was styled "Eka-hloki Gita." It also contained seditious matter at long and varied intervals and interspersed with discussions of religious matters. The accused took no part in the management of the press; nor did it appear that he had read the book or acquainted himself with the nature of it. He was charged with the offence made punishable under S. 124-A, Penal Code, and convicted of the same. On appeal:—

Held by Chandavarkar, J. that the cumulative effect of the surrounding circumstances was such as to make it as probable that the accused had not read the book as that he had known its seditious object; and that the evidence having thus been evenly balanced and equivocal, a reasonable doubt arose as to the guilt of the accused, the benefit of which must be given to him.

Held by Heaton, J., that it was impossible to convict the accused under S. 124-A, Penal Code, unless it was found that he had an intention of exciting disaffection, and that the evidence fell very far short of proving the intention.

Per Chandavarkar, J.—A declaration made under S. 4 of the Press Act, 1867, is intended by the legislature to have a certain effect, namely, that of fastening responsibility for the conduct of the press on the person declaring in respect of matters where public interests are involved. Therefore, when a book complained of as seditious or libellous is printed in a press, the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a

1.—Imperial Acts—(Continued).**Act XXV of 1867 (Press)—(Concluded).**

presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption, however, is not conclusive, it is not one of law but of fact, and it is open to the accused to rebut it.

The object of making a declaration under S. 4 is to create a sense of responsibility, so that, if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must *prima facie* be held responsible for it. At the same time, the Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration, but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of S. 124-A, Penal Code, where the charges is under that section.

Per Heaton, J.—An attempt to do a thing must necessarily involve some intention; for a man cannot be said to attempt to do that which he has absolutely no knowledge of doing and no intention to do. **Emperor v. Shankar Shrikrishna Dev**, 12 Bom. L.R. 675 (Cr.).

CHANDAVARKAR and HEATON, JJ.

Act XV of 1871 (Factories).

S. 15 (1) (c), Rule 22 (ii)—*Unfenced machinery—Ring-frames with tail-ends unfenced.*

It is not necessary that an order or notice from the Inspector of Factories should be issued to a person, who has not conformed to the rules made under the Act, before he can be charged for any offence under it. It is the duty of such person to obey the rules, and, in case of his disobedience, he becomes liable to conviction, whether there was any order or not from the Inspector, calling upon him to obey the rules. **Emperor v. Banoomian Pirbhai**, 12 Bom. L.R. 225=5 Ind. Cas. 969=11 Cr. L.J. 336.

CHANDAVARKAR and KNIGHT, JJ.

Act I of 1872.

See EVIDENCE ACT.

Act I of 1878 (Opium).

(1) S. 9—*Illicit sale of opium—Evidence of sale.*

Several persons were found in a house, and one of them was smoking *chandu*. On the

1.—Imperial Acts—(Continued).**Act I of 1878 (Opium)—(Continued).**

premises were also found three pipes, two iron needles, one pair of tongs and a smoking pillow. The quantity of opium, however, found in the house was within the limit allowed by law.

Held, that the circumstances were not strong enough to warrant the presumption that *chandu* was being sold on the premises. **Mussammat Ajuba v. King-Emperor**, 7 A.L.J. 25=5 Ind. Cas. 450=11 Cr. L.J. 138.

TUDHALL, J.

Reference:—(1902) A.W.N. 17, D.

(2) *S. 9—Opium, possession of—Possession of a railway receipt for parcel containing opium.*

Where it was found that the accused had in his possession a railway receipt for a parcel containing opium.

Held, (*dubitant*)—That the possession of the railway receipt constituted possession of the opium to which the receipt related within S. 9 of the Opium Act (I of 1878) (*a*). **Ashruf Ali v. The King-Emperor**, 11 C.W.N. 233=36 C. 1016=11 Cr. L. J. 29=1 Ind. Cas. 699.

JENKINS, C.J., and CASPERSZ, J.

References:—(*a*) 32 C. 557; 9 C.W.N. 719 doubted, but followed.

(3) *S. 9, cl. (c)—Possession of opium, ingredients necessary to constitute—Whether crew of boat in which opium was found, could be said to be in possession of the opium.*

For the purposes of an offence under S. 9, cl. (c) of the Opium Act (I of 1878), nothing is necessary beyond possession of the opium; no particular frame of mind of the person found in possession is necessary to constitute the offence.

The more fact that the accused were two of the crew of the boat in which contraband opium was found, is not sufficient to attribute to them possession within the meaning of S. 9 of the Opium Act. **The Government of Eastern Bengal v. Serajuddin**, 14 C.W.N. 308 (Cr.)=37 C. 25=5 Ind. Cas. 555.

JENKINS and CASPERSZ, JJ.

(4) *Ss. 9 and 10—Presumption of guilt, rule of, in S. 10—Meaning of—Circumstantial evidence of guilt.*

In construing S. 10, Opium Act, some limitation must be placed upon the general words of the section, namely, "it shall be presumed, until the contrary is proved, that all opium

1.—Imperial Acts—(Continued).**Act I of 1878 (Opium)—(Continued)?**

for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act."

The effect of Ss. 9 and 10 of the Opium Act seems to be that, when once it is proved that an accused person has dealt with opium in any of the ways described in S. 9, the *onus* of proving that he had a right so to deal with it is thrown upon the accused by S. 10.

But the commission of an act which may be an offence must be proved before the presumption under S. 10 comes into play, and the presumption cannot be used to establish the fact.

Where the accused, after having purchased opium on behalf of his master, did not send it to the master's shop, but falsely said, when asked as to it, that the opium had been stolen,

held, these circumstances, though they raise a suspicion that the accused sold the opium, are not sufficient to prove that he had done so; and the rule of statutory presumption embodied in S. 10 of the Act does not apply and cannot be used to establish that fact.

But as, on the facts proved, the accused might have been convicted of unlawful transport of opium, the conviction and sentence were not interfered with. **Iswar Chandra Singh v. The Emperor**, 14 C.W.N. 710=6 Ind. Cas. 173=11 Cr. L.J. 256=12 C.L.J. 19=37 C. 581.

STEPHEN and CARNDUFF, JJ.

(5) *S. 10—Presumption—Onus.*

Accused was tried for illegal possession of opium found on him on the 18th May, 1909. He accounted for it by saying that he had purchased it from a licensed vendor. This fact was accepted by the prosecution, but they alleged that the date of his purchase was such that this explanation was not satisfactory: *Held*, that it lay upon the prosecution to prove that date, and only then, upon the accused failing to satisfactorily account for the large quantity of opium still in his possession on the date of his arrest, could any presumption be drawn against him under S. 10 of the Opium Act. **Emperor v. Pa**, 8 Ind. Cas. 461.

FOX, C.J., and PARLETT, J.

References:—1 L.B.R. 311; 9 Cr. L.J. 16, Cons.

(6) *Direction 31—Obtaining opium by personation in excess of amount allowed by Exercise officer—Fraudulent act.*

I.—Imperial Acts—(Continued).**Act I of 1878 (Opium)—(Concluded).**

Where a person licensed to buy opium obtains from the licensed vendor, by personating a real or imaginary person, more opium than he would have got without such personation, he cannot be said to act dishonestly, as there would have been no wrongful gain or loss had the opium been sold to him. He does, however, act fraudulently, as his intention was to deceive the vendor and thereby obtain an advantage or privilege, which without such deception could not have been obtained.

Emperor v. Tan Kep Si, 8 Ind. Cas. 596.

MOORE, J.

(7) S. 10—See No. 4, *supra*.

Act VII of 1878 (Forest).

S. 25, cl. (i)—*Hunt—Interpretation.*

The accused was sitting in a reserved forest in a *bhoja*, or specially prepared screen devised for hunting, and had by his side a loaded gun. He was sitting there with the intention of hunting. Upon these facts he was proceeded against under S. 25, cl. (i), Forest Act, 1878, for hunting in a reserved forest without a license:—

Held, that the accused was hunting within the meaning of S. 25, cl. (i), Forest Act, 1878.

The word "hunt" is used intransitively in S. 25, cl. (i) of the Act. **Emperor v. Malu Hiru Bagara**, 12 Bom. L.R. 520 = 7 Ind. Cas. 450 = 11 Cr.L.J. 486.

BACHELOR and HEATON, JJ.

Act XI of 1878 (Arms).

(1) *Case not tried under Arms Act or Explosives Act—Retrial not asked for—Conviction under either of the Acts—Legality.*

Where a case might properly have been tried under the Arms Act or the Explosives Act, but the Public Prosecutor did not ask the High Court to order a re-trial, the High Court cannot convict the accused under either of those two enactments without a fresh trial. **Emperor v. Joseph Kangani**, 8 M.L.T. 296.

MILLER and MUNRO, JJ.

(1-a) S. 4—*Empty cartridge case—Ammunition.*

Empty cartridge case is ammunition as defined by S. 4 of the Arms Act, the possession of which is an offence. **Baldeo Singh v. King-Emperor**, 7 A.L.J. 102 = 4 Ind. Cas. 405 = 10 Cr. L.J. 573 = 32 A. 152.

TUDBALL, J.

Reference:—7 Bom. L.R. 474, R.

I.—Imperial Acts—(Continued).**Act XI of 1878 (Arms)—(Concluded).**

(2) S. 4—*"Arms" definition of—Cook's-knife, whether is an arm.*

The purpose for which an implement is primarily intended regulates whether it should be considered an arm or not.

A cook's knife is not an arm. The accused's conduct in manufacturing a sheath for the knife, to enable him to conveniently carry it about with him, does not convert it into an arm, unless the character of the knife is altered, (e.g.), by grinding it so as to make it double edged. **King-Emperor v. Aung Ba**, 5 L.B.R. 130.

PARLETT, J.

References:—(a) 1 L.B.R. 271 : 3 L.B.R. 1, and Cr. Rev. No. 556 of 1903, F.

(2 a) S. 4—*Dashe-upyat, whether an arm.*

It is the intention of the manufacturer, and not of the possessor of a weapon as to the use to which it is to be put, which determines whether a weapon is an arm or not.

A *dashe-upyat* of the usual type is primarily intended for domestic and agricultural purposes and is not an arm within the meaning of the Arms Act. **King-Emperor v. Hamyit**, 5 L.B.R. 207.

FOX, C.J., and PARLETT, J.

(3) Ss. 4, 19—*Ammunition—Lead moulded into bullets—Sentence for technical offences.*

Held, that, although lead is exempt from the operation of S. 4 of the Indian Arms Act (XI of 1878), yet when it is moulded into bullets of 20 to 24 bore, it is ammunition within the meaning of the said section.

The definition of ammunition given in the said S. 4 is not exhaustive, and the question whether a certain article falls within its purview is to be decided according to the circumstances of each case (a).

Held, also, that, in a case of technical offence, a nominal sentence is always quite sufficient to meet the ends of justice. **Sant Singh v. The Crown**, 23 P.W.R. 1910 (Cr.) = 16 P.R. 1910 = 6 Ind. Cas. 952 = 11 Cr. L.J. 421.

REID, C.J., and RATTIGAN, J.

References:—(a) Cr. 20 P.R. 1890 ; 21 M. 360 (F.B.), R. (b) 7 Bom. L.R. 474 ; 24 C. 749, F.

(4) S. 19—See No. 3, *supra*.

1.—Imperial Acts—(Continued).

Act XVII of 1878 (Northern India Ferries).

- (1) Ss. 4, 26—Change in course of river—No limit fixed by Government—Conviction—Illegal.

Where there has been a change in the course of a river and there has been no specification of limits under S. 4 of the Ferries Act subsequent to the change, a conviction under S. 26 of the Act for working a Ferry within the previously prohibited limits cannot be sustained. **Bansi Dhar v. Emperor**, 8 Ind. Cas. 221 (Cr.).

KARAMAT HUSAIN, J.

References:—37 C. 543; 12 C.L.J. 21; 6 Ind. Cas. 98, R.

Act XVIII of 1879 (Legal Practitioners).

- (1) Ss. 3, 36. See TOUT, Nos. 1 and 2, 26 and 27 P.W.R. 1909 (Cr.).

[(2) Ss. 12, 13 and 14—Pleader—Unprofessional conduct—Meaning of “any other reasonable cause”—Letters Patent, S. 10—Ejusdem generis, principle of—Interpretation of statute—Marginal notes, value of.

Where two pleaders became directors of a Provident Society, which was in no sense an undertaking for the purposes of life-insurance in the ordinary acceptance of the term, but was a means of furnishing profit to the directors, by enabling those who so desired to gamble to become applicants to the society: *held*, that they were guilty of unprofessional conduct under section 13, cl. (f) of the Legal Practitioners Act.

Per Miller, J.—“Any other reasonable cause” must be given a wide meaning, and must not be construed in a limited way on the principle of *ejusdem generis*.

Per Krishnaswami Iyer, J.—Dishonourable or dishonest conduct, not in the discharge of professional duty, would fall within the purview of “reasonable cause” in S. 13. (The application of the doctrine of *ejusdem generis* considered). When a vakil does that which involves dishonesty, it is for the interest of suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as a vakil of the Court.

Value of marginal notes considered. *In the matter of two Second Grade Pleaders*, 6 Ind. Cas. 313=11 Cr.L.J. 310=8 M.L.T. 22=20 M.L.J. 500.

WHITE, C.J., MILLER and KRISHNA-SWAMI AIYAR, JJ.

1.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners)—(Continued).

- (3) Ss. 12, 14—Muktear—Conviction of rioting—Liability to suspension from practice—Conviction if conclusive.

Two muktears, who were parties to a proceeding under S. 145, Cr. P.C., in the course of which a *chur*, the subject of the proceeding, was attached under S. 146 and placed in charge of a receiver, collected a number of armed men who formed an unlawful assembly with a view to take forcible possession of the *chur*:

Held—That, having regard to character of the offence, an order under S. 12 of the Legal Practitioners Act could properly be passed against them.

That, in such a proceeding, it was not open to them to go behind their conviction by the Criminal Court and invite the Court to examine the facts with a view to showing that the conviction was erroneous (a).

But the Court in such a case will look into all the facts as found to determine the position of the persons concerned. *In re Kali Prasanno Bosu Chaudhury*, 14 C.W.N. 1073 (Cr.).

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 26 I.A. 242; s.c. 22 All. 49; 3 C.W.N. 736 (1899), F.

- (3-a) S. 13—See No. 2, *supra*.

- (4) Ss. 13 (c) (d)—Payment by pleader out of his *Munshi's* fee to a person who brings a case to him—Misconduct.

Held by the Full Bench that:—

(1) That *Munshiana* (Clerk's fee) does not mean the fee paid or payable to a pleader for his services, within the term of section 13 (c) of Act XVIII of 1879 as amended.

(2) Paying wholly or in part *Munshiana* to a person, who introduces a client to a pleader, is not objectionable under the said S. 13 (c), provided it is not done in pursuance of any previous arrangement between that person and the pleader, for the procuring by the former of clients for the latter.

Obiter:—(3) The *Munshiana* system is very similar to that in force in England, where a Counsel's clerk is paid by his employer and receives fees as well from that employer's clients.

On receiving back the case from the Full Bench, the Division Bench (Johnstone and Williams, JJ.) after remarking as follows:—

1.—Imperial Acts—(Continued).

Act XVII of 1879 (Legal Practitioners)
—(Continued).

Held, that a pleader, who himself pays a sum of money to a procurer of clients or allows him to take his clerk's *Munshiana* in whole or in part as a gratification for having procured him a client, is as liable to be dealt with under section 13 (c) of Act XVIII of 1879 as if he has paid out of his own fee.

Remark—

"In referring the aforesaid question regarding it (section 13-c) to the Full Bench, we rather assumed that the words "out of any fee ...services" qualified "tenders" or "gives" as well as "consents to the retention of;" but examination of the structure of the clauses shows that this assumption was hardly correct ...the real meaning of the clause is this:—

"Who tenders or gives any gratification for procuring or having procured the employment, etc., or consents to the retention out of any fee paid or payable to him for his services, or any gratification for procuring, etc." **In the case of Amolak Ram, Pleader**, 22 P.W.R. 1910 (Cr.) = 6 Ind. Cas. 736 = 11 Cr. L.J. 396.

REID, C.J., RATTIGAN and CHEVIS, JJ.

(5) *Ss. 13, 14—As amended by Act XI of 1896—Competency of District Judge to enquire into a charge of misconduct—Toutism—Chief Court's power of revision.*

Held, that:—

(1) Section 14 of Act XVIII of 1879 applies to all clauses of its section 13 as amended by Act XI of 1896.

(2) When any of the charges mentioned in section 13 of the said Act is brought to the notice of any Court within whose local limits the pleader is ordinarily practising, the presiding officer has jurisdiction to proceed against him (pleader) under its section 14 and can report, in the manner prescribed thereunder, to the High Court for suspending or dismissing such pleader in case the charge is made out (a).

(3) In acting under section 14 of the said Act, the Court is bound to hold preliminary inquiry in order to find out distinctly what is the charge, and after satisfying itself that it is *prima facie* a true one, but not before, the Court can proceed to issue notice required in paras. 1 and 2 of the same section. Such a notice if issued on a vague report is liable to be set aside on revision by the High Court.

1.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners)
—(Concluded).

(4) In order to sustain a charge under clause (c) of section 13 of the Act the gratification paid to the tout must be "out of any fee paid or payable to a pleader" but does not include a payment made out of the *Munshiana* of a pleader's *Munshi*. **Amolak Ram v. The Crown**, 31 P.W.R. 1909 (Cr.) = 4 Ind. Cas. 1022 = 11 Cr. L.J. 148.

JOHNSTONE and WILLIAMS, JJ.

References:—(a) 15 C. 152 (P.C.); 27 C. 1025, D.

(5) *Ss. 13, 40—Other reasonable cause," meaning of, in S. 13—Not restricted to matters ejusdem generis with matters in cls. (a) to (e)—Charges, necessity to formulate with particularity—Evidence Act (I of 1872), S. 133—Answers not objected to—No privilege.*

An order under S. 13 of the Legal Practitioners Act can only be made, after notice has been given to the pleader to show cause why he should not be suspended or dismissed. The notice must formulate the charges with sufficient precision, to enable the pleader to know the charge which he is called upon to meet.

The words "other reasonable cause" in S. 13 cl. (f) are not restricted to matters *eiusdem generis* with the matters mentioned in cls. (a) to (e) (a).

Two pleaders organized a political meeting and one of the speakers at the meeting was convicted of sedition. The two pleaders were also charged with having published a leaflet to honour B. C. Pal. *Held*, these circumstances did not constitute "reasonable cause" for their suspension or dismissal.

The evidence given by witnesses can be used against them in a subsequent proceeding, if they did not claim privilege or object to answer any of the questions which were put to them (b). **In re Ganapathy Sastry**, 6 M.L.T. 253 (F.B.) = 19 M.L.J. 504 = 3 Ind. Cas. 344.

ARNOLD WHITE, C.J., BENSON, MILLER and SANKARAN NAIR, JJ.

References:—(a) 26 M. 448, F. (b) 3 M. 271, F.

(7) S. 14—See Nos. 2, 3 and 5, *supra*.

(8) S. 36—See No. 1, *supra*.

(9) S. 40—See No. 6, *supra*.

1.—Imperial Acts—(Continued).**• Act VI of 1882 (Companies).**

S. 74 and Regulations under S. 220 (b)—Failure to file balance sheet—Registrar only competent to prosecute—Power of High Court to interfere in a pending case—S. 439 of the Criminal Procedure Code.

(1) *Held*, that, under the regulations framed by the Local Government under S. 220 (b) of Act VI of 1882, the Registrar is the only officer authorized for instituting and conducting all prosecutions under the Act, specially where the prosecutions are in connection with breach of the rules relating to submission of balance-sheets and other periodical returns. So a complaint under S. 74 of the Indian Companies Act for wilful default in filing a balance sheet, not brought by the Registrar but by a Clerk of his office and countersigned by the Public Prosecutor, is bad in law and not entertainable by a Criminal Court.

(2) *Held*, also that, where, by any law or regulation, a certain person is only authorized to complain about a particular offence, the proceedings of a Magistrate based on a complaint relating to that offence, made by any unauthorized person, are *ultra vires* and liable to be set aside on revision by the High Court at any time during the pendency of the case. **Shib Das v. Sangam Lal**, 35 P.W.R. 1910 (Cr.).

WILLIAMS, J.

References:—Cr. 20 P.W.R. 1908; Cr. 1 P.W.R. 1909; Cr. 8 P.W.R. 1909, R.

Act XV of 1882 (Presy. S. C. Court).

S. 38—Sanction to prosecute—Full Court's power to grant or revoke sanction. See CRIM. PRO. CODE, No. 86, 12 Bom. L.R. 130.

Act IV of 1884 (Explosives).

"Patakhas" or crackers, whether "fire-work" —License, whether necessary for sale.

Patakhas, which are small packets, wrapped in a paper, of coloured potash mixed with small pieces of *kankar*, and which explode with a slight report when thrown with force against a wall or other hard surface, are not *fireworks* within the meaning of the Explosives Act, and so no license is necessary for the manufacture or sale of "*Patakhas*." **Crown v. Banshidar**, 8 P.R. 1910 (Cr.) = 9 P.W.R. 1910 = 5 Ind. Cas. 911 = 11 Cr.L.J. 287 (Cr.).

REID, C.J., and JOHNSTONE, J.

2 Cr.

1.—Imperial Acts—(Continued).**Act IV of 1889 (Merchandise Marks).**

(1) Ss. 6 and 7—Use of word 'copyright'—False description—Conviction. See PENAL CODE, No. 94, 7 M.L.T. 309.

(2) S. 7—See No. 1, *supra*.

• Act IX of 1890 (Railways).

(1) *S. 7—City of Bombay Municipal Act (Bom. Act III of 1888). S. 394—Railway Company storing sleepers on their premises—License from the Municipal Commissioner for the use of premises not necessary.*

The G.I.P. Railway Company used certain plots of land in Bombay for the purpose of storing sleepers (timber) for the use of their line. In the Presidency Magistrate's Court, the Agent of the Company was charged, under S. 394 (i) (d) of the City of Bombay Municipal Act, with having used the plots for storing timber without a license from the Municipal Commissioners.

Held, (1) that no license was necessary, as S. 7 (1) of the Indian Railways Act, IX of 1890, enabled the Railway Company to do all act necessary for making, maintaining, altering or repairing and using the Railway, notwithstanding anything in any other enactment for the time being in force;

(2) that the storing of sleepers was necessary for the maintenance, repairing, etc., of the railway line;

(3) that, under sub-S. (2) to S. 7, the exclusive control of the Railway administration was vested in the Governor-General in Council, and if the Company was exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it was open to the Municipal Commissioners to make a representation to that effect to the Governor-General in Council. **Municipal Commissioners of Bombay v. G.I.P. Ry. Co.**, 11 Bom. L. R. 1181 = 34 B. 252 = 4 Ind. Cas. 281 = 10 Cr. L. J. 548.

SCOTT, C.J., and BATCHELOR, J.

(1-a) *S. 47—(General Rules—Great Indian Peninsula Railway Working Time Table, O. VII—Rules not invalid—Ultra vires—Guard's duty to see the pair of points to ensure the safety of his train.*

The rules in O. VII of the G.I.P. Ry. Working Time Table, though not made under S. 47 of the Indian Railways Act, are yet absolutely within the power of the Company to impose,

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Continued).**

so long as they are not inconsistent with the Railways Act or with the General Rules made under that Act. The rules in O. VII are merely administrative orders or executive directions; nevertheless, the Company's servants are bound to obey them. There is no inconsistency between the rules in O. VII and the Railways Act or the General Rules made under that Act.

The object of rule 1, O. VII, is that the guard of a train waiting at a station on a loop line, in order to enable another train running in the opposite direction to cross at the station, is to prevent a collision with his own train, in other words, he is to secure the safety of his own train by seeing to the particular pair of points which lead into the line occupied by his train. **Emperor v. Donald Bruce Weir**, 12 Bom. L. R. 930.

CHANDAVARKAR and HEATON, JJ.

(2) *S. 101—Railway—Rash or negligent act—Act endangering safety of a person.*

Under S. 101 of the Railways Act, the offence consists in (1) disobeying rules or doing any rash or negligent act and (2) thereby endangering the safety of any person. It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did, in point of fact, so endanger any person's safety.

The Assistant Station Master of Talwandi allowed a goods train to proceed to the next station Dogra, without informing the staff of the latter station of his doing so, and without previously obtaining a line clear message from that station. A passenger train was nearing Dogra from the opposite direction, and the goods train was detained at the distant signal of the Dogra station till line was clear to receive the goods train.

Held, that the Assistant Station Master could not be convicted of the offence under S. 101 of the Railways Act. **Crown v. Ganesh Das**, 8 P.L.R. 1910 (Cr.)=6 Ind. Cas. 483 =11 Cr. L.J. 362.

REID, C.J., and RATTIGAN, J.

References:—13 P.R. 1906 Cr. S.C.; 59 P. L.R. 1907; 4 Bur. L. R. 354; 6 M. 201; 4 Bur. L.R. 139; 11 C.W.N. 173; 32 C. 79; 7 P.R. 1892 Criminal Revision No 1049 of 1894, R.

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Concluded).**

(3) *Ss. 102, 108, 109, 120—Passenger defined—Resisting an attempt by a Railway servant to put into carriage more passengers—Assault—Indian Penal Code (Act XLV of 1860), S. 352.*

Held, that, if a person objects to the coming in of more passengers, and stands against the door, he commits an offence falling under Ss. 109 (2) and 120 (c) of Act IX of 1890, and is liable to removal, not only from the carriage, but also from the Railway by any Railway servant, and the latter does not commit an offence of assault under S. 352, I.P.C., or any other offence, if, in ejecting the passenger, he does not use more force or violence than is actually necessary for the purpose.

Held, also, that, for the purposes of various sections of the said Act, *e.g.*, 102, 108 and 109, a person who is a ticket-holder is regarded as a passenger, even before he has actually boarded the train. **Hari Sarup Salekh Chand Abdul Basit and Ijaz Hussain v. The Crown**, 11 P.W.R. 1910 (Cr.)=7 Ind. Cas. 355=11 Cr. L.J. 451.

CHEVIS, J.

(4) S. 108—See No. 3, *supra*.

(5) S. 109—See No. 3, *supra*.

(6) S. 120—See No. 3, *supra*.

Act XII of 1896 (Excise).

(1) *Ss. 3 (1) (n), 51, 52—Scope—Quantity of liquor which may be possessed by a licensee—Penalty for excess.*

A licensee may possess liquor in excess of the amount specified in S. 3 (1) (n), and up to the amount specified in his license or pass, and, if he is in possession of more than the latter quantity, he is punishable under S. 51, which applies to "any person." S. 52 providing a penalty for certain offences not punishable by S. 51, the words "for the breach of which rule or condition no other penalty is hereby provided" being clear and meaning that S. 52 does not apply to cases for which a penalty is provided by some other part of the Act. **Mangal Singh v. The Crown**, 21 P.R. 1910 (Cr.).

REID, C.J.

(2) *Ss. 36, 37, 38, 44, 57, 49 and 52—Police Officer invested with powers under S. 44, whether Excise Officer—His authority to make a complaint of an offence under S. 52 or 49.*

I.—Imperial Acts—(Continued).**Act XII of 1896 (Excise)—(Concluded).**

A Police Officer invested with powers under S. 44 can only be treated as an Excise Officer for the purpose of Ss. 36 to 38, but he is not an Excise Officer within the meaning of S. 57, so as to be competent to make a complaint or report of an offence punishable under Ss. 49 or 52 of the Act. **The Crown v. Niadar Singh**, 13 P.R. 1910 (Cr.)=27 P.W.R. 1910 =6 Ind. Cas. 717=11 Cr. L.J. 394.

SHAH DIN and WILLIAMS, JJ.

References:—9 P.R. 1897 (Cr.), *F.*; 22 P.R. 1900 (Cr.) and 8 P.R. 1901, *D.*

- (3) S. 37. See No. 2, *supra*.
- (4) S. 38. See No. 2, *supra*.
- (5) S. 44. See No. 2, *supra*.
- (6) S. 49. See No. 2, *supra*.
- (7) S. 51. See No. 1, *supra*.
- (8) S. 52. See Nos. 1, 2, *supra*.
- (9) S. 57. See No. 2, *supra*.

Act V of 1898.

See CRIM. PRO. CODE, 1898.

Act VI of 1898 (Post Office).

S. 64—V.P. Post—Rule framed under the Act requiring declaration as to existence of bona fide order—Signing false declaration—Whether offence under S. 64—Rules framed under the Act, effective as the Act itself.

K sent a copy of his magazine by V.P. post to W, signing a declaration to the effect that the article was sent in execution of a *bona fide* order received by him; without which declaration the Post office would not, by reason of the rule issued under the Post Office Act (VI of 1898), have accepted the article for transmission by V.P. post. The accused was charged under S. 64 of the Act for making a false declaration in violation of the terms of the Act. It was found that the accused had received no order from W and that the declaration signed by him was false. But the Magistrate thought that the prosecution must fail, because the Post Office Act itself, that is, the sections in the body of the Act do not require such a declaration to be made and the rule framed under the Act is not part of the Act.

Held that the Magistrate's view was wrong, and that the rules and bye-laws framed for the purpose of carrying out the objects of an Act under the powers conferred by it, shall have effect as if enacted by the Act. An order to send the article cannot be inferred merely

A—Imperial Acts—(Continued).**Act VI of 1898 (Post Office)—(Concluded).**

because the addressee did not refuse to receive, nor returned by post any of the previous issues sent to him, and did not make a protest even after he received intimation that he had been enrolled as a subscriber and that the issue in question would be sent by V.P. post.

But, if the addressee had paid for the issue sent to him by V.P., and continued to receive further issues, say for about an year, and then an issue was sent to him V.P. for the amount of subscription for that year, it might be well that one could infer an order under such circumstances. **The Crown Prosecutor v. G. Kothandaramiah**, 7 M.L.T. 69=5 Ind. Cas. 738.

BENSON and ABDUR RAHIM, JJ.

Reference:—6 A.L.J. 481, *D.*

Act V of 1908.

See CIVIL PROCEDURE CODE.

Act VI of 1908 (Explosives).

(1) Case not tried under—Re-trial not asked for—Conviction under—Legality. See ACT XI OF 1878 (ARMS), No. 1, 8 M.L.T. 296.

(2) Ss. 3, 5—Gist of S. 3—Essentials of S. 5. See PENAL CODE, No. 54, 7 M.L.T. 314.

(3) S. 5—See No. 2, *supra*.

Act VII of 1908 (Newspapers, Incitement to offences).

(1) Ss. 2, 3—*Pallichitra*, 'Newspaper'—*Criminal Procedure Code*, S. 129—*Opinion of third Judge*.

Per Mookerjee, J.—Where the Judges composing the Court of appeal are equally divided in opinion upon the question of the guilt of an accused person, though upon certain aspects of the case they may be agreed, the case of the accused is, under S. 429, laid before a third Judge, whose duty it is to consider the whole case and all the points involved, and it will be according to the opinion of such Judge that the judgment will follow.

The terms 'Newspaper' in Act VII of 1908 involves the idea of periodicity, as also the fact that what is contained in the paper is public news or comment thereon. A monthly magazine and critical review, which in one particular issue contains sentences or paragraphs which may by stretch of language be deemed to contain public news, is not a 'newspaper' within the Act.

1.—Imperial Acts—(Continued).

Act VII of 1908 (Newspapers, Incitement to offences)—(Concluded).

Per Harington and Mookerjee, JJ.—On a consideration of the poem, it was not one which contained an incitement to murder or to an offence under the Explosive Substances Act or to an act of violence.

Per Harington and Teunon, JJ.—A paper which manifestly contains an item of public news is 'Newspaper' within the Act. **Sarat Chandra Mitter v. King-Emperor**, 12 C.L.J. 294 (Cr.).

HARINGTON, MOOKERJEE and TEUNON, JJ.

(2) S. 3—Order—Forfeiture of press.

S. 3 of the Newspaper (Incitement to Offences) Act, 1908, provides for the making of a conditional order, declaring the printing press used for the purpose of printing or publishing the offending newspaper to be forfeited. The section refers to the whole of the press, and no order could be made under it limited only to such portions of the press as were employed in printing the offending newspaper. *In re Dhondo Kashinath Phadke*, 12 Bom. L.R. 120 = 5 Ind. Cas. 858 = 12 Cr. L. J. 268 = 34 B. 327.

SCOTT, C.J., and BATCHELOR, J.

(3) S. 3—See No. 1, *supra*.

Act XIV of 1908 (Criminal Law Amendment).

(1) Ss. 12, 14 (1)—*High Court's power to grant bail to accused tried under the Act—Criminal Procedure Code (Act V of 1898), Ss. 498, 497—Discretion, exercise of—Cognizance, taking, what amounts to.*

The power of the High Court to grant bail to an accused person under S. 498, Crim. Pro. Code, is untouched by the provisions of the Criminal Law Amendment Act (XIV of 1908).

But, in exercising its discretionary power under that section, the High Court will take into consideration the terms of S. 12 of the Act, whereby the powers of Courts, other than the High Court and the Sessions Court, of releasing the accused on bail, given by S. 497, Crim. Pro. Code, have been made subject to the proviso that no person remanded to custody in the course of proceedings under the Act shall be released on bail, if there appear to be sufficient grounds for enquiry into his guilt.

Taking cognizance of an offence does not involve any formal action or indeed any action of any kind, but occurs as soon as a Magistrate,

1.—Imperial Acts—(Continued).

Act XIV of 1908 (Criminal Law Amendment)—(Concluded).

as such, applies his mind to the suspected commission of the offence. **Sourindra Mohan Chuckerbutty v. The Emperor**, 14 C.W.N. 512 = 6 Ind. Cas. 9 = 11 Cr. L. J. 217 = 37 C. 412.

STEPHEN and CARNDUFF, JJ.

(2) S. 14 (1)—*Sessions Judge's power to grant bail—Criminal Procedure Code (Act V of 1898)—S. 498—Sessions Court, superior to District Magistrate—District Magistrate's duty to send records to Sessions Judge when called for.*

Where the provisions of Part I of the Criminal Law Amendment Act have been applied to proceedings before a Magistrate in respect of an offence, the Sessions Judge ceases to have jurisdiction to grant bail under S. 498, Crim. Pro. Code, the exercise of such jurisdiction being inconsistent with the special procedure prescribed in the said Part.

The proper Court to apply to for bail in such a case is the High Court, whose power to admit to bail is not affected by the Act (a).

The District Magistrate acted improperly in not sending the records to the Sessions Judge, when he called for them. **Emperor v. Lalit Kumar Chatterjee**, 14 C.W.N. 516 = 6 Ind. Cas. 10 = 11 Cr. L. J. 219 = 37 C. 439.

STEPHEN and CARNDUFF, JJ.

Reference:—14 C.W.N. 512, R. (1910).

(3) S. 14 (1)—See No. 1, *supra*.

Act III of 1909 (Presidency Towns Insolvency).

(1) S. 17, 103—*Adjudged insolvent—"Suit or other legal proceedings" against the insolvent—Penal Code (Act XLV of 1860), S. 421—Fraudulent transfer of property—Magistrate's jurisdiction to try the offence.*

M applied to the Insolvent Debtors Court at Bombay for relief under the Presidency Towns Insolvency Act, 1909, and was adjudicated an insolvent the same day. Ten days later, a creditor of his filed a complaint in the Magistrate's Court, against him for an offence under S. 421, Penal Code, and against two others for abetment of the offence. M contended that the Magistrate's jurisdiction to entertain the complaint under S. 421, was excluded by the Insolvency Act, 1909, and that only the

1.—Imperial Acts—(Concluded).

Act III of 1909 (Presidency Towns Insolvency) —(Concluded).

Insolvency Court at Bombay had jurisdiction to entertain the complaint :

Held, that the Magistrate's jurisdiction to try an adjudged insolvent for an offence under S. 421, Penal Code, was not taken away by the Insolvency Act, 1909.

The expression "or other legal proceedings" in S. 17 of the Insolvency Act, 1909, following as it does the word "suit," a word of more limited application, must be construed on the principle of *ejusdem generis*.

Where the Insolvency Act, 1909, creates an offence, it is the Insolvency Court which has jurisdiction as to it. But as to offences under the Indian Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to be excluded, unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences.

S. 103 of the Act does not substantially interfere with S. 421 of the Code. As its essential ingredient shows, it is more or less a new offence, created by the Act in addition to the offence under the Code.

One statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but the inconsistency must be so great that they cannot both be to their full extent obeyed. *Emperor v. Mulshankar Harinand Bhat*, 12 Bom. L. R. 750 (Cr.).

CHANDAVARKAR and HEATON, JJ.

(2) S. 103—See No. 1, *supra*.

2.—Bengal Acts.

Act VI of 1870 (Chowkidari).

Warrant under—Delegation of authority to execute—Execution by person not expressly authorized. See PENAL CODE, No. 30, 14 C.W.N. 282.

Act V of 1875 (Bengal Survey).

S. 41—Order under—Effect. See CRIM. PRO. CODE, No. 58, 11 C.L.J. 417.

Act I of 1885 (Ferries).

(1) *Ss. 6, 16, 28—Declaration of ferry being public—Private ferry not to ply within specified distance of public ferry.*

Where a ferry has not been declared to be a public ferry under S. 6 of the Bengal Ferries Act, no conviction under *Ss. 16 and 28* of the Act can take place for plying a private ferry

2.—Bengal Acts—(Continued).

Act I of 1885 (Ferries)—(Concluded).

within the specified distance of the ferry. *Maharaj Mandal v. Pokak Singh*, 6 Ind. Cas. 198=37 C. 548=11 Cr. L. J. 293=12 C.L.J. 21.

STEPHEN and CARNDUFF, JJ.

(2) S. 16—See No. 1, *supra*.

(3) S. 28—See No. 1, *supra*.

Act III of 1885 (Bengal Local Self-Government).

S. 140—Encroachment—Erection of a fence on the roadside land—Passage along the road not impeded—Offence—Proprietary right of the District Board over roadside land—Continuing offences likely to be committed after proceeding—Daily fine—Legality.

Where a bye-law made under S. 140 of the Bengal Local Self-Government Act, 1885, enacted that "no person shall damage or encroach on any part of a road, its slopes or side-ditches, by placing a fence thereon," and where a person erected a fencing that stood upon the roadside land and thereby encroached upon such land.

Held, that the encroachment, though it did not impede the passage along the highway, was an offence.

The fact that it was admitted that the District Board has no proprietary right in the road or in the land on which its slopes or side-ditches stand, and that its rights are confined to maintaining the road, does not affect the question.

A sentence of a daily fine, imposed in respect of a continuing offence, which may be committed after the date of the proceeding, is illegal. *Nilmani Ghatak v. Emperor*, 37 C. 671.

• STEPHEN and CARNDUFF, JJ.

Act I of 1895 (Public Demands Recovery).

Resistance to the execution of warrant under the—, after the date specified in the warrant—Extended date not specified in the warrant—Execution by person not expressly authorised—Effect. See PENAL CODE, No. 30, 14 C.W.N. 282.

Act III of 1899 (Calcutta Municipal).

(1) *S. 3, cl. (29)—Nuisance—Putting up posts to prevent wheel-traffic passing through busti, if nuisance.*

The owner of a *busti* put up certain posts which had the effect of preventing the wheel-traffic passing through the *busti* from east to west

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).

and from north to south, leaving the opening on to the main road open and free at all times for any cart which had business in the *busti* and could go all over it and all round it and out again by the same passage by which it came in; but the cart could not get in and out of this *busti* by the shortest route as it had to go back by the way it came in:

Held, that, although it may be inconvenient to the Municipal servants and although it may add to the expense of cleansing the *busti*, the act of the owner cannot in any way interfere with the effective cleansing of the *busti*, which it is necessary to establish before it can be held to be a nuisance. **Narendra Nath v. Chairman, Corporation of Calcutta**, 8 Ind. Cas. 17 (Cr.).

HOLMWOOD and DOSS, JJ.

(1-a) S. 3, cl. 29 and S. 632—Nuisance—Building wall to prevent neighbour from acquiring easement, if nuisance—May be otherwise nuisance—Duty of Court in abating nuisance.

The building of a wall, however high on a man's own property, for the purpose of preventing his neighbour from acquiring rights of easement over his land, is not in itself a nuisance under the Calcutta Municipal Act (a).

But although the height of the wall may not be a nuisance, yet the accumulation of filth and want of space to clear the drainage between it and the neighbour's house may cause it to be a nuisance.

The Court should not pull down the wall to a lesser height, but should consider whether the nuisance may not be abated by some means of clearing the space. **Khagendra Nath v. Bhupendra Narayan**, 8 Ind. Cas. 530.

HOLMWOOD and FLETCHER, JJ.

References :—(a) 14 C.W.N. 637; 6 Ind. Cas. 595, R.

(1-b) Ss. 102 (1) (c), 391—Sanction to alteration of buildings—Sanction to alteration of plan—Power of District Surveyor—Initiation of proceedings by Secretary, validity of—Irregularity.

S. 391 of the Calcutta Municipal Act applies only to alterations of, and additions to, existing buildings, and a supplementary application proposing an addition to an already sanctioned plan of a contemplated building cannot be held

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).

to fall within its scope, and need not be sanctioned by the General Committee, and such an application may be lawfully sanctioned by the District Surveyor under powers delegated to him by the Chairman.

Obiter dictum :—Even if the Secretary to the Corporation, who is also the Secretary to the General Committee, has no power to make any application complaining against any person, for having erected any building without a valid sanction, the defect or irregularity is covered by S. 102 (1) (c) of the Calcutta Municipal Act. **Kishori Lal Jaini v. The Corporation of Calcutta**, 6 Ind. Cas. 172=11 Cr.L.J. 255=12 C.L.J. 24=37 C. 585.

CARNDUFF and RICHARDSON, JJ.

(1-c) Ss. 299, 574—Drainage—“Place lawfully set apart,” meaning of.

A place “lawfully set apart” for the use of the public by the Corporation within the meaning of S. 299 of the Act, must be a place over which the Corporation have acquired, by some procedure under the statute, a right to make use of private property as a public drain.

Where every hut in a *busti* had a surface drain connected with the private common drain of the landlord and this latter drain discharged into the Municipal sewer at a distance outside the statutory limits.

Held, that this private common drain of the landlord cannot be presumed to be a place lawfully set apart for the discharge of drainage within the meaning of S. 299, that a tenant of one of the huts in the *busti* cannot be called upon to alter his connecting drain to suit the convenience of the Corporation, and that he cannot be fined for neglecting to do so. **Gobinda Chandra Addy v. Corporation of Calcutta**, 8 Ind. Cas. 706 (Cr.).

HOLMWOOD and FLETCHER, JJ.

(2) Ss. 341, 450, 574, 631—Fixture—Demolition—Limitation period in S. 631, whether applies to demolition order.

Where, a notice under S. 341 of the Calcutta Municipal Act having been served in January, 1907 upon the petitioner to remove a certain fixture, proceedings were instituted against the petitioner in 1907 under S. 450, and on the 30th October, 1909 the Municipal Magistrate ordered under S. 450 (b) that the fixture should be demolished by the Chairman of the Corporation at the expense of the petitioner.

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).

Held—that S. 631 has no application to the order of the Magistrate, and the order of demolition is not illegal on the ground of having been made after the limitation period prescribed by the section. **Sarat Chandra Mukerjee v. The Corporation of Calcutta**, 14 C.W.N. 591=5 Ind. Cas. 644=11 Cr. L.J. 183=37 C. 384.

STEPHEN and CARNDUFF, JJ.

(2-a) S. 391.—See No. 1, *supra*.

(2-b) Ss. 407, 408, 574—"Owner" in S. 407, meaning of—Owner of land—Owner of busti—Notice—Standard plan.

The word "owner" in S. 407 of the Act does not include "owner of huts" also, so as to make it obligatory on the General Committee to hear the objections of "owners of huts" under S. 407 before the approval of the standard plan.

The Municipality does not proceed against any body under S. 409. They issue notices in three different kinds of cases. If huts belonging to the occupiers have to be removed, a notice need be issued to them; if they disobey, they are liable to prosecution under S. 574. If improvements are to be done which can be exclusively done by the owners of the land, the same rule applies. If the standard plan includes work which has to be done partly by the owners of the huts and partly by the owner of the land, and a notice is issued under S. 409 on either or both of them, and it is disobeyed, the party in default is still liable to be prosecuted under S. 574. If the whole of the work has to be done by the owners of the huts, then the cancelling of the notice on the owner of the land does not oust the jurisdiction of the Municipality under S. 409. If, on the other hand, the Municipality have cancelled the notice on the owner of the *bustee* land but still require him to carry out any portion of the work, it is clear that they must serve fresh notice on the owner of the *bustee* before they become vested with any jurisdiction under S. 409. **Corporation of Calcutta v. Muzaffar Hussain**, 8 Ind. Cas. 53 (Cr.).

HOLMWOOD and DOSS, JJ.

(3) Ss. 444 (2) 574—Using a house found unfit for human habitation—Joint penalty imposed on several accused, if legal.

A joint conviction and a joint penalty were passed against the owner of a house and a person occupying it with him, under S. 444, cl. (2),

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).

read with S. 574 of the Calcutta Municipal Act, for disobeying an order prohibiting them from using a house found to be unfit for human habitation:

Held—That the act of disobedience in each of the accused was a separate offence, and there was no provision of law justifying the passing of a joint penalty. **Bhairab Chandra Kolay v. The Corporation of Calcutta**, 14 C.W.N. 911=6 Ind. Cas. 874=11 Cr. L.J. 412.

HARINGTON and TEUNON, JJ.

(4) S. 449—Order of demolition—Acceptance of rates in respect of the premises pending negotiation, if acquiescence.

The acceptance, by the Municipality, of rates in respect of premises which have been ordered to be demolished under S. 449 of the Act, does not amount to an acquiescence by the Municipality to disobedience of the order for demolition. **Luchmi Narayan Mahto v. The Corporation of Calcutta**, 14 C.W.N. 912=6 Ind. Cas. 800=11 Cr. L.J. 406.

HARINGTON and TEUNON, JJ.

(4-a) S. 449—See No. 7, *infra*.

(4-b) S. 450—See No. 2, *supra*.

(5) Ss. 466 and 574 and Sch. XVIII, cl. 8—Iron includes steel.

The petitioner stored steel joists etc., without a license. He was convicted under S. 574 of the Calcutta Municipal Act for not taking out a license under S. 466 (1).

Held that as the term "iron" as used in Sch. XVIII, cl. 8 of the Act includes "steel" the conviction is right. **Ganga Narain Pal v. Corporation of Calcutta**, 10 C.L.J. 486=4 Ind. Cas. 438=11 Cr. L.J. 277.

MOOKERJEE and VINCENT, JJ.

(6) Cl. (18), Ss. 559, 561 (b), 631—Bye-laws, S. 1—Encroachment on a public street by raising pillars—Obstruction, removal of, notice for—Notice, disobedience to the requisition of—Proceedings, institution of, three months after the expiration of the period of the requisition—Limitation—Offence, if continuous.

A Bye-law must conform with the provision of the enactment under which it purports to be made.

Bye-law, S. 1, so far as it relates to obstruction, comes within the provisions of cl. (18)

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).
of S. 559 of the Calcutta Municipal Act (III of 1899).

S. 561 (b) only authorises the penalty for the continuance of a breach, where notice follows breach. The penalty is attached to a breach, which only arises after the notice, and there is no provision for any subsequent notice, which could come within the provisions of S. 561, requiring that there should be notice after breach.

The Bye-law purports to create a continuous breach, which is outside of and fails to comply with the provision of S. 561, cl. (b), under which alone it can claim vitality. There is, therefore, no provision for a continuing breach, that could take the case outside the provision of S. 631 of the Calcutta Municipal Act. **Narain Chandra Chatterjee v. Corporation of Calcutta**, 10 C.L.J. 623 = 14 C.W.N. 614 = 4 Ind. Cas. 259 = 10 Cr. L. J. 522.

JENKINS, C.J., and WOODROFFE, J.

(6-a) S. 561 (a). See No. 6, *supra*.

(6-b) S. 574—See Nos. 2, 3 and 5, *supra*.

(6-c) S. 631—See Nos. 2 and 6, *supra*.

(7) Ss. 632, 449—“Nuisance,” building sanctioned by Municipality, if may be—Nuisance, if must be public—Building in contravention of regulations, if to be proceeded against only under S. 449—Partition decree, effect of.

The term “nuisance” in S. 632 of the Calcutta Municipal Act does not refer only to nuisances affecting the public generally. It applies as well to nuisances affecting an individual.

The mere fact that the Municipality could have proceeded against a building erected contrary to the building regulations under S. 449 of the Act does not preclude the Municipal Magistrate from interfering with it under S. 632, at the instance of the person whose house has been deprived of light and air by the building.

If a building is a nuisance, it is no answer in a proceeding under S. 632 to say that the Corporation had sanctioned it. Whether erected with or without sanction, or in contravention of the building regulations or not, any person residing in Calcutta affected by it can move the Magistrate, and it is within the jurisdiction of the Magistrate to pass an order

2.—Bengal Acts—(Continued).

Act III of 1899 (Calcutta Municipal)—(Ctd.).
under S. 632, if in his discretion he is so advised.

A partition decree previously passed, which purported to specify the easements reserved to the portion which fell to the complainant cannot be held to override the provisions of the Calcutta Municipal Act, which is directed to provide for public sanitation among other public considerations. **Bhagwan Das v. Ragh Behari Mullick**, 14 C.W.N. 637 = 6 Ind. Cas. 595 = 11 Cr. L. J. 377.

COXE and RYVES, JJ.

(8) Sch. XVIII, cl. 8.—See No. 5, *supra*.

Act VI of 1901 (Assam Labour and Emigration).

S. 164—Emigrate, meaning of—Inducement to emigrate to Fiji—Subsequent inducement at another place to emigrate to Sylhet—Place of trial—Jurisdiction of Criminal Court—Emigration.

Where the accused induced L to leave Cawnpore in order to go to Fiji for work, and, on the way at Arrah, told him that he would have to go to Sylhet, and placed him in a train bound therefor,

held that the Magistrate at Arrah, and not the Magistrate of Cawnpore, had jurisdiction to try the case. L was not induced to leave Cawnpore in order to go to Sylhet, but in order to go to Fiji, and no offence was therefore committed at Cawnpore. The inducement to go to Sylhet was made at Arrah, and so the Arrah Court alone had jurisdiction. **Faiz Ali v. Emperor**, 37 C. 27 = 4 Ind. Cas. 495 = 11 Cr. L.J. 14.

COXE and RYVES, JJ.

Act II of 1907 (Eastern Bengal and Assam).

(1) Ss. 2, 3, 6—Eastern Bengal and Assam—Disorderly Houses Act (II, E. & A.C. of 1907)—Offence under—Procedure of the Magistrate in making inquiry under the Act—Criminal Court, whether a Magistrate acting under S. 3, is—Irregularity in the proceedings, effect of—Revision—Criminal Procedure Code (Act V of 1898), Ss. 435, 439.

A Court acting under S. 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) is a Criminal Court within the meaning of S. 435, Crim. Pro. Code, and the High

2.—Bengal Acts—(Concluded).

Act II of 1907 (Eastern Bengal and Assam)—(Concluded).

Court has jurisdiction to interfere under Ss 485 and 489, Cr. P. O.

Ss. 2 and 3 of the Act do not create any offence and the only offence created by the Act is that created by S. 6. The power conferred by Ss. 2 and 3 is not a power to hold a criminal trial or to take any preliminary proceedings under the criminal procedure. It is a power similar to those conferred on Criminal Courts by Chaps. VIII, X, XI and XII of the Code.

The Eastern Bengal and Assam Disorderly Houses Act does not prescribe any particular procedure except such as is indicated by the last paragraph in S. 2 and Ss. 4 and 5. The Magistrate may make his enquiry under Ss. 2 and 3 in any way that does not violate ordinary rules of fairness and propriety, and in making the enquiry he performs an administrative duty and not a judicial duty.

Where, in any inquiry under S. 2 of the Act it was contended that the Magistrate had erroneously administered oaths to witnesses.

Held that, the proceeding of the Magistrate having been perfectly fair and reasonable in themselves, the error, if any, did not vitiate them. **Rajani Khemtawalli v. The King-Emperor**, 14 C.W.N. 404=11 C.L.J. 297=5 Ind. Cas. 323=11 Cr.L.J. 112=37 C. 287.

STEPHEN and CARNDUFF, JJ.

(2) S. 3—See No. 1, *supra*.

(3) S. 6—See No. 1, *supra*.

3.—Bombay Acts.

Act V of 1878 (Bombay Abkari).

(1) Ss. 43 (b), 47—*Cocaine—Illegal possession—Removal—Transportation of cocaine.*

Accused No. 1, who was illegally in possession of cocaine, brought it from his room and gave it to accused No. 2, who stood opposite his house. The latter carried it to some distance and delivered it to a Purdeshi. The two accused were, under these circumstances, charged with transporting cocaine, an offence punishable under S. 43 (b) of the Bombay Abkari Act, 1878. The Magistrate, however, acquitted them of the offence and convicted them of illegal possession of cocaine, under S. 47 of the Act. Against this order of acquittal, the Public Prosecutor appealed to the High Court.

3.—Bombay Acts—(Continued).

Act V of 1878 (Bombay Abkari)—(Concluded).

Held, that the Magistrate was right in declining to convict the accused under S. 43 (b) of the Bombay Abkari Act, 1878, inasmuch as the accused's offence consisted, not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act.

S. 43, cl. (b), seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place. **Emperor v. Balvantrao Anantrao**, 12 Bom. L.R. 124 (Cr.)=5 Ind. Cas. 860=11 Cr. L.J. 269=34 B. 342.

BACHELOR and KNIGHT, JJ.

(2) S. 47—See No. 1, *supra*.

Act III of 1888 (City of Bombay Municipal).

(1) S. 302—See No. 1, *infra*.

(1-a) Ss. 305, 302 to 307—*Private streets—Levelling and draining of—Owner of several premises—Premises—Owner dividing a large plot of ground into several building sites—The building sites let out on long terms to lessees—Lessees building houses and receiving rents—Lessees are owners of the premises—Construction of statutes.*

The mere owner of land, who has let it out under a building scheme for building purposes, is not the owner of the property, within the meaning of S. 305 of the City of Bombay Municipal Act, 1888, because the property contemplated by the section necessarily embraces buildings, whether erected or to be erected; and the legislature regards him as the owner of the premises who has the right to receive rent in respect of that property. It would, therefore, include a lessee from the original owner of vacant site, who leases the building site on a long term and erects a building upon the site.

The word "premises" occurring in S. 305 of the City of Bombay Municipal Act must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of the immediately preceding sections of the Act (Ss. 302–307). That group has reference to streets made for the use of buildings or building sites. The dominant idea running through the Ss. 302 to 304 is that of buildings either erected or projected: that

3.—Bombay Acts—(Continued).**Act III of 1888 (City of Bombay Municipal)**
—(Continued).

is the kind of property dealt within what has gone before S. 305; and, therefore, that is its "*premissa*."

It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. There is one exception to this rule, *viz.*, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, when the law has attached that sense to them. **Emperor v. Ramachandra Bhaskar Mantri**, 12 Bom. L. R. 669 (Cr.).

CHANDAVARKAR and HEATON, JJ.

(1-b) S. 307—See No. 1, *supra*.

(2) S. 377—*Municipal Commissioner—Neglected premises—Notice to remove nuisance—Magistrate's discretion.*

The accused was served with a notice of requisition under S. 377 of the City of Bombay Municipal Act, 1888, requiring him to remove filth, rubbish, heaps of cutchera and stable refuse from a large piece of vacant land belonging to him. He failed to comply with the requisition, and a prosecution was instituted against him. The Magistrate viewed the premises; and having so viewed them, but without hearing any evidence, acquitted the accused, as the premises did not appear to him to be in a filthy condition:—

Held, that the premises having appeared to the Commissioner to be in a filthy condition, the notice was validly issued under S. 377 of the City of Bombay Municipal Act, 1888; and that, there having been a non-compliance of the notice, the offence was complete.

Held, further, that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under S. 377.

S. 377 of the City of Bombay Municipal Act, 1888, enacts, that the only condition precedent to the valid issue of a requisition is that it shall appear, not to the Magistrate, but to the Commissioner, that the premises are in the condition specified in the section. **Emperor v. Raja Bahadur Shivalal Motilal**, 12 Bom. L.R. 126=5 Ind. Cas. 860=11 Cr. L.J. 270=34 B. 346.

BATCHELOR and KNIGHT, JJ.

(3) S. 390—*Factory, establishing of—Municipal Commissioner, permission of.*

3.—Bombay Acts—(Continued).**Act III of 1888 (City of Bombay Municipal)**
—(Concluded).

The accused obtained the Municipal Commissioners' permission under S. 390 (1) of the City of Bombay Municipal Act, 1888, to establish a hand-loom factory worked by an oil engine; but by means of this oil engine he also established a flour mill without any permission. The accused was, therefore, charged with the offence under S. 390 (1) of the Act:

Held, that the accused was guilty of technical offence under S. 390 (1) of the City of Bombay Municipal Act, 1888; for although the accused had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory. **Emperor v. Mulji Damodardas**, 12 Bom. L. R. 122 (Or.)=5 Ind. Cas. 859=11 Cr. L.J. 269=34 B. 344.

BATCHELOR and KNIGHT, JJ.

Act IV of 1890 (Bombay District Police).

(1) S. 44—*Religious procession—Exhibition of an emblem—Vyasantol emblem—Jingayats—District Magistrate—Order permitting the carrying of emblem—High Court—Revisionary powers—Cr. P.C., S. 435—Jurisdiction.*

An order passed by a District Magistrate under S. 44 of the Bombay District Police Act, 1890, being a mere executive police order, cannot be interfered with by the High Court under its criminal revisional jurisdiction.

It is competent to a District Magistrate, acting under S. 44, to order that persons forming a religious procession on a particular day and on specified roads may carry a particular emblem. *In re Pandurang Shidrao*, 12 Bom. L.R. 1029.

BATCHELOR and RAO, JJ.

Reference:—12 Bom. L. R. 378, R.

Act III of 1901 (Bombay District Municipal).

S. 96—*Notice of new building—Erecting a building—Re-building a wall that had been fallen down—Material re-construction.*

One of the walls of the house of the accused having fallen down, he applied on the 19th April, 1910 to the Municipality for leave to re-construct it. Without having received the leave or without waiting for it for one month from the date of its application, he re-built the

3.—Bombay Acts—(Concluded).

Act III of 1901 (Bombay District Municipal) —(Concluded).

wall on the 11th May, 1910. On the 18th idem, the Municipality issued an order to the accused prohibiting him from making the reconstruction. The accused was upon these facts prosecuted under S. 96 of the Bombay District Municipal Act, 1901, but was acquitted by the Magistrate. The Government having appealed:—

Held, reversing the order of acquittal, that the accused had erected a building within the meaning of S. 96 of the Act, inasmuch as in re-building the whole wall which had fallen down, there was a material re-construction or an erection of a building as defined in the explanation to the section. **Emperor v. Kalekhan Sardarkhan**, 12 Bom.L.R. 1060.

BATCHELOR and RAO, JJ.

Reference:—(1888) Unrep. Cr.C. 402, *R.*

4.—Burma Acts.

Act I of 1899 (Burma Gambling).

(1) S. 4—*Game of skill*.

In the games of *thonbonpe* or dominoes, as played in Burma, the element of chance is so subordinated to the element of skill that the game must be looked upon as a game of the kind contemplated by S. 4 of the Burma Gambling Act. **Emperor v. Tun Zun**, 8 Ind. Cas. 451.

LEWIS, J.

5.—Madras Acts.

Act III of 1869 (Madras Revenue Summons).

(1) S. 1—Disobedience to summons—Offence. See PENAL CODE, No. 20-a, 8 M.L.T. 373.

Act IV of 1884 (Madras Dt. Municipalities).

(1) Ss. 180 (1) and (5) and 263—*Construction of walls for erecting house—Construction commenced before receipt of license—Offence*.

The word 'building' in cl. 5 of S. 180 of the Act includes 'more walls' built for the purpose of erecting a house, and the construction of such walls without the license of the Municipality renders the person constructing them liable to the penalty prescribed in S. 263, even though the house, to support which the walls were designed, had not been built. **The Public Prosecutor v. Kalia Perumal**, 8 M. L.T. 431

ABDUR RAHIM, J.

5.—Madras Acts—(Continued).

Act III of 1888 (Madras City Police).

(1) Ss. 75, 93—*Arrack shop whether a place of public resort*.

Where the accused, charged under S. 75 of Madras Act, III of 1888, with being drunk, and disorderly in an arrack shop, were acquitted on the ground that an arrack shop is not a place of "public resort" within the meaning of S. 75.

Held, that S. 75, read in connection with S. 23 of this Act, and with due advertence to the mischief which the section is intended to prevent, makes it clear that an arrack shop is a "place of public resort" within the meaning of the section.

Held, also, that the doctrine of *ejusdem generis* should not be applied in considering the scope of S. 75. **Emperor v. Moonoo-sawmy and others**, 6 M.L.T. 16=9 Cr. L. J. 496=2 Ind. Cas. 84=33 M. 83.

BENSON and MILLER, JJ.

(2) S. 23—See No. 1, *infra*.

Act I of 1900 (Malabar Compensation for Tenants' Improvements).

S. 3—'Licensee' whether comes within the definition of 'tenant.'

A licensee does not come within the definition of tenant in S. 3 of the Act, and he is not therefore entitled to the benefit of Act I of 1900. *In re Oliveria*, 7 M.L.T. 121=5 Ind. Cas. 831=11 Cr. L.J. 258.

WHITE, C.J.

Act III of 1904 (Madras City Municipal).

(1) Ss. 103, 118, 120, 124, 125, 126, 172, 177—*Failure to pay professional tax—Conviction—Legality*.

The President of the Madras Municipality served a notice on the accused to pay profession tax, but the accused failed to comply with the notice, alleging that, for sixty days during the half-year in question, he was not in the city exercising any trade etc., and therefore pleaded that he was not liable. He was convicted under S. 125 (1) of the Act. *Held* that the conviction was right.

Held also that the President of the Municipality can order prosecution, if the accused fails to pay after fifteen days from the date of service of notice, and that failure to complain of the classification within the time limited is

5.—Madras Acts—(Continued).**Act III of 1904 (Madras City Municipal)
—(Concluded).**

conclusive under S. 172 of the Act (a). *In re Veeraraghavalu*, 8 M.L.T. 305.

WALLIS and KRISHNASWAMY IYER, JJ.

References:—(a) 24 M. 205, D.; 14 M. 140, not F.; 7 C. 322, compared.

(1-a) S. 118—Sec No. 1, *supra*.

(2) S. 120—Trader buying goods through servant at Madras—Shop in Tinnevely—Whether carries on business at Madras—Profession tax—Liability to be taxed under S. 120.

Held that, a person, who is a trader in piece goods and has a shop in Tinnevely where he sells the goods and earns his profits, cannot be said to carry on business at Madras, merely because he buys his goods at Madras (where he has no office), through a servant, who, acting under his orders, buys and forwards them to Tinnevely (a), and that he is not liable to be taxed under S. 120 of the Act. **P.S.K. Hajee Shiek Meera Rowther v. The President of the Corporation of Madras**, 7 M.L.T. 80 = 33 M. 82 = 5 Ind. Cas. 744.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 5 H. & N. 711; (1895) 1 Q. B. 580 and 1908 A.C. 46, *applied*.

(3) S. 120—See No. 1, *supra*.

(4) S. 124—See No. 1, *supra*.

(5) S. 125—See No. 1, *supra*.

(6) S. 126—See No. 1, *supra*.

(7) S. 172—See No. 1, *supra*.

(8) S. 177—See No. 1, *supra*.

(9) S. 322—Fee for license—Place used for more purposes than one—Powers of President of the Municipality.

If the license is required for more purposes than one, there is apparently nothing to prevent its issue, but there is also nothing to restrict the amount of the fee which may be charged for its issue, provided that it is levied with the approval of the Corporation and the sanction of Government. If the President, with such approval and sanction, prescribed in such a case a fee equal to the total of the fees which would be leviable if a separate license were taken for the use of a separate place for each of the purposes for which the license is required, the action of the President is not *ultra vires*. **Myns Mahomed Saib v. Llyod**, 8 M.L.T. 878.

MILLER and MUNRO, JJ.

5.—Madras Acts—(Concluded).**Act II of 1907 (Madras Hill Municipalities).**

Order under S. 23 (3)—Finality—Appeal under S. 23 (4)—Party entitled to show cause—Or. P.C. (Act V of 1898), Ss. 435, 439.

Held, that the finding of the Chairman under S. 23 (3), Act II of 1907, that a certain work was not in accordance with the approved plan, is final, subject to a right of appeal to the Council under S. 23 (4) of the same Act.

The owner is entitled to show cause against an order under S. 23 (3) of the Act. *In re H. Nabi Khan Sahib (petitioner)*, 7 M. L. T. 183 = 5 Ind. Cas. 929 = 11 Cr. L.J. 332.

WHITE, C.J.

6.—N. W. P. Acts.**Act I of 1900 (N.W.P. and Oudh Municipalities).**

(1) Ss. 87 (5), 149, 152—*Legality of notice and validity of conviction under Ss. 149, 152, application of.*

S. 87 of the Municipalities Act, 1900, was not intended to empower a Board to require a man to pull down his house, though it had been standing there before the passing of the Act.

If the Board have no power to issue a notice under S. 87 (5), it cannot be considered to be a notice under that section and the provisions of S. 152 do not apply. When the Board issued such a notice and it was not complied with, a prosecution could not be entertained (a). **Ram Dayal v King-Emperor**, 7 A.L.J. 1075.

CHAMIER, J.

Reference:—(a) 27 W.N. 2, R.

(2) S. 147—*Prosecution under—Decision of Civil Court in favour of the accused.*

In accordance with a decree of the Civil Court passed in favour of B against the Municipal Board of Etawah, B erected certain buildings. The Board objected and the Civil Court ordered demolition of some of the buildings and allowed others to remain. During the pendency of the proceedings in the Civil Court, the Board instituted proceedings against B in the Criminal Court. *Held* that it was not open to the Board to prosecute B in respect of the buildings, pending the decision of the Civil Court, and to continue the prosecution after its decision.

6.—N. W. P. Acts—(Concluded).

Act I of 1900 (N.W.P. and Oudh Municipalities)—(Concluded).

The provisions of the Municipalities Act were not intended to enable Municipal authorities to override the decision of a Civil Court where that Court had jurisdiction. **Baldeo Prasad v. King-Emperor**, 7 A.L.J. 735=7 Ind. Cas. 288=11 Cr. L. J. 445.

KARAMAT HUSAIN and CHAMIER, JJ.

(3) S. 149—See No. 1, *supra*.

(4) S. 152—See No. 1, *supra*.

Act III of 1901 (U.P. Land Revenue).

(1) Ss. 4 (9), 46—Nature of proceedings by a Revenue officer. See CRIM. PRO. CODE, No. 160, 13 O.C. 198.

(1-a) S. 46—See No. 1, *supra*.

(2) Ss. 142, 143, 146—Co-sharer confined in lock-up for arrears of revenue—Escape from custody. See PENAL CODE, No. 47, 7 A.L.J. 21.

(2-a) S. 143—See No. 2, *supra*.

(2-b) S. 146—See No. 2, *supra*.

(3) S. 147—Citation under—Disobedience—Effect. See PENAL CODE, No. 20, 13 O. C. 55.

7.—Punjab Acts.

Act XX of 1891 (Punjab Municipal).

(1) Ss. 42 (1) (f), 201—Municipality—Boundaries, extension of—Octroi on goods stored at a place outside original, but within extended boundaries at the date of extension—Attachment by order of Magistrate to recover octroi—Revision—Criminal cases—Criminal Procedure Code (Act V of 1898), S. 439.

When a Municipality moves a Magistrate to take action under S. 201 of the Punjab Municipal Act, it is his duty to see that, on the facts as stated by the Municipality, the amount would be "claimable," i.e., whether the claim is *intra vires* or *ultra vires*. If the Municipality is properly constituted and competent to levy the tax in the area in which it is sought to levy it, the Magistrate is not competent to enquire whether the amount claimed under a tax duly and legally imposed and said to be in arrears is due or not; the remedy as to that lies under S. 52. But if he finds that the sum claimed could not be legally claimed from any one and is beyond the power, *ultra vires* of the Committee, then he is bound to refuse to

7.—Punjab Acts—(Concluded).

Act XX of 1891 (Punjab Municipal)—(Ctd.).

act. **The Crown v. Kanhaiya Lal**, 109 P.L.R. 1909=28 P.W.R. 1909=2 P.R. 1910 (Cr.).

ROBERTSON and SHAH DIN, JJ.

References:—1 P.R. 1891 (Cr.), F.; 22 A.M.O.; 17 B. 173; 21 C. 319; 13 M. 1878; 1 M. 158, R.

(1-a) S. 201—See No. 1, *supra*.

(2) S. 204—Brothel house, removal of—Discretion of Magistrate—Exercise of discretion by his predecessor—Complaint not addressed to Magistrate.

The discretion of the Magistrate for the time being in charge of a District, which he is entitled to exercise under S. 204 of the Municipal Act, is not necessarily fettered by the manner in which his predecessors have in the past exercised that discretion.

A petition presented to the District Magistrate, and acted upon by him is a complaint within the meaning of S. 204 of the Punjab Municipal Act, though it may not be addressed to him. **Mussammatt Malo v. The Crown**, 28 P.L.R. 1910.

WILLIAMS, J.

Act XIII of 1900 (Land Alienation).

Proceedings under—Perjury. See PENAL CODE, No. 74, 80 P.L.R. 1910.

Appeal (General).

(1) Whether—lies from order of District Magistrate in trials conducted by him as Superintendent of Hill States outside the limits of British India.

No appeal lies to the Chief Court from the order of a District Magistrate, in the case of trials conducted by him in his capacity as Superintendent of Hill States outside the limits of British India, since the Magistrate is not acting in his ordinary capacity as a Magistrate under the Criminal Procedure Code *In the matter of the appeals of Bishen Das*, 14 P. R. 1910 (Cr.).

REID, C.J. and RATTIGAN, J.

(2) Evidence—Power of appellate Court to take further evidence—Sessions Judge referring to documents not on the record of Magistrate's proceedings—Jurisdiction—Crim. Pro. Code (Act V of 1898), S. 437.

The Sessions Judge should not in an appeal refer to documents and evidence which did not

Appeal (General)—(Concluded).

form part of the record of the proceedings before the Magistrate. *In re Muthu Gownden v. Palaniandi Gownden*, 6 Ind. Cas. 12=11 Cr. L.J. 221=8 M.L.T. 81.

MILLER and MUNRO, JJ.

References :—6 C.L.J. 251 ; 6 Cr. L. J. 357, R.

- (3) *Trial of person under S. 59, Frontier Crimes Regulation, without the assistance of Council of Elders—Course of appeal.*

Where a Magistrate, empowered by S. 59 of the Regulation, tries, without the assistance of a Council of Elders, a person charged with having done an act punishable under the Regulation, the ordinary course of appeal prescribed by the Code of Criminal Procedure applies. *The King Emperor of India v. Mussamat Alam Khatun*, 19 P.R. 1910 (Cr.).

ARTHUR REID, C.J.

- (4) Appeal—Disposal on prosecution evidence alone—Effect. See CRIM. PRO. CODE, No. 150, 7 M.L.T. 182.

- (5) Under S. 195, Cr. P.C.—Power of appellate Court to take or call for further evidence. See CRIM. PRO. CODE, No. 95, 7 M.L.T. 128.

- (6) Conviction for theft and release upon probation of good conduct under S. 562, Cr. P. C.—Whether appeal lies against the order. See CRIM. PRO. CODE, No. 144, 5 L.B.R. 129.

- (7) Order of Dt. Magistrate specially appointed by Local Government to try criminal cases in a Native State outside British India—Jurisdiction of Chief Court to hear appeal from the order. See PUNJAB CHIEF COURT, No. 1, 20 P.W.R. 1910 (Cr.).

- (8) Judgment in—Contents of judgment. See CRIM. PRO. CODE, No. 140, 37 C. 194.

- (9) Order under S. 195, Crim. Pro. Code—Appeal—Jurisdiction. See CRIM. PRO. CODE (MYSORE), No. 1-a, 15 M.C.C.R. 73.

- (10) Summary dismissal of—Exercise of discretion. See CRIM. PRO. CODE, No. 144-a, 13 O.C. 309.

Appellate Court.

- (1) Power of, to take additional evidence—See CRIM. PRO. CODE, No. 14F-d, 8 M.L.T. 418 and 428.

Approver.

- (1) *Evidence—Approver—Weight of approver's evidence.*

The evidence of an approver has to be most carefully analyzed and considered. It must be so far above suspicion that a Court has no alternative but to accept and act upon it.

Where the Court believes in the approver's evidence in part, and disbelieves in part, it has no alternative but to reject the evidence altogether. *Balkaran v. Emperor*, 7 Ind. Cas. 185 (Cr.).

KNOX and KARAMAT HUSAIN, JJ.

- (2) *Pardon—Tender by committing Court—Retracting confession before special Bench—Proper Court to enquire question of forfeiture—Powers of special Bench—Accused's right to challenge falsity of statements before special Bench after commitment—Cr. P.C. 1898, Ss. 317, 339.*

Where an approver, to whom a pardon was tendered under S. 337, Cr. P.C., 1898, by the committing Magistrate, retracted his confession and previous deposition before a special Bench of the High Court.

Held, that it was only the committing Court, and not the special Bench, that ought to hold the enquiry as to whether the approver has or has not complied with the conditions upon which the pardon was tendered, whether he has made a full and true statement and disclosed the true facts, and whether he has thereby forfeited the pardon (a).

The special Bench cannot take any action in respect of the offence as regards which the pardon was tendered.

Per Chatterjee, J.—After commitment it is perfectly open to the accused to show before the special Bench that the statements which are alleged to be false are true in fact, or were induced by improper influences. *Emperor v. Abani Bhushan Chuckerbutty*, 37 C. 845 (S.B.).

HOLMWOOD, SHARFUDDIN and CHATTERJEE, JJ.

References :—(a) 24 C. 492, *appr.*; 30 B. 611 ; 32 M. 173, R. ; 25 B. 675, D.

- (3) Evidence of—Value—Corroboracion necessary. See PENAL CODE, Nos. 78 and 74-a, 13 O.C. 235 and 13 O.C. 243.

Arms Act.

See ACT XI OF 1878.

Assam Labour and Emigration Act.

• See ACT VI OF 1901 (BENGAL).

Assessor.

(1) *Person not summoned to act as assessor acting as such—Trial with the aid of person not summoned to act as assessor, legality of—Constitution of Court, defect in, where mere irregularity—Accused, want of objection by—Cr.P.C., Ss. 326 and 537.*

In this case the Sessions Judge under S. 326, Cr.P.C., had requested the District Magistrate to summon five persons to attend as assessors. When the case was taken up only one of those persons was present. Thereupon the Sessions Judge directed that a search should be made as to whether there was any one present in the precincts of the Court who was acquainted with English and who could be required to act as an assessor. The result of the search was that the Nazir of the Court was produced and was directed by the Judge to act as an assessor. The Judge noted that no objection was raised to the course taken by him.

Held, that, as the Nazir was not a person summoned to act as an assessor, and there was nothing to show that he was on the list of assessors and could have been summoned, the trial was illegal.

Held further, that, in the circumstances, the Court was not properly constituted, and a defect of this kind was not a mere irregularity which could be cured by S. 537, Cr.P.C.

Held also, that the fact that the appellant did not object to the Nazir's sitting as an assessor was immaterial. **Khub Singh v. King-Emperor**, 13 O.C. 397 (Cr.).

CHAMIER, J.

Reference:—15 Bom. 514; 25 Bom. 695, R.

Attachment.

Cognizance of an offence of mischief by cutting timber—Order of attachment of trees—Its legality. See CRIM. PRO. CODE, No. 81, 37 C. 221.

Attempt.

Essentials of intention necessary. See ACT XXV OF 1867 (PRESS), No. 1, 12 Bom. L. R. 675.

Bail.

(1) Persons required to execute bond for keeping peace—Refusal of bail to such persons—Legality. See CRIM. PRO. CODE, No. 8, 7 M. L. J. 104.

Bail—(Concluded).

(2) Power to grant. See ACT XIV OF 1908 (CRIMINAL LAW AMENDMENT), Nos. 2 and 1, 14 C.W.N. 516 and 512.

(3) Order refusing—Judgment—Appeal. See LETTERS PATENT, MADRAS, No. 1, 4 Ind. Cas. 871.

Berar Municipal Law (1886).

Ss. 146 (1), 151—Municipal member—Becoming interested in contracts in contravention of the terms of S. 146 (1)—Applicability of S. 151—Offence under S. 168, I.P.C.—Complaint, as required by S. 151, whether necessary—Objection overruled summarily—Propriety.

Where a member of a Municipal Committee in Berar becomes directly or indirectly interested in contracts made with the said Committee, in violation of the prohibition contained in S. 146 (1) of the Berar Municipal Law, 1886, he commits an offence punishable under S. 168, I.P.C., and S. 151 of the Berar Municipal Law, 1886, has no application. S. 151, Berar Municipal Law, 1886, applies only to what are generally known as Municipal offences, *i.e.*, offences against the powers, rules and bye-laws of a Municipal Committee, in respect of which the Committee is given a discretion to complain or not to complain, and in such cases, the Criminal Courts are restrained from taking cognizance unless and until the Committee has complained. **Narayan v. Emperor**, 6 N.L.R. 114 (Cr.).

STANYON, A.J.C.

Bombay City Municipality Act.

See ACT III OF 1888.

Calcutta Municipal Act.

See ACT III OF 1899.

Cantonment Code.

(1) S. 203—Meaning of section—Information, by Medical officer of one Cantonment to another, whether amounts to *prima facie* grounds for believing."

Information forwarded by the Medical officer of one Cantonment to the authorities of another, to the effect that a woman is believed to have a venereal disease, amounts to "*prima facie* grounds for believing" within the meaning of S. 203 of the Cantonment Code. The section does not mean that the authorities issuing the notice must have something in the nature of legal evidence before them; on the

Cantonment Code—(Concluded).

contrary, the vague and general wording employed in the section seems intended to cover all such matters as would reasonably justify an executive officer in taking action. **Imperator v. Phuski**, 3 Sind. L. R. 184=4 Ind. Cas. 1157.

KNIGHT and CROUCH; J.C.S.

- (2) *S. 283, fine under, for breach of the conditions of a license—No notice to the accused—Legality of fine—Proceedings, if judicial proceedings—Revision—Accused entitled to copy of proceedings in the summary register.*

Where the accused was fined under S. 283 of the Cantonment Code for breach of the conditions of his license, and there was no proof that any notice was issued to the accused and that he failed to comply with any such notice or otherwise committed a breach of the provisions thereof.

Held that S. 283 of the Code was not applicable, there being no notice to the accused; that the proceedings were judicial proceedings and, as such, revisable by the Chief Court; that the only lawful penalty was the cancellation or suspension of the license; and that the accused was entitled to a copy of the proceedings in the summary register. **Mangi Ram v. The King-Emperor of India**, 9 P.R. 1909 (Cr.)=37 P.L.R. 1910.

JOHNSTONE, J.

Cattle.

(1) Powers of police with regard to seizure of—. See **CRIM. PRO. CODE**, No. 175, 14 P.W.R. 1909 (Cr.).

(2) Disappearance of—Presumption. See **PENAL CODE**, No. 43, 6 Ind. Cas. 250.

Charge.

- (1) *Charge—Conviction without charge—Conviction for offences under Ss. 447, 352, I.P.C.—Conviction by appellate Magistrate for offences under S. 379—Legality.*

Where the accused were charged under Ss. 447 and 352, I.P.C., and convicted by the Magistrate, and the appellate Magistrate, without expressing any opinion as to whether those convictions were right, convicted the accused under S. 379, I.P.C.

Held that the charge of theft is a distinct and separate charge, and should have been separately made, and the accused given the opportunity of answering the same. *In re*

Charge—(Concluded).

Bemmareddi Somireddi, 7 M.L.T. 202=5 Ind. Cas. 974=11 Cr. L. J. 340.

SIR ARNOLD WHITE, C.J.

References :—27 C. 660; 30 C. 283, *appl.*

(2) Addition of further charge by Sessions Judge as to offence committed independent of the charge on which committal is based—Illegality. See **CRIM. PRO. CODE**, No. 112, 20 P. R. 1909 (Cr.).

Charter Act (24 and 25, Vic. C. 104).

S. 15—When High Court will interfere—. See **CRIM. PRO. CODE**, No. 49-b, 7 Ind. Cas. 798.

Cheating.

- (1) *Cheating by false personation—Student entitled to concession tickets obtaining a pass on a certificate given to another student—Whether amounts to an offence.*

Four students, who were entitled to travel at a reduced rate, were mentioned in a certificate which was properly signed by the proper authority and endorsed by the railway company. The accused, who was not one of the four, was also entitled to travel at the reduced rate, as a student, and there is no rule prohibiting the transfer of student's ticket. On the presentation by the accused, of the endorsed certificate containing the names of four persons eligible for concession tickets, the Railway Company issued a pass for four passenger tickets, and arrested the accused who was convicted.

Held that the conviction was bad, as it cannot be assumed that the accused intended to use the pass for persons who were not entitled to travel at the reduced rate. *In re James Fletcher*, 7 M.L.T. 201=5 Ind. Cas. 798=11 Cr. L.J. 339.

SIR ARNOLD WHITE, C.J.

(2) *What amounts to—Promise to do something in the future—Effect.* See **PENAL CODE**, No. 83, 26 P.W.R. 1910 (Cr.).

(3) Essentials of the offence of—. See **PENAL CODE**, No. 43, 6 Ind. Cas. 250.

(4) Mortgagee not disclosing his defective title. See **PENAL CODE**, No. 83-a, 40 P.W. R. 1910 (Cr.).

Chemical Analyst.

(1) Report of—How far and when evidence. See **PENAL CODE**, No. 54, 7 M.L.T. 314.

(2) Articles sent to the—Proof as to such articles. See **EVIDENCE ACT (MYSORE)**, No. 1, 15 M.C.O.R. 1.

• **Chowkidari Act.**

See ACT VI OF 1870 (BENGAL).

City Municipality Act.

See ACT III OF 1904 (MADRAS).

City Police Act.

See ACT III OF 1888 (MADRAS).

Civil law.

Principle of, when applies to a criminal case. See PENAL CODE, No. 83, 26 P.W.R. 1910 (Cr.).

Civ. Pro. Code (1908).

O. 21, r. 24—Essentials of warrant—Resistance to execution of warrant when not illegal. See PENAL CODE, No. 30, 14 C.W.N. 282.

Cognizance.

What amounts to. See ACT XIV OF 1908 (CRIMINAL LAW AMENDMENT), No. 1, 14 C.W.N. 512.

Commitment.

(1) *Commitment proceedings—Defence reserved—Trial—Dispensing with witnesses.*

Where, during the course of the commitment proceedings, an accused person declines to disclose the nature of his defence, it is a fair presumption either that there is no defence at all or a story is in contemplation which will not bear investigation.

A prosecutor is not legally bound to tender for cross-examination a witness whom he does not intend to examine, but, before releasing witnesses from attendance, the Court should satisfy itself that their evidence will not be required either for the prosecution or for the defence (a). **Sanjiva v. Government of Mysore**, 15 M.C.C.R. 265 (Cr.).

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

Reference :—(a) (1893) 16 All. 84, F.

(2) Commitment on offences not triable exclusively by Court of Session—Legality. See CRIM. PRO. CODE, No. 154, 7 M.L.T. 186.

(3) Sessions Court—Commitment—Some accused committed while others not arrested—Quashing of commitment. See CRIM. PRO. CODE, No. 155, 7 M.L.T. 187.

(4) Certificate by Political Agent under S. 188, Cr. P.C.—Charge not mentioned in the certificate—Order of commitment—Whether good. See CRIM. PRO. CODE, No. 79, 8 M.L.T. 203 (Cr.).

• **Commitment—(Concluded).**

(5) Framing of charge—Order of—Procedure. See CRIM. PRO. CODE, No. 107, 12 Bom. L.R. 521.

(6) When, should be ordered. See CRIM. PRO. CODE, No. 108-i, 12 Bom. L. R. 923.

Companies Act.

(1) See ACT VI OF 1882.

(2) Offence under Companies Act—Complicity to prosecute. See ACT VI OF 1882 (COMPANIES), No. 1, 35 P.W.R. 1910 (Cr.).

Complaint.

(1) —when can form subject of charge under S. 211, Penal Code—Accused filing complaint before the disposal of original complaint against him—Conviction under S. 211—Effect. See PENAL CODE, No. 42, 3 Sind. L.R. 189.

(2) —dismissed—Petition for revision to the Sessions Judge also dismissed—Fresh complaint on the same facts not allowed. See CRIM. PRO. CODE, No. 105, 11 P.W.R. 1910 (Cr.).

(3) Dismissal of—Revival of, on same facts—Court's discretion to proceed or not with it—Remedy for wrong dismissal of. See CRIM. PRO. CODE, Nos. 126-a and 126-b, 4 S.L.R. 52 and 53.

Compounding offences.

Revision—Power of Court to give leave to compound. See CRIM. PRO. CODE, No. 156, 7 A.L.J. 103.

Compromise.

(1) *Compromise—Award of compensation after—Illegal.*

See CRIM. PRO. CODE, No. 123-b, 30 P.R. 1910 (Cr.).

• **Confession.**

(1) *Confession, retracted—Corroboration—Penal Code, Ss. 114, 302, conviction under—Charge under S. 302, Penal Code.*

Where a confession was taken by a Magistrate in jail with a police officer in the next room and was subsequently retracted.

Held, such a confession could not be acted upon unless supported by very good corroboration.

Quere.—Whether a person charged under S. 302 as a principal can be convicted under Ss. 302 and 114 as an abettor. **Sheikh Sohali v. The King-Emperor**, 11 C.L.J. 278 = 5 Ind. Cas. 773 = 11 Cr.L.J. 247.

STEPHEN and CARNUFF, JJ.

Confession—(Continued).

(2) *Confession, definition of—Retracted confession—Corroboration—Confession of co-accused—Discovery of important fact—Evidence Act (I of 1872), S. 27.*

1. An admission of all the ingredients required to constitute an offence is a confession. A statement of the following kind cannot be regarded as a confession of complicity in an offence.

"I told the other accused that, if they wanted to kill my husband, they were at liberty to do so, and I would bring no case against them. But when they arrived at my husband's house on the fateful night, I endeavoured to restrain them and was only prevented from doing so by their threats to kill me and my son if I interfered. I did neither take any part in the murder, nor did I in any way assist the murderers after my husband was put to death."

2. A confession, taken in conformity with the strict provisions of the law by a Magistrate cannot be ruled out of Court, simply because the accused was produced before the Magistrate with the sole object of having his confession recorded by him (a).

3. A confession of a co-accused is corroborative evidence of another co-accused's confession, if the former supports the latter in all its material parts.

4. A confession retracted at an early opportunity must be very carefully scrutinised before it is accepted by the Courts. But if the confession is made under circumstances which preclude the idea that it was not genuine, and if the confession is such that, had there been no retraction, the Court would not have hesitated to accept it as a voluntary admission of guilt, its value is not diminished simply because its author has subsequently thought fit to disclaim it (b).

5. The fact of pointing out the place where the murdered body is found strongly corroborates the confession in a very material particular. But when the place has already been pointed out by another co-accused, the value of this evidence remains very small.

6. In the absence of any evidence connecting the accused with the commission of the crime, it is not lawful to convict an accused person simply on the strength of the co-accused's confession. **Bhag Singh v. Emperor**, 4 Ind

Confession—(Continued).

Cas. 429 = 24 P.W.R. 1909 (Cr.) = 153 P.L.R. 1909.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 21 P.R. 1869 (Cr.), not appl. (b) 16 P.R. 1903 (Cr.); 153 P.L.R. 1903, F.

(3) *Confession—Statement by a person not implicating himself—Inadmissibility of such a statement—Circumstantial evidence—Evidence Act, Ss. 11 and 30—Murder.*

Held that:—

1. A statement of an accused to the effect that, under threats of death, he was forced to sit outside the door of the house where a murder was being committed, to warn the murderers of the approach of any body, and not to divulge the secret and to remain an impassive agent in the crime, and that he took no part in, on the other hand he vainly tried to dissuade the co-accused from committing the crime, does not amount to a confession of either murder or its abetment, and consequently is also inadmissible in evidence under S. 30 of Act I of 1872, against the co-accused.

2. A retracted confession, though admissible in evidence, is not of much value.

3. The circumstantial evidence, not satisfactorily explained, to the following effect, is sufficient to convict G and S of murder, even in the absence of a clear and strong motive for committing it.

"The deceased was the wife of one G who was living with her in the quarters adjoining those occupied by S his brother at M; on 25th May she was seen alive in the company of G and S, and said she was going off early next day with G to K; and after 25th she disappeared and was never heard of until her body was found in a well at M on 26th July. The medical opinion was that the body was that of a woman and was thrown down the well after being fully murdered and it must have been in water from two to four weeks. G arrived at K without her on 27th July; neither G nor S gave report to the Police of her disappearance and on the 6th August ornaments worn by her were found with S."

4. Satisfactory proof that clothes found on the body of a murdered person belong to him and were worn by him immediately before disappearance is sufficient to find that the corpse is of that person, although it is too decomposed

• **Confession—(Continued).**

to be identified otherwise. **Gul Hassan and Rasool Khan v. The Crown**, 88 P.W.R. Cr. 1910.

REID, C.J., and RATTIGAN, J.

- (4) *Burden of proof—Rape on a child—Complaint of robbery—Report of Chemical Examiner—Confession.*

The accused, who belonged to the menial staff of a railway station, were convicted of ravishing a girl 11—13 years of age, who was travelling in a train and was left at the station while getting a drink. Their confessions were recorded by a Magistrate of the first class a day after the occurrence, and the Chemical Examiner's report supported the girl's story. On appeal it was contended that the confessions were not admissible in evidence and that the girl having in the first instance complained only of the robbery of her ornaments was not a credible witness.

Held that the contentions were not valid, for the confessions were validly recorded and appeared to be voluntary, and the fact that the girl in the first instance complained only of robbery of the ornaments to the strangers was natural. **Sosni v. The Crown**, 93 P.L.R. 1910.

REID, C.J.

- (5) *Confession—Admissibility of statement alleging that it was not voluntary.*

Where the accused makes a statement in writing containing an allegation, from which it is to be inferred that the statement of which it forms a part was not voluntarily made, *held* that such a statement is not admissible under the provisions of the Crim. Pro. Code. **Emperor v. Taranath Roy Chowdhry**, 37 C. 735.

WOODROFFE, J.

- (5-a) *Confession of co-accused—How far can be acted on.*

The confession of a co-accused cannot be taken into consideration, where he does not substantially implicate himself to the same extent as the other accused, but on the contrary tries as far as he can to minimise the part he took. Where a conviction is based for the most part on such evidence, it is bad in law. **Sivasami Pillai v. Emperor**, 8 Ind. Cas. 719 (Cr.).

MUNRO and SANKARAN NAIR, JJ.

Confession—(Concluded).

- (6) *Act I of 1872 (Evidence), S. 91—Applicability of, when writing is not evidence of matter recorded—Search list—Whether excludes oral evidence as to matters recorded therein—Confession—Non-compliance with Government order—Weight to be attached to Govt. Order—Question whether confession was voluntary—Oral evidence to prove—Admissibility—Cr.P.C., S. 167.*

S. 91, Evidence Act, pre-supposes that, where a certain matter is required by law to be reduced to writing, the writing is itself evidence of the matter so reduced, and the section does not apply if the writing is not evidence of the matter.

A search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter.

As regards a confession, the only question to be determined is whether the confession was voluntary or not.

A Government Order prescribing rules as to the mode of recording any confession or statement under S. 167, Cr. P.C., has not the force of law, and failure to comply with its provisions, though it might be a circumstance to be considered in deciding the question whether a confession was made voluntarily or not, does not preclude admission of evidence to prove the character of the confession. **The Public Prosecutor v. Sarabu Chinnayya**, 33 M. 413.

SUBRAHMANIA AIYAR, O.C.J., and O'FARRELL, J.

- (7) *Admissibility—Record of, by Magistrate who subsequently holds enquiry—Confession made during investigation—Effect—Value of, against co-accused. See CRIM. PRO. CODE, No. 71, 37 C. 467.*

- (8) *Definition of—Whether confession admissible in evidence if made to a police officer. See EVIDENCE ACT, No. 6, 5 L.B.R. 131.*

Construction.

1.—OF ACTS.

2.—OF WORDS.

—1.—(Of Acts).

- (1) *Statute—Interpretation—Rules or bye-laws, whether form part of the Act. See ACT VI OF 1898 (POST OFFICE), No. 1, 7 M.L.T. 69.*

- (2) *Penal statutes—Construction. See STAMP ACT (1899), No. 1, 7 A.L.J. 180.*

Construction—(Concluded).**—1.—(Of Acts)—(Concluded).**

(3) Admissibility of proceedings of Legislative Council for purposes of. See PENAL CODE, No. 20, 13 O.C. 55.

(4) Rules as to—Duty of Court. See CRIM. PRO. CODE, No. 66, 7 A.L.J. 468.

(5) Value of marginal notes. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

(6) Interpretation of words having a popular meaning—Exception to the rule. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPAL), No. 1, 12 Bom. L.R. 669.

(7) —where language is plain and unambiguous. See CRIM. PRO. CODE, NO. 111, 7 A.L.J. 897.

—2.—(Of words).

(1) Meaning of "land." See CRIM. PRO. CODE, No. 60, 14 C.W.N. 611.

(2) Meaning of "child" in S. 488, Crim. Pro. Code. See CRIM. PRO. CODE, No. 163, 28 P.W.R. 1910 (Cr.).

Contradictory statements.

Mode of proving. See PROOF, No. 1, 4 S.L.R. 38.

Conviction.

—upon a hypothetical state of facts—Legality. See PENAL CODE, NO. 17, 11 C.L.J. 270.

Copyright.

(1) Use of the word—False description—Conviction. See PENAL CODE, No. 94, 7 M.L.T. 309.

Costs.

(1) Who may decide by whom costs are to be paid—Time for making order for— Who may pass order as to amount of— See CRIM. PRO. CODE, No. 54, 13 O.C. 66.

Court.

(1) Person not summoned to act as assessor acting as such—Defect in constitution of— See ASSESSOR, No. 1, 13 O.C. 337.

Criminal cases.

Duty of Crown to produce evidence in Criminal trial. See EVIDENCE, No. 1, 3 S.L.R. 200.

Criminal Law Amendment Act.

See ACT XIV of 1908.

Crim. Pro. Code.

(1) Ss. 4 (m), 176—*Execution proceedings, if judicial proceedings—Jurisdiction of executing Court to determine genuineness of decree—Onus of proof as to jurisdiction.*

The petitioners presented an application for the execution of a decree alleged to have been passed, whereas as a matter of fact no such decree had been passed, and all the statements contained in the application were false. The Court took action under S. 476, Cr. P.C., the petitioners were prosecuted, and convicted under S. 193.

Held that execution proceedings are "Judicial proceedings" within S. 476, Cr. P.C. The test which has to be applied to a particular proceeding before a Court, to determine whether it is or is not a "Judicial proceeding" for the purposes of S. 476, is, whether, in the course of that proceeding, the Judge has power legally to take evidence on oath, not whether he has actually taken such evidence. [See S. 4 (m), Cr. P.C. (a).]

Held, also, that the Munsiff had jurisdiction in the matter, as the *onus* lay upon the petitioners of showing that the amount of the decree sought to be executed exceeded the pecuniary limits of the Munsiff's jurisdiction and they were unable to discharge the same.

Held further that the Munsiff had jurisdiction to enquire into and decide the question of genuineness of the decree, and the mere fact that the decree was fictitious and so not executable cannot make the proceedings, so far as regards the determination of the genuineness or otherwise of the decree, void for all purposes. **Chanan and Raghu Ram v. Crown**, 1 P.R. 1910 = 3 P.W.R. 1910 = 5 Ind. Cas. 257 = 11 Cr. L.J. 90v

ROBERTSON, O.C.J., and SHAH DIN, J.

References:—32 C. 367; 35 C. 133, *Diss.*; 10 C.W.N. 55, *F.*; 10 B. 288, *R.*

(2) S. 30— See No. 124, *infra*.

(2-a) S. 35—Separable offences under S. 71, I.P.C., whether distinct offences under S. 35, Crim. Pro. Code.—Punishment. See PENAL CODE, No. 4, 3 S.L.R. 224.

(2-b) S. 48—Effect of decree for restitution of conjugal rights. See MAINTENANCE, No. 1, U.B.R. 1910, 2nd Qr., 34.

(3) S. 54—Power of police officer to arrest without warrant—Case of burglary—Reasonable suspicion—Assaulting police officer—Offence under S. 339, Penal Code.

• **Crim. Pro. Code—(Continued).** •

Under S. 54, Crim. Pro. Code, a police officer investigating a charge of burglary (a cognisable case) is empowered to arrest, without an order from a Magistrate or a warrant, persons against whom a reasonable suspicion of having been concerned in the burglary existed, and so the persons assaulting the police officer while arresting them would be guilty of an offence under S. 332, Penal Code (a). **The Crown v. Yusuf and others**, 18 P.R. 1910 (Cr.) = 92 P.W.R. 1910 = 6 Ind. Cas. 954 = 11 Cr. L. J. 423.

ARTHUR REID, C.J.

References :—(a) 18 A. 246 and 26 C. 630, D.

(4) Ss. 62, 143, 190, 191 and 528 (3)—*Police report—Transfer of case—Notice.*

Held, that, under S. 190 (b), the term (*Police Report*) does not necessarily mean only a Chalan, but includes also a report by the Police under S. 62 of the Code of Criminal Procedure, 1898, cl. (c) of the former section cannot possibly cover a case of information derived from the police, and does not oblige a Magistrate to proceed under S. 191 of the Code and ask the accused whether he consented to be tried by him.

Held, also, that the rule that notice should be given before a criminal case is transferred at the instance of a party does not apply where the District Magistrate *suo moto* withdraws it to his own file or transfers or re-transfers it from one Court to another under his control.

Held, further, that under S. 528 (3) "reasons" for transfer should be recorded; but the defect does not necessarily vitiate the order of transfer, and the superior Court can call for the reasons.

The provisions of the Indian law in regard to the transfer of criminal cases are calculated to be used, and are in practice used, not to further justice, but to harass and annoy opponents. **Abdullah v. The Crown**, 35 P.W.R. 1909 (Cr.) = 3 P.R. 1910 = 4 Ind. Cas. 1025 = 11 Cr. L.J. 150.

JOHNSTONE, J.

References :—28 P.R. 1902; 24 M. 317, F.; 22 B. 549, D. and *Disapp.*

(5) Ss. 75, 537—Essentials of search warrant. See ACT III OF 1867 (GAMBLING), No. 3, 23 P.R. 1910 (Cr.).

(5-a) Ss. 94, 96, 192—*Account books, production of—Procedure to be followed—Valuable security—Title page of account book*

• **Crim. Pro. Code—(Continued).** •

signed by partners—Penal Code (Act XLV of 1860), Ss. 30, 177.

The complainant complained before a Magistrate that the accused had fraudulently tampered with the account books of a partnership business. The Magistrate directed the Police "to enquire and report and to take possession of the khata books." The Magistrate not being satisfied with the Police report submitted to him, referred the case to an Honorary Magistrate for further enquiry and report. The Honorary Magistrate reported that the charge was not "utterly devoid of foundation." The Magistrate then directed the issue of process for the attendance of the accused to answer a charge under S. 477, Penal Code.

Held, that the order upon the police to take possession of the account books of the firm was illegal, and that, if their production was necessary, the Magistrate should have issued either a summons to produce under S. 94 or a search warrant under S. 96 of the Crim. Pro. Code.

Held, also, that the order directing the Honorary Magistrate to enquire and report was one not authorized by law, and that, if the Magistrate thought proper to refer the case to some other Magistrate for an enquiry other than a local investigation, he should have transferred the case under S. 192 of the Crim. Pro. Code, to such Magistrate, not for report, but for disposal.

A title page of an account book of a firm, containing the names of the several partners and showing the amount of capital contributed by each, if signed by the partners, may be a valuable security within the meaning of S. 30, Penal Code. **Hari Charan Goral v. Shrish Chandra Sadhukhan**, 7 Ind. Cas. 747 (Cr.).

CHATTERJEE and TEUNON, J.J.

(5-b) S. 96—*Transfer of complaint by District Magistrate to Deputy Magistrate for disposal—Issue of search warrant by Deputy Magistrate—Omission to examine complainant on oath.*

Where a District Magistrate transferred a complaint to the Deputy for enquiry and disposal, and the latter, without examining the complainant on oath, issued a search warrant under S. 96, Crim. Pro. Code. *Held*, that the issue of the search warrant was illegal, and

Crim. Pro. Code—(Continued).

that the warrant should be discharged. *In re Sinagurunatha Pillai*, 7 Ind. Cas. 895.

MUNRO and SANKARAN NAIR, JJ.

Reference:—13 M. 18, F.

- (6) S. 100—*Complaint against husband for keeping wife in confinement—Procedure to be adopted by the Magistrate.*

Held, that, on a complaint against a husband for keeping his wife in confinement, the Magistrate taking its cognizance is not allowed to pass an hasty order to the following effect:

"S. B. states that her husband is keeping her in confinement. She wishes to go to her mother. She is at liberty to go where she pleases."

Before finally disposing of the proceedings, he is bound to hear both sides, and after making such inquiry as may seem necessary, he should pass such order as may seem right. If he finds the confinement amounted to an offence, he should let the wife go and warn the husband against interfering with her except through a Civil Court. If on the other hand he arrives at the conclusion that such is not the case, he should advise the wife to go home with her husband, warning the husband at the same time against using any coercion in taking the wife with him. *Sher Shah v. Musammat Sakina Begam*, 29 P.W.R. 1910 (Cr.)=7 Ind. Cas. 354=11 Cr. L.J. 450.

JOHNSTONE, J.

- (7) S. 103—*Search list—Evidence—Whether search list the only evidence of its contents.*

The contents of a search list need not be proved by the search list alone. "External evidence of its contents is admissible." *Elamathan v. Emperor*, 11 Cr. L.J. 136=5 Ind. Cas. 438=7 M.L.T. 362.

BENSON and ABDUR RAHIM, JJ.

References:—Weir's Criminal Rulings, 4th Ed., Vol. II, p. 515, *not followed*; Weir's Criminal Rulings, 4th Ed., Vol. II, p. 767, F.

- (7-a) S. 103—*See No. 71, infra.*

- (8) S. 106—*Accused convicted by second class Magistrate—Direction of Sub-Divisional Magistrate to execute bonds on appeal—Legality.*

The order of the Deputy Magistrate, in appeal, directing the execution of a bond under S. 106, Cr.P.C., is illegal, where the convicting Court was a second class Magistrate and therefore not a Magistrate who could make an

Crim. Pro. Code—(Continued).

order under that section. *In re Latchumana Thalavan and others*, 7 M.L.T. 104=5 Ind. Cas. 807.

BENSON and ABDUR RAHIM, JJ.

References:—29 M. 190 and 30 M. 48, R.

- (9) S. 106, cl. 3—*Order by appellate Court—Jurisdiction of original Court—Limitation on appellate Court's power—Indian Penal Code (Act XLV of 1860), S. 71—Conviction for several offences.*

An appellate Court is entitled to order an appellant to furnish security to be of good behaviour under S. 106, Crim. Pro. Code, and the power of the appellate Court under cl. 3 of that section is not limited in any way by the powers of the original Court which tried the case (a).

A Magistrate of the second class convicted the accused under several sections and sentenced them to several terms amounting to nine months. *Held* that S. 71, Penal Code, did not apply, and the Magistrate was empowered to pass separate sentences for different offences (b). *Dharam Dass v. King-Emperor*, 7 A.L.J. 910 (Cr.)=7 Ind. Cas. 412=11 Cr.L.J. 480.

TUDBALL and CHAMIER, JJ.

References:—(a) 33 Bom. 30, F. (b) 9 All. 645, F.

- (9-a) S. 106 (3)—*Conviction for offences under Ss. 147, 323, Penal Code—Appellate Court confirming sentence and ordering security to keep peace—Legality.*

Where a Sub-Divisional Magistrate, while confirming the sentence of the lower Court for offences under Ss. 147 and 323, Penal Code, ordered some of the accused to furnish security under S. 106 (3), Cr.P.C., *held* that the order of the Sub-Divisional Magistrate is opposed to the decisions of the Madras High Court, and the order, so far as it directs security to be taken, should be set aside (a). *Emperor v. Rhoddamatia*, 8 M.L.T. 291.

SANKARAN NAIR, J.

References:—(a) 30 M. 48; 30 M. 182, F; 29 M. 190, R.; 33 B. 33, *not F.*

- (9-b) Ss. 106—*Security to keep peace—In what cases may be demanded.*

S. 106 of the Cr. P.C. is not applicable to a person not convicted of riot, assault, or other offence involving a breach of the peace, or of abetting the same, or of assembling armed men, or taking other unlawful measures with evident

Crim. Pro. Code—(Continued).

intention of committing the same, or committing criminal intimidation. The latter offence is defined by S. 503 of the Penal Code and it is made punishable by S. 506 with rigorous imprisonment for two years or fine or both.

Although intimidation is one of the elements of an unlawful assembly, the criminal intimidation specified in S. 106 is the offence specifically defined by S. 503, the sentence provided by S. 506 being more severe than that provided by S. 143, and S. 106 cannot be applied to a person convicted under S. 143, merely because intimidation by show of criminal force is in the fourth and fifth parts of the definition in S. 141 an element of the offence punishable under S. 143. **Abdulla Khan v. The Crown**, 126 P.L.R. 1910 (Cr.).

REID, C.J.

Reference :—3 P.R. 1890 (Cr.), R.

- (10) *Ss. 106, 226, 354—Persons required to execute bond for keeping the peace—Whether, 'persons accused of an offence' or 'accused persons'—Order refusing bail to such persons—Correctness.*

An order refusing bail to persons required to execute bonds for keeping the peace under S. 106, Cr. P. C., is wrong.

Persons ordered to give security for keeping the peace are not persons accused of an offence.

Quere.—Whether such persons are accused persons within the meaning of the Code? *In re Kora Ayyappa and another*, 7 M.L.T. 104 = 5 Ind. Cas. 809 = 11 Cr. L.J. 251.

MILLER, J.

Reference :—30 A. 334, R.

- (11) *Ss. 106, 349—Conviction by third class Magistrate—Appeal—Recommendation to first class Magistrate as to binding down—Conviction and appeal good—Recommendation bad.*

The accused were convicted by a third class Magistrate, who submitted the record to the Sub-Divisional Magistrate under S. 349, Crim. Pro. Code, in order that they might be bound down under S. 106. The Sub-Divisional Magistrate ordered the accused to be bound down. An appeal was then instituted from the original conviction, and the appellate Court set it aside.

Held, that the recommendation as to binding down the accused was without jurisdiction, and the action of the Sub-Divisional Magistrate

Crim. Pro. Code—(Continued).

under S. 106 was also without jurisdiction; but the original conviction and the appeal against it were good and within jurisdiction (a). **Lukhan Dosadh v. Bachi Singh**, 11 Cr. L.J. 170 = 5 Ind. Cas. 576.

STEPHEN and CARNDUFF, JJ.

References :—35 C. 1093; 9 Cr. L.J. 72, R.

- (12) *S. 107—When security should be demanded—Disobeying legal order.*

To justify an order under S. 107, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquility or to do some wrongful act that may occasion a breach of the peace.

Where an order was passed prohibiting the applicants from killing cows, and the Magistrate, believing that they would disobey the order, bound them down to keep the peace, *held*, that, the order being illegal, the applicants could not be bound down. **Muhammad Yakub v. King-Emperor**, 7 A.L.J. 649 = 6 Ind. Cas. 454 = 11 Cr. L. J. 355.

RICHARDS and TUDBALI, JJ.

- (12-a) *S. 107—Security to keep the peace—Principle on which a person may be bound over.*

Before a person is bound over to keep the peace, it must be shown that he is himself likely to commit a breach of peace or do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquility. He cannot be bound down merely because he is a wealthy or influential member of a party. **Jagat Narain v. King-Emperor**, 7 A.L.J. 1161.

CHAMIER, J.

- (13) *Ch. VIII—Surety bond—Breach and forfeiture of—Fresh proceedings necessary for fresh bond.*

A person cannot be required, without fresh proceedings taken against him, to find sureties a second time, when, in consequence of a breach, his original security is forfeited. The Code does not provide for a renewal of the bond without fresh proceedings. *In re Muthu Thevan*, 7 M.L.T. 90 = 5 Ind. Cas. 761 = 11 Cr. L.J. 244.

MILLER, J.

- (14) *Ss. 109 and 110—Security demanded under both sections, whether legal—Single enquiry in the case of two persons—Proof of association or concert.*

Crim. Pro. Code—(Continued).

Security should not be demanded of a person under both sections 109 and 110, Crim. Pro. Code.

A Magistrate should not hold a single enquiry, under sections 109 and 110, Crim. Pro. Code, in the case of two persons, unless he is satisfied that the two men were acting in concert, *i.e.*, were associated in the acts charged. **Kakkal Reddi v. Fareed Khan**, 11 Cr. L. J. 50 = 5 Ind. Cas. 156.

MILLER, J.

(15) *Ss. 109, 123 and 397—Penal Code (Act XLV of 1860) S. 379—Concurrent sentences—Consecutive sentences.*

The accused was proceeded against under S. 109, Crim. Pro. Code, and sentenced under S. 123 of the Code to rigorous imprisonment for nine months, in default of security for good behaviour, on the 6th July, 1909. He was then tried for an offence of theft committed by him in November, 1908, and was, on the 17th August, 1909, sentenced to suffer rigorous imprisonment for three months: the second sentence was directed to take effect on the expiry of the first sentence.

Held, that the two sentences could not run consecutively, but must run concurrently. **Emperor v. Arjun Ambo Kathodi**, 12 Bom. L.R. 129 = 5 Ind. Cas. 861 = 11 Cr. L. J. 271 = 34 B. 326.

CHANDAVARKAR and BATCHELOR, JJ.

(15-a) *S. 110—Bond for good behaviour—Conviction for receiving stolen property in Native State—Forfeiture—Nature of offence under section—Proof of commission Necessary.*

A person who was under security for good behaviour under S. 110, Cr. P.C., does not merely on proof of conviction for dishonest receipt of stolen property by a Court in a Native State, forfeit his security.

Obiter.—But proof of commission of an offence punishable by the Code entails such forfeiture. **The Crown v. Dewa Singh**, 28 P. R. 1910 (Cr.).

REID, C.J., and JOHNSTONE, J.

References:—2 P.R. 1884 (Cr.) 17 P.R. 1904 (Cr.), *D.*

(16) *S. 110—Security for good behaviour—Charge of dacoity—Definite charge—Want of sufficient evidence.*

Crim. Pro. Code—(Continued).

Some persons were charged of dacoity. The charge failed for want of sufficient evidence. But the District Magistrate upon police information and upon evidence on the record took proceedings against some of the accused under S. 110 of the Crim. Pro. Code and bound them over to be of good behaviour: *Held*, that the order of the Magistrate under the circumstances was good. **Raj Karan v. Emperor**, 11 Cr. L.J. 36 = 4 Ind. Cas. 709 = 6 A.L.J. 961 = 32 A. 55.

TUDBALL, J.

References:—11 C.W.N. 431; 5 Cr.L.J. 191, *D.*

(17) *S. 110—Separate trial—Conduct before previous bond.*

In cases under S. 110, Crim. Pro. Code, each accused is entitled to an entirely independent examination of his own case.

To take up facts, against an accused, of dates older than the previous security bond, is against law and justice, and cannot be made ground for fresh proceedings. **Bahadur Shah v. Emperor**, 4 Ind. Cas. 432 (Cr.) = 25 P.W.R. (3909) Cr. = 4 P.R. 1909 = 149 P.L.R. 1909.

JOHNSTONE, J.

(17-a) *S. 110—Evidence that a man was merely of bad character—Effect.*

Where all the evidence proved was that a person was of bad character, such a finding does not bring the case within S. 110. *In re E. V. Karuppanan Servai*, 8 M.L.T. 246.

MUNRO and ABDUR RAHIM, JJ.

(17 b) *S. 110—See No. 14, supra and No. 174, infra.*

(18) *S. 110 (c)—Employment of or association with ex-convicts or reputed thieves—Whether amounts to 'harbouring' or 'protecting' them.*

Where the applicant employed or associated with two ex-convicts, of whom one subsequently committed a new offence and was sent to jail again some four or five years prior to the present proceedings against the applicant, or where he employed or associated with two persons who were reputed to be thieves, of whom one was convicted for committing dacoity at the applicant's house, *held*, that the applicant, in neither case, protected or harboured them within the meaning of S. 110 (c), Crim. Pro. Code. **Nga pu Gyi v. King-Emperor**, U.B.R. 1910, 1st Qr., 4 (Cr.).

SHAW, J. C.

Crim. Pro. Code—(Continued).

(18-a) *Non-liability of manager of a shrine freely open to public where thieves resort—Previous convictions of gambling and of offences not relating to property.*

Held that the manager of a public shrine, which does not belong to him and is not under his exclusive control, and which is freely open to the public, cannot be called upon to furnish security for good behaviour under S. 110 (c), although some thieves have been arrested there on several occasions and it is generally used as a gambling resort, and among the people, who come up there, are a number of thieves and bad characters; and although the manager himself has nine convictions against him, none of which has anything to do with property and six of which are for gambling, inasmuch as the shrine is not his house and he cannot be said to harbour thieves and such like, convictions cannot fairly be raked against a person involved in the proceedings under the said S. 110 (c).

Held, also, that an order under this section is not justifiable, where, apart from the police officials, only two persons are produced to support the prosecution, against a large body of apparently respectable witnesses of an immediate neighbourhood who testify in favour of the accused. **Soman, son of Mohammad Baksh v. The Crown**, 37 P.W.R. 1910.(Cr.).

RYVES, J.

(19) *Ss. 110 to 118 and 439—Defective notice—Chief Court's power of revision in a pending case and to quash defective proceedings.*

Held, that the Chief Court is competent at any stage of a criminal case to interfere, in order to exercise its powers of revision, particularly where the case is of an exceptional nature. So where the proceedings of a Magistrate under S. 110, Crim. Pro. Code, are defective on one or more of the following grounds, the Chief Court has power to quash them at once.

(1) The accused has already been twice acquitted on similar facts and evidence, and nothing new is urged against him.

(2) The original order is only initialled and not signed by the Magistrate, and neither the amount of security and the period for which it is required, nor the full particulars of the bad livelihood, are mentioned therein.

A Magistrate is not justified in issuing unreasonably a warrant for arrest of an accused person on excessive security, while the accused

3 Cr,

Crim. Pro. Code—(Continued).

had reasonable excuse for not attending in obedience to the notice. **Natha Singh v. The Crown**, 17 P.W.R. 1910=6 Ind. Cas. 624=11 Cr.L.J. 387.

SCOTT-SMITH, J.

• *References*:—I.L.R. XXII C. 131; 22 S.W. R. Cr. 23; I.L.R. XX Bom. 543; I.L.R. XXV C. 233, F. Cr.; 45 P.R. 1885, D.

(20) *Ss. 110 and 112 and 439—Defective proceedings—High Court's power to set them aside before their termination.*

Held, that the proceedings of a Magistrate are liable to be set aside by the High Court in revision, even before they are terminated against the accused, if the notice issued under S. 110, Crim. Pro. Code;

(a) omits to give substance of the information received as required by S. 112 of the Code;

(b) purports to issue under the Old Code of 1882;

(c) requires more security than what is entered in the original order; and

(d) is not personally served upon the person to whom it is given. **Bahadar Singh v. The Crown**, 18 P.W.R. 1910 -6 Ind. Cas. 626=11 Cr.L.J. 388.

SHAH DIN, J.

• *References*:—I.L.R. XXII Cal. 131; I.L.R. XX Bom. 543; Cr. Rev. 604 of 1909=Cr. 17 P. W.R. 1910, F.

(21) *Ss. 110 and 118—Bad livelihood—Sureties, fitness of—Pecuniary fitness of the surety, whether the only test.*

In deciding whether sureties tendered in bad livelihood cases are to be accepted or refused, the first matter to be inquired into is the ability of the sureties to pay the sums for which they become bound, in case of default of the persons who are bound down for good behaviour; but there may be other objections to be considered, but any such objections must be dealt with in each case as it arises.

Where the sureties were found to be competent from the pecuniary point of view, but no other cause of unfitness was made out, the sureties were wrongly rejected. **Jafar Ali Howlader v. The Emperor**, 14 C.W.N. 666=37 C. 446=6 Ind. Cas. 663=11 Cr.L.J. 332.

STEPHEN and CARNDUFF, JJ.

• *References*:—6 C.W.N. 593; 35 C. 400, F.; 13 C.W.N. 80, R.

Crim. Pro. Code—(Continued).

(21-a) Ss. 110 (f), 117—Security for good behaviour—When to be ordered—Evidence of general repute—Admissibility.

Where a person is solely charged under S. 110, cl. (f), evidence of general repute is not admissible, as a provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the Legislature.

Such evidence is only admissible under S. 117 to prove that a person is a habitual offender, under S. 110, but not to prove a charge under S. 110, cl. (f) of being a desperate and dangerous character. *In re Muthu Pillai*, 8 M.L.T. 347.

SANKARAN NAIR, J.

References:—25 A. 273; 29 C. 779; 11 C.W. N. 789, R.; 13 C.W.N. 247, D.

(22) Ss. 110, 122, 123, Sub-S. (3), 367 and 424—Bad livelihood—Order under S. 123, Sub-S. (3) should show that the case of each individual prisoner was considered—Sureties, fitness of, enquiry into, to be held by whom—Reasons for refusing to accept sureties, necessity for recording—Refusal of sureties, proper grounds for—Enquiry under S. 122, Cr.P.C., whether a judicial enquiry—Delegation of an enquiry under S. 122, Cr.P.C.—Evidence, relevancy of—Indian Evidence Act (I of 1872), S. 11.

It is open to doubt whether the provisions of Ss. 367, 424, Cr.P.C., govern orders under S. 123, Sub-sec. (3).

But even if they do not, the Sessions Judge's order under S. 123, Sub-S. (3), Cr.P.C., should show that he has considered the case of each individual prisoner. Even if the order need not contain all the details required by S. 367, Cr.P.C., still each prisoner has a right to have his case considered on its own merits, and the order should show that this has not been lost sight of.

When the question is whether a man is a habitual cheat, the fact that he belongs to an organisation formed for the purpose of habitually cheating in concert is relevant under S. 11 of the Evidence Act.

A Magistrate is justified in refusing to accept sureties who, being called upon by the Magistrate to attend for examination, do not do so.

But it would not be proper for a Magistrate to reject the security offered by the sureties simply on the ground that they, having been

Crim. Pro. Code—(Continued).

asked by the Magistrate to state in writing what influence they have over the persons bound down for good behaviour, have failed to do so.

Where the Magistrate, after his decision of a bad livelihood case, asked a subordinate Magistrate to make an enquiry into the fitness of the sureties offered and, on his report, refused to accept the sureties without recording any independent reasons of his own.

Held Per Ryves, J. (Coze, J., contra)—Under S. 122, Cr. P.C., the Magistrate, who decides the bad livelihood case, should himself hold an enquiry into the fitness of proposed sureties.

Per Coze, J.—That the procedure adopted by the Magistrate was not illegal. That S. 122, Cr. P.C., does not necessitate a judicial enquiry, and even if it does, there is no reason why such an enquiry should not be delegated to another Magistrate.

In refusing to accept sureties, the Magistrate should record his reasons, but his omission to do so in this case did not justify any interference by the High Court, as it is clear the Magistrate adopted the reasons of the subordinate Magistrate who enquired into the fitness of the sureties. *Kalu Mirza v. Emperor*, 14 C.W.N. 49—5 Ind. Cas. 29=11 Cr. L.J. 23=37 C. 91.

COXE and RYVES, JJ.

(22-a) Ss. 110 and 123, cls. 2 & 3—District Magistrate calling for security under S. 110—Failure to furnish same—Sentence of imprisonment by District Magistrate subject to confirmation by Sessions Judge—Confirmation by latter—Legality—Proper procedure under S. 123, cls. 2 & 3—Gist of Ss. 123, cls. 2 & 3—Reference under S. 123—Duty of Sessions Judge to weigh evidence.

Where, on failure to furnish security by a person called upon by the District Magistrate to execute a bond under S. 110 for three years, the Magistrate sentenced him to three years' rigorous imprisonment subject to confirmation by the Sessions Judge, and where the latter simply confirmed the District Magistrate's sentence, *held*, that the Magistrate's procedure was not according to S. 123, sub-S. 2 & (3), Cr. P.C., and that he had no authority to pass the order which he did.

The gist of S. 123, sub-Ss. 2 & 3, is that the Magistrate commits the person, from whom

Crim. Pro. Code—(Continued).

security has been demanded, to prison and sends the proceedings to the Sessions Judge for disposal as he thinks fit. There is nothing in the section about the Magistrate's order being confirmed.

It is the duty of a Sessions Judge, in a reference under S. 123, Cr. P.C., to consider the evidence and pass an order after doing so. He should not, as a matter of course and without regard to the evidence, send the person to prison. **Nanku alias Muhammad Din v. The Crown**, 29 P.R. 1910 (Cr.).

SCOTT SMITH, JJ.

(22-b) S. 111—See No. 19, *supra*.

(23) S. 112—Order to find sureties from Zamindar class—Legality—Revision.

An order, rejecting sureties, who were not of the class of Zamindars holding twenty acres of land round a particular locality as fixed by an order under S. 112, is not illegal, and cannot be interfered with in revision. **The Crown v. Jam Mahomed**, 3 S.L.R. 239=6 Ind. Cas. 887=11 Cr. L.J. 417.

HAYWARD and CROUCH, A.J.CS.

(24) S. 112—Sureties for good behaviour—Sureties living ten miles away—Friends of accused—Whether proper sureties.

Unnecessary difficulties should not be thrown in the way of people required to give security. Where a man is called upon to produce persons who would be sureties for him and he produces them, held that they should not be rejected merely on the ground that they lived ten miles away from him and were on friendly terms with him. **Bhagwan Sahai v. King-Emperor**, 7 A.L.J. 993 (Cr.).

CHAMIER, J.

(24-a) S. 112—See Nos. 19 & 20, *supra*.

(25) Ss. 112 and 122—Power to reject sureties—Discretion of Magistrate, how to be exercised—Record of reasons—Power of High Court to interfere with the order.

In determining whether or not a surety is "respectable" within the meaning of that term as used in the order under S. 112, the Magistrate may fairly demand a reasonable degree of social importance and influence, and, if it be found, on proper enquiry, that the income of any surety offered is such as to make it reasonably certain that he does not possess that degree of social importance and influence, such surety

Crim. Pro. Code—(Continued).

may be rejected. What the standard of respectability should be in any particular case must be left to the Magistrate to determine.

The Magistrate is justified in using and applying his knowledge of his division when acting under S. 122, and if he knows that the inhabitants generally of a village bear a bad character, he is justified in rejecting as unfit any such inhabitant who may be offered as a surety, provided that he records his reasons for so doing.

The duty of the High Court is merely to see that the Magistrate has exercised his authority with reasonable discretion and has infringed no rule of law. **Imperator v. Din Mahomed**, 3 Sind. L.R. 168.

LUCAS and CROUCH, J.CS.

(25-a) S. 113—See No. 19, *supra*.

(25-b) S. 114—See No. 19, *supra*.

(25-c) S. 115—See No. 19, *supra*.

(25-d) S. 116—See No. 19, *supra*.

(25-e) S. 117—See No. 19, *supra*.

(26) Ss. 117 and 242—Proceedings under S. 117—Procedure—Failure to conform to provisions of S. 242—Revision.

A Sub-Divisional Magistrate proceeding under S. 117 as nearly as practicable in the same way as under S. 242, Cr. P.C., has to state to the accused the particulars of the matter against them, and ask them if they could show cause why they should not be required to execute bonds. An order of the Sub-Divisional Magistrate who failed to do so, being irregular, should be set aside. **In re Palaniappa Asari and others**, 7 M.L.T. 304=6 Ind. Cas. 682=11 Cr. L.J. 393.

MILLER, J.

(26-a) S. 118—See Nos. 19 and 21, *supra*.

(27) Ss. 118 and 122—Sureties in bad livelihood cases, refusal of—Reasons for the refusal—Testing reasons.

The Magistrate, in rejecting sureties under S. 122, Cr. P.C., has to record his reasons for doing so. Before recording the reasons, he should carefully consider and test them. This could be best done by bringing them to the notice of the persons offered as sureties, and allowing them an opportunity of controverting them. **Ela Buksh v. The Emperor**, 14 C.W. N. 709=6 Ind. Cas. 124=11 Cr. L.J. 243.

STEPHEN and CARNDUFF, JJ.

Crim. Pro. Code—(Continued).

(28) Ss. 118, 122—Right of representation by pleader. See **PLEADER**, No. 2, 4 S.L.R. 49.

(29) Ss. 119, 209, 253, 259, 437—Order of 'discharge under S. 119'—Jurisdiction of District Magistrate to direct 'further inquiry' under S. 437—Scope and applicability of S. 437—'Discharge,' Meaning.

Where a Magistrate, after hearing the evidence adduced on behalf of an accused person, 'discharges' him under S. 119, **Crim. Pro. Code**, held, that a District Magistrate has no jurisdiction to order further inquiry under S. 437 of the Code. S. 437, **Crim. Pro. Code**, undoubtedly applies to disposals under Ss. 253 and 259 and possibly to a disposal under S. 209 also. But the discharge under S. 119 is a different matter. The jurisdiction given by S. 437 should not be applied to cases under Ch. VIII, at any rate, where before making an order under S. 119, the Magistrate has called on the person, into whose conduct the inquiry is made, to establish his defence. The term 'discharge' may have two meanings and S. 119 indicates that its meaning in that section is non-technical. The 'discharge' of S. 119 is merely 'a permission to depart.' **Yelu Tayi Amma! v. Chidambara Yelu Pillai**, 6 M.L.T. 133=33 M. 85=20 M.L.J. 137=4 Ind. Cas. 1057=11 Cr. L.J. 162.

MILLER, J.

(30) S. 121—Bonds for good behaviour—Grounds of forfeiture—Section exhaustive.

Where an accused is not shown to have committed an offence, to have attempted to do so, or to have abetted such a thing,

held, his bond for good behaviour cannot be forfeited under S. 121, Cr. P.C.

S. 121, Cr. P.C., is explicit, and, so far as bonds for good behaviour are concerned, is exhaustive, though it might not be so as regards bonds for keeping the peace. **The Crown v. Jalal Shah**, 5 P.R. 1910 (Cr.)=8 P.W.R. 1910=5 Ind. Cas. 827.

JOHNSTONE, J.

Reference:—2 M. 169, not F.

(31) S. 122—Proceedings under, if judicial proceedings—Order based on Police report, effect of—Police report, if evidence.

Though proceedings under S. 122, Cr. P.C., are judicial proceedings as defined in S. 4 (1) (m), Cr. P.C., and S. 5 of the Oaths Act (X of 1873), and are therefore proceedings governed

Crim. Pro. Code—(Continued).

by the regular rules as to admitted facts and legal evidence under the Indian Evidence Act or other law relating to evidence, nevertheless, they are not proceedings for which any formal procedure has been provided beyond the formal record in writing of the reasons for refusing to accept surties offered under Ch. VIII, Cr. P.C. It is not necessary formally to record the evidence.

There is no law rendering reports of Police Inspectors or Mukhtyarkars admissible evidence in proceedings either under division B or division C of Ch. VIII, Cr. P.C. (a). **Imperator v. Haju Usman**, 4 S.L.R. 18 (Cr.).

HAYWARD and LFGGATT, JJ.

References:—(a) 2 S.L.R. 11; 2 S.L.R. 15, F.

(31-a) S. 122—See Nos. 22, 25, 27 & 28, *supra*.

(31-b) S. 123—See No. 15, *supra*.

(31-c) S. 123—Sub. S. (3)—See No. 22, *supra*.

(32) Ss. 123, 397—Detention in prison in default of giving security—"Undergoing a sentence of imprisonment" imprisonment for substantive offence when should commence.

"A person who has been committed to prison, or is detained in prison" under section 123, Criminal Procedure Code, is not "undergoing a sentence of imprisonment" within the meaning of section 397, Crim. Pro. Code (a).

Where a man so committed or detained is convicted and sentenced to imprisonment for a substantive offence, the sentence should run concurrently with the period of detention imposed under section 123. **Emperor v. Pandhi**, 11 Cr. L.J. 15=4 Ind. Cas. 608=8 S.L.R. 114.

LUCAS, J.C. and CROUCH, A.J.C.

(32-a) Ss. 123, 406—Security for good behaviour—Appeal to District Magistrate—Sessions Judge, submission of proceedings to—Procedure to be adopted by Sessions Judge—Presentation of appeal to Sessions Judge, procedure in case of—Cr.P.C., Ss. 123 and 406.

A person ordered to give security for good behaviour by a Magistrate is entitled to appeal to the District Magistrate, notwithstanding that the proceedings may have been laid before the Sessions Judge under S. 123, Cr. P.C. But the right of appeal is lost as soon as the Sessions Judge has passed orders on the case under sub-S. (3) of S. 123.

Crim. Pro. Code—(Continued).

The Sessions Judge, on receiving a record under sub-S. (2) of S. 128, should at once give notice to the person ordered to give security of the date on which the case will be taken up. If before the last mentioned date the person ordered to give security does not object to the case being taken up by the Sessions Judge on the ground that he has appealed, or the Sessions Judge does not become aware that an appeal has been filed in the Court of the District Magistrate, the Sessions Judge should proceed to dispose of the case. If, on the other hand, the Sessions Judge is informed or becomes aware that an appeal has been filed, he should stay his hand until the appeal has been disposed of.

Where the person ordered to give security presented an appeal to the Sessions Judge, *held*, that the Sessions Judge should have returned the memorandum of appeal to him for presentation to the District Magistrate, instead of forwarding the appeal to the District Magistrate directly. **Puttu alias Ghulam Husain v. King-Emperor**, 13 O.C. 354 (Cr.).

CHAMBER, J.

(33) *Ss. 125 and 476—Power of the District Magistrate to cancel bail bonds under S. 125—Sanction to prosecute—Whether Magistrate acting under S. 125 has jurisdiction to sanction prosecution under S. 476.*

M and others having been bound down by the Sub-Divisional Magistrate in a proceeding under S. 107, Cr.P.C., at the instigation of the petitioner who filed some rent receipts, the District Magistrate cancelled the bonds executed by them for keeping the peace, and, holding that the rent-receipts were forgeries, sanctioned under S. 476, Cr.P.C., the prosecution of the petitioner for an offence under S. 471, Cr.P.C.

Held that, as the District Magistrate acted under S. 125, Cr.P.C., the rent-receipts did not come before him in a judicial proceeding, and he had no jurisdiction to sanction prosecution under S. 476, Cr.P.C. **Daya Nath Thakur v. The Emperor**, 14 C.W.N. 806 = 37 C. 72 = 5 Ind. Cas. 555.

CASPERSZ and RYVES, JJ.

(34) *S. 133—Specific Relief Act (I of 1877), S. 42—Claim of private right by plaintiff over land—Claim of public right by defendants—Cause of action—Parties—Persons claiming public right are alone necessary parties—Civil Procedure Code*

Crim. Pro. Code—(Continued).

(Act XIV of 1882), S. 30—*Irregularity in not recording formal order.*

Where the plaintiff claims a private right upon a certain land, over which a public right of way is claimed by the defendants, who initiated proceedings under S. 133, Crim. Pro. Code, and there has been an order by the Magistrate upon the plaintiff to remove certain structure which the Magistrate found to be an obstruction upon the alleged public right of way:

Held, that, as a cloud had been thrown upon his title by the proceedings under S. 133, Crim. Pro. Code, the plaintiff had a cause of action to bring a suit for declaration of his title:

Held, also, that the plaintiff had a right to bring the suit against the defendants alone without impleading any other member of the public (a).

Where notices under S. 30 of the Civil Procedure Code, 1882 were issued one year before the trial, mentioning the defendants and other residents of the neighbouring villages, and the defendants put in written statement after the service of the notices, and adduced evidence in support of the public right of way, the notices must be considered to be definite enough, and the simple fact that a particular person was not directed, by an express order of the Court before the trial, as authorized to defend the suit, did not affect the result of the case (b). **Sheik Ekhar Ali v. Anu Manjhi**, 6 Ind. Cas. 46.

CHATTERJEE, J.

References:—(a) 17 C. 460 (F.B.), F. (b) 21 C. 180, 29 C. 100, F.; 17 C. 906, R.

(35) *Ss. 133, 137—Order without taking evidence—Waiver by party.*

In a case under s. 133, if the party summoned appears and show cause, the Court is to apply the provisions of s. 137 the language of which is mandatory, and the only course open to the Magistrate is to take evidence, even if the party agrees to abide by the decision of the Magistrate based, not upon evidence legally received but upon information gathered upon local enquiry, for no waiver on the part of the party can confer on the Magistrate authority to act in a manner not prescribed by the Legislature. **Upendra Nath Mandal v. Rampal**, 11 Cr. L.J. 1 = 4 Ind. Cas. 496 = 10 C.L.J. 482.*

MOOKERJEE and CHATTERJEE, JJ.

Crim. Pro. Code—(Continued).

(36) *Ss. 133, 137, 140—Penal Code (Act XLV of 1860), S. 88—Conditional order, vague and indefinite—Final order, scope of.*

An order under S. 133 Crim. Pro. Code, must be such that the persons, against whom it is directed, can learn from its terms what it is that they are to do for the purpose of complying with it.

Where a conditional order made under S. 133 Crim. Pro. Code, was itself too vague and indefinite, the High Court set aside the final order passed under S. 137, Crim. Pro. Code, and declined to send back the case for retrial, on the ground that under the latter section the Magistrate could only decide on the reasonableness or propriety of the conditional order, and was not competent to go behind it. **Kali Mohan Kar v. Nakari Chandra Das**, 11 C.L.J. 114—5 Ind. Cas. 722.

JENKINS, C.J., and CASPERSZ, J.

(37) *Chap. X, Ss. 133, 138, 139—Obstruction of a pathway—Magistrate's power to refer the matter to a jury—Bona fide claim to the pathway as private—Magistrate's duty to decide.*

In a proceeding under Chap. X, Cr. P.C., relating to the obstruction of a way, it is the duty of the Magistrate, before referring the matter to the jury, to decide himself whether or not the claim of right to the land in question is made in good faith, and whether the pathway is a public one or not, and it is only on deciding that there is no such claim that any matter can be referred to the jury. **Dharam Mandal v. Gossain Das Mondal**, 14 C.W.N. 544=6 Ind. Cas. 271.

STEPHEN and CARNDUFF, JJ.

Reference:—10 C.W.N. 845, *F.* (1906).

(33) *Ss. 133, 556—Magistrate issuing notice as Chairman of Local Board—Case should not be tried by him.*

It is highly undesirable that a Magistrate should judicially act in a case which he has himself extra-judicially investigated, and in which, upon facts so investigated, he has come to conclusions of fact adverse to the party against whom he subsequently initiates proceedings under the criminal law.

Therefore, where a Magistrate as the Chairman of a certain Local Board issued a notice calling upon the petitioner to remove a certain obstruction, and the petitioner submitted a representation which proved infructuous, and

Crim. Pro. Code—(Continued).

subsequently the Magistrate initiated proceedings against the petitioner under section 133 of the Criminal Procedure Code: *Held*, that the concern of the Magistrate with the case is not merely in a public capacity so as to take the case out of section 556 of the Criminal Procedure Code, **Rajani Kanta Panja v. Emperor**, 11 Cr. L.J. 2=4 Ind. Cas. 437=10 C.L.J. 484.

MOOKERJEE and CHATTERJEE, JJ.

References:—5 A.L.J. 357, A.W.N. (1908) 95; Cr.L.J. 393, *R.*

(38-a) S. 137—See Nos. 35 and 36, *supra*.

(39) S. 138—*Jury, appointment of—Five persons named as jurors—Report by four, one being ill—Whether report legal.*

Five persons were appointed jurors in accordance with the provisions of S. 138. Of these persons only four jurors dealt with the case, one of them being ill and unable to attend. On the report of the four jurors, the conditional order was made absolute:

Held, that, notwithstanding that the jury as a body can act by a majority, that act must be by a majority out of a jury of five people who investigated the case, and that in the present case the report was not legal and the order should be set aside. **Promotha Nath Bose v. Basanta Kumar Bose**, 6 Ind. Cas. 777 (Cr.) = 11 Cr.L.J. 402.

HARINGTON and TEUNON, JJ.

(39-a) S. 138—See No. 37, *supra*.

(39-b) S. 139—See No. 37, *supra*.

(39-c) S. 140—See No. 36, *supra*.

(39-d) S. 143—See No. 6, *supra*.

(40) S. 144, *Magistrate if may take proceedings by way of the execution of the final orders in a proceeding under S. 145—Ultra vires—Police delivering formal possession to a party whose possession was declared by the Magistrate, legality of.*

After passing final order declaring a party to a proceeding under S. 145, Cr.P.C., to be in possession, the Magistrate has no jurisdiction to take any proceedings in the nature of execution of that order.

Where, after the Magistrate, in a proceeding under S. 145, Cr.P.C., has declared the first and third parties to be in possession of the property in dispute, the police gave formal possession to those parties by planting bamboos, but

Crim. Pro. Code—(Continued).

disputes still not ceasing, the Magistrate held a local enquiry and again declared the possession of the first and third parties, and a further inquiry was held to determine whether the property of which possession had been declared was identical with the subject of the proceeding under S. 145, Cr.P.C.

Held, that all the proceedings after the final order passed by the Magistrate in the proceeding under S. 145, Cr.P.C. were *ultra vires*. There is no specific provision in the Code authorising a Magistrate to take proceedings in the nature of execution after passing orders under S. 145. **Kumar Ronendra Narain Roy v. Kishori Lal Roy Chowdhuri**, 14 C.W.N. 78 = 5 Ind. Cas. 40 = 11 Cr. L.J. 26.

COXE and RYVES, JJ.

(41) *S. 144—Extension of period of two months by repeating order.*

A Magistrate has no power to extend the period of two months prescribed by section 144 of the Criminal Procedure Code by repeating the order on a subsequent date. **J. A. Thomson v. Emperor**, 11 Cr. L.J. 12 = 4 Ind. Cas. 590 = 13 C.W.N. 195 = 5 M.L.T. 96.

SHARFUDDIN and COXE, JJ.

(42) *S. 144—Object of order—Prevention of pecuniary loss to a party—Remedy in Civil Court.*

Section 144 of the Criminal Procedure Code cannot apply to a case where the object of the order under the section appears to have been merely to prevent pecuniary loss to the opposite party. The proper remedy for the party aggrieved lies in the Civil Court. **Rām Autar Sahu v. Krishnaput Ram**, 11 Cr. L.J. 11 = 4 Ind. Cas. 577 ; 13 C.W.N. 188 ; 5 M.L.T. 92.

BRETT and RYVES, JJ.

References :—9 C. 103 ; 8 C.W.N. 373, F.

(43) *S. 144—Ex parte order—When can be passed.*

An *ex parte* order under S. 144 can only be passed in cases of emergency or when there is no time to serve notice. **Yengataraya Goundan v. The Very Reverend N. Rony**, 8 M.L.T. 180 = 7 Ind. Cas. 348 = 11 Cr. L.J. 449.

MUNRO and ABDUR RAHIM, JJ.

(44) *S. 144—Disobedience of order under—Essentials for granting sanction to prosecute.* See PENAL CODE, No. 31 ; 14 C.W.N. 284.

(45) *S. 145—Procedure.*

Crim. Pro. Code—(Continued).

An application was made to a Magistrate to take action under S. 145, Crim. Pro. Code. The Magistrate passed an order that the opposite party be summoned and the complainant produces his evidence. On the date fixed, the Magistrate merely examined the *patwari* and passed the final order. *Held*, that, as the Magistrate had not followed the procedure laid down in Chapter XII of the Code, his order was without jurisdiction. **Bitau Rai v. Bisheshar Rai**, 5 Ind. Cas. 128 = 11 Cr. L.J. 47.

TUDBALL, J.

(46) *S. 145—Postponement of case sine die—Solenamah deciding right to possession, whether Magistrate bound to follow.*

A Magistrate has jurisdiction to postpone a proceeding under section 145 of the Criminal Procedure Code *sine die* when he expected that settlement proceedings in respect of the land in dispute were soon to commence.

When a previous *solenamah* between the parties did not decide possession but the right to possession, the Magistrate is not bound to act in accordance with it in a proceeding under section 145, Criminal Procedure Code. **Guru Das Hazra v. G. L. Weatheral**, 11 Cr. L.J. 7 = 4 Ind. Cas. 537 ; 13 C.W.N. 601.

SHARFUDDIN and COXE, JJ.

(47) *Ss. 145—Parties jointly interested in subject-matter of dispute—Decision as to method of possession—Jurisdiction of Magistrate.*

A Magistrate has no jurisdiction to pass any order under section 145 of the Criminal Procedure Code in respect of the subject-matter of the dispute in which the parties claim to be jointly interested. He is entitled to decide which of the parties is in possession, but he cannot decide the method by which the possession is to be exercised, or the agency by which the person in possession is to collect the profits.

M and K were jointly entitled to a property. K gave an agreement to M authorising him to make collections of the entire property and to divide the share at the close of each year. Subsequently K leased out his share to A who attempted to collect the share leased out to him. Proceedings under section 145 of the Criminal Procedure Code were then instituted with the result that the Magistrate declared M to be in possession.

Crim. Pro. Code—(Continued).

Held, that the Magistrate had no jurisdiction to take possession under the section. **Akaloo Chandro Das v. Mohesh Lal**, 11 Cr. L. J. 29 = 4 Ind. Cas. 696; 36 C. 986.

COXE and RYVES, JJ.

References:—10 C.W.N. 1088; 4 Cr. L. J. 215, F.; 27 C. 259, p. 261; 4 C.W.N. 420 (421) D.; 3 C.W.N. 426, R.

(48) *S. 145—Failure to decide effect of Civil Court decree between parties—Refusal of jurisdiction.*

Neglecting to decide what effect a Civil Court decree between the parties to a proceeding under S. 145 of the Criminal Procedure Code may have had on the question of possession, is omission to deal with a material part of the case made before the Magistrate and a refusal of jurisdiction by him. **Gopal Chandra Chowdhry v. Uma Charan Ghosh**, 11 Cr. L.J. 184 = 5 Ind. Cas. 646.

STEPHEN and CARNDUFF, JJ.

(49) *S. 145—Jurisdiction of Magistrate in case of dispute as to joint possession.*

A dispute not relating to possession of a share in the fishery, but to a share in its profits, may be dealt with under S. 145 by force of subsection (2). But where the dispute is with regard to possession of a share in the fishery, and the two parties are found to have joint rights in the same, neither of them can be considered as claiming exclusive possession, and therefore S. 145 is inapplicable. **Bhabanath Chakravarti v. Peary Sarma**, 11 C.L.J. 412 = 6 Ind. Cas. 544 = 11 Cr. L.J. 370.

STEPHEN and CARNDUFF, JJ.

References:—11 C.W.N. 512, F.; 10 C.W.N. 1088; 36 C. 986; 27 C. 259, R.

(49-a) *S. 145—Property in dispute—Order prohibiting complainant from taking possession—Trespass on the property.*

In the face of the order prohibiting complainant from taking possession, a trespass on the property in his possession cannot be sustained. *In re Susal Pillay*, 8 M.L.T. 289.

SANKARAN NAIR, J.

(49-b) *S. 145—Witness—Process—Magistrate—Charter Act (24 and 25 Vict. C. 104), S. 15.*

In a proceeding under S. 145 of the Cr. P.C., it is not obligatory on the Magistrate to enforce the attendance of any witness at the instance of the parties (a).

Crim. Pro. Code—(Continued).

In a case where the Magistrate has acted in accordance with law, it would require very strong circumstances to justify the interference by the High Court under the Charter Act, S. 15, and it would be necessary to show quite clearly that the procedure, though right in law, has in fact amounted to an absolute denial of justice.

Where a party, in a proceeding under S. 145 of the Cr. P.C., states that four material witnesses did not appear and complains that the Magistrate did not enforce their attendance, but it does not appear what evidence these witnesses were going to give and there is nothing to show what efforts the party has made to procure their attendance: *held*, that nothing like a case of denial of justice has been made out and that the High Court could not interfere. **Harendra Kumar Bose v. Girish Chandra Mitra**, 7 Ind. Cas. 798 (Cr.).

HARINGTON and TEUNON, JJ.

References:—(a) 32 C. 1093; 2 C.L.J. 280; 2 Cr. L.J. 679, F.

(49-c) *S. 145—Dispute between tenants of joint owners—Jurisdiction of Magistrate to proceed under S. 145.*

Certain land was jointly leased to tenants by two joint owners and the former continued in possession for several years under the lease. One of the joint owners sued for partition of his share and obtained a decree, but he did not obtain possession of his share under the decree, and while the old tenants were in possession as before, some new tenants forcibly entered on the land asserting that they were the tenants of only one of the joint owners. The Magistrate acting under S. 145, Cr.P.C., put the old tenants in possession.

Held, that the Magistrate did not act without jurisdiction, and that, though there is no doubt that the Court must give effect to a decree of a Civil Court for partition, yet in this instance the dispute not being between the parties to the decree but between two rival sets of tenants, the Magistrate was right in putting the old tenants into possession of the land. **Ma E Mya v. Maung Po Thauing**, 8 Ind. Cas. 453.

PARLETT, J.

(49-d) *S. 145—See No. 138, infra.*

(50) *S. 145 (2)—Dispute concerning land—Person interested as tenant, not required to attend as party—Application for addition of party—Practice.*

Crim. Pro. Code—(Continued).

Under S. 145 (5), any person claiming to be interested in the land in dispute as a tenant of part of it, who is not required to attend as a party, should be heard, if he makes an application to be added as a party, in order to show that no dispute likely to cause a breach of the peace exists or has existed. **Haran Mandal v. Mohin Chandra Pramanik**, 37 C. 285 = 11 C. L.J. 414 = 14 C.W.N. 708 = 6 Ind. Cas. 545 = 11 Cr. L.J. 371.

STEPHEN and CARNDUFF, JJ.

- (51) *Ss. 145 and 146—Attachment under S. 146—Written statements, failure to file in time—Evidence, omission to adduce—Jurisdiction of Magistrate to attach under S. 146 when the parties did not adduce evidence on the appointed date.*

Where the parties to a proceeding under S. 145, Cr. P. C., did not file their written statements or adduce evidence, though more than two months had expired from the date the proceeding was drawn up, but applied for time to file the written statements :

Held that the Magistrate did not act without jurisdiction in refusing to grant time and in attaching the disputed land under S. 146, Cr. P. C., on the failure of the parties to adduce evidence. **Bejoye Modhub Chowdry v. Chandra Nath Chuckerbutty**, 14 C.W.N. 80 = 5 Ind. Cas. 40 = 11 Cr. L. J. 27.

CASPERSZ and RYVES, JJ.

Reference :—12 C.W.N. 896 (1908), *D.*

- (52) *Ss. 145, 146—Order of attachment, without written statement and evidence—Jurisdiction of Magistrate.*

Although it is not beyond the jurisdiction of a Magistrate to make an order under S. 146, Crim. Pro. Code, without written statements and without evidence, yet, if he makes such an order, without making any attempt to investigate the question in the light of evidence and of written statements, he acts without jurisdiction. **Asfandiyar Khan v. Irshad Khan**, 11 Cr. L.J. 90 = 5 Ind. Cas. 249.

STEPHEN and CARNDUFF, JJ.

- (53) *Ss. 145, 146—Receiver, accretions to property, if vests in—Accretion, title to, prevails against all persons not claiming under prior title—Bona fide tenant under a de facto proprietor, if acquires raiyati rights—Non-occupancy raiyat, if entitled to possession of accretions—Crim. Pro. Code (Act*

6 Cr.

Crim. Pro. Code—(Continued).

V of 1898), Ss. 145, 146—Receiver appointed under S. 146, rights of.

As a general rule, a Receiver takes no title in property acquired by the person formerly in possession.

But a Receiver is entitled to any accretion to the property vested in him, upon general principles and the policy of the law by which a proprietor acquires a title to accessions to his property.

Where a Receiver has been appointed under S. 146 of the Crim. Pro. Code in respect of any property in dispute, the Receiver is entitled, unless some special circumstance is established not only to the subject-matter of the proceeding under S. 145, but also to the accreted land, and gives good title to a tenant under him.

Such title will prevail against a trespasser but not against a person who establishes a title to the accreted land acquired prior to the vesting of the lands in the Receiver (a).

Semle :—Whether a tenant, who enters upon a land held under a *de facto* proprietor, can acquire a raiyati interest therein, even though the *de facto* possessor ultimately turns out to be no real owner, in case the tenant should have entered on the land in good faith (b).

Where a tenant has acquired the status of a non-occupancy raiyat in respect of any land, he is entitled to possession of land which has accreted to his holding (c). **Madhu v. Sabar Ali**, 14 C.W.N. 681 = 6 Ind. Cas. 177 = 11 Cr. L. J. 288.

MOOKERJEE and TEUNON, JJ.

References :—(a) 10 C.L.J. 55, *R.* (b) 20 C. 708; 8 C.W.N. 315 = 5 C.L.J. 9, *R.* (c) 21 C. 233; 4 C.L.J. 63 = 33 C. 444; 13 C.W.N. 269 = 8 C.L.J. 537; 13 C.W.N. 267 = 8 C.L.J. 538; 8 C.L.J. 541, *R.*

- (53-a) *Ss. 145, 146—Dispute likely to lead to breach of peace—Attachment—Appointment of receiver—Legality.*

In this case the Magistrate received information of a dispute likely to lead to a breach of the peace and directed the attachment of the property in dispute and also appointed a Receiver before enquiring into the matter. *Held* that the order of attachment was perfectly legal under cl. 4 of S. 145, but that the appointment of the Receiver was *ultra vires*. **Subhadramma v. Satyam Swami**, 8 M.L.T. 314.

AYLING, J.

Crim. Pro. Code—(Continued).

(54) *Ss. 145, 146 and 147—Costs of proceedings under Ss. 145, 146 or 147—Amount of costs, assessment of—Time for making order for costs.*

Held, that only the Magistrate who passes an order under section 145, 146 or 147 of the Code can decide by whom the costs of the proceedings are to be paid, but the amount of the costs may be assessed by his successor.

Held further, that an order for costs should as a rule be made at the time of passing the order under section 145, 146 or 147, when the facts are fresh in the mind of the Magistrate. **Iklas Kuar v. Raja Reghura**, 13 O.C. 66=5 Ind. Cas. 943=11 Cr. L. J. 335.

CHAMIER and EVANS, O.J.C.

References :—21 C. 609; 22 C. 384; 23 C. 37; 22 C. 387; 24 C. 757; 29 M. 373; R.

(55) *Ss. 145, 439—Written order defective—Apprehension of breach of the peace—Jurisdiction—Revision.*

Where the initial order in writing made by a Magistrate under S. 145 (1), Crim. Pro. Code, is defective, but both sides are fully cognizant of the matter in dispute and there is a danger of the breach of the peace, the High Court will not interfere in revision with the final order passed by the Magistrate. **Ganga Saran Singh v. Bhagwat Prasad**, 7 A.L.J. 53=5 Ind. Cas. 471=11 Cr. L. J. 141=32 B. 132.

KNOX and KARAMAT HUSAIN, J.J.

(56) *Ss. 145 and 439—Omission to follow procedure laid down therein—Revision.*

* *Held*, that an order purporting to be one under S. 145, Crim. Pro. Code, 1898, without following the procedure laid down therein, and tacked on to an order dismissing a complaint under S. 297, Indian Penal Code, is illegal and without jurisdiction, and is therefore liable to be set aside in revision. **Haldar Shah and Nathe Shah v. The Crown**, 24 P.W.R. (Cr.) 1910=6 Ind. Cas. 955=11 Cr. L. J. 422.

CHEVIS, J.

Reference :—Cr. 7 P.R.=24 P.W.R. 1907, F.

(57) *S. 146—Possession suit for—Previous possession for eleven years—Jalkar—Attachment by Criminal Court under S. 146, Crim. Pro. Code.*

A jalkar was attached by the Criminal Court under S. 146 of the Code. The plaintiff brought this suit for recovery of possession and proved undisturbed and peaceable

Crim. Pro. Code—(Continued).

possession for eleven years before the attachment, and the defendant was proved not to have been in possession before the Magistrate's order :

Held, that the plaintiff was entitled to maintain the possession which he had against all but the true owner; the defendant had not shown himself to be the true owner, and therefore, the plaintiff was entitled to a decree. **Shama Charan Roy v. Surja Kanta Acharya Bahadur**, 6 Ind. Cas. 806 (Cr.).

JENKINS, C.J., and DOSS, J.

(57-a) *S. 146—Enquiry as to possession—Conflicting claims based on different titles—Refusal of Magistrate to decide as to possession—Jurisdiction.*

Where, in an enquiry as to possession, the parties put in claims based on different titles, one claiming under a Will, another under a partition, settlement and Will, and the Magistrate, holding that he was unable to decide as to the question of possession, ordered that the property do remain under Court attachment till the parties had settled their differences in a Civil Court :

Held, that the Magistrate acted without jurisdiction and should have decided on the question of possession. **Veyya Manikiam v. Venkaiya**, 8 Ind. Cas. 63 (Cr.).

ARNOLD WHITE, C.J.

Reference :—2 Weir 110, R.

(57-b) *S. 146—See Nos. 51 to 54, supra.*

(58) *Chap. XII—Competent Court—Survey authorities—Bengal Survey Act (V of 1875 B.C.), S. 41.*

An order by the Survey authorities under S. 41 of the Bengal Survey Act has the force of a Civil Court decree, and is therefore tantamount to an order passed by a competent Court as provided for in Chap. XII of the Crim. Pro. Code. On such an order being passed with respect to any lands attached under S. 146, Crim. Pro. Code, they should be released from attachment. **C. T. Ambler v. Shah Somi Ahmed**, 11 C.L.J. 417=37 C. 831=6 Ind. Cas. 545=11 Cr. L. J. 372.

STEPHEN and CARNDUFF, J.J.

(59) *Ch. XII—Dispute as to possession of immoveable property—Evidence as to title, admissibility of.*

In a proceeding under Chapter XII of the Code of Criminal Procedure, the Magistrate

Crim. Pro. Code—(Continued).

may, if necessary, take and consider evidence of title to enable him to decide the question of actual possession, but such evidence should be used only to "supplement" evidence of user. **Pananganti Parthasarathy Nayanim Garu v. Pallikapu Venkatasami Reddi**, 6 Ind. Cas. 398=11 Cr. L. J. 353=8 M.L.T. 102.

MILLER, J.

References:—7 C. 46; 8 C.L.R. 645; 6 C.L. J. 182; 6 Cr. L.J. 192, R.

(60) *S. 147—Right to perform puja in a temple, whether falls within the scope of—"Land," meaning of.*

A dispute concerning the right to perform *puja* by entering into a certain temple is not a dispute concerning the right of use of any land within the meaning of S. 147, Cr. P.C.

Semble.—The expression "land" in S. 147 Cr. P.C., does not necessarily include buildings. **Gulram Ghosal v. Lalqehary Das**, 14 C.W.N. 611=6 Ind. Cas. 182.

STEPHEN and CARNDUFF, JJ.

(60-a) S. 147—See No. 54, *supra*.

(61) Ss. 148, 202, 293, 294, 556—See LOCAL INQUIRY, No. 1, 14 C.W.N. 422.

(62) Ss. 154, 157, 250—"Information," meaning of—Compensation—Order if can be made against servant for information given on behalf of master—Information subsequent to the original complaint.

The question whether a servant can be held responsible under S. 250, Cr. P.C., for an information lodged on behalf of his master, is a question of fact and depends on the question whether the servant is merely the mouthpiece of the master and is merely giving expression to his master's accusation, or whether he joins personally in the accusation himself. In the former case no order of compensation should be made against the servant under S. 250, Cr. P.C.

"Information" referred to in S. 250, Cr. P.C., need not necessarily be the information on which the case is instituted.

Where a person making a complaint against an accused person subsequently gives information leading to the accusation of others in the case, he may be dealt with under S. 250, Cr. P.C. in respect of his subsequent information.

The words "from information received" in S. 157, Cr. P.C. refer to the information given in S. 154, Cr. P.C., **Jagadami Pershad Singh**

Crim. Pro. Code—(Continued).

v. Mahadeo Kandoo, 14 C.W.N. 326=5 Ind. Cas. 693=11 Cr. L. J. 201.

COXE and RYVES, JJ.

(63) Ss. 156, 190—Sessions Judge—Jurisdiction to direct an investigation by Police.

• S. 156 only gives power to a Magistrate empowered under S. 190 to direct an investigation by the Police into cognizable cases. So a Court of Sessions has no power to order such an enquiry, and such an order, if made, would be *ultra vires*. **King-Emperor v. Ali**, 11 P.R. 1910 (Cr.)=16 P.W.R. 1910.

ROBERTSON and JOHNSTONE, JJ.

(64) S. 157—Failure by police to send report under—Serious neglect of duty.

Failure to send to the Magistrate the report required by S. 157 (1), Cr. P.C., and also by the Police Manual, is a serious neglect of duty which may lead to failure of justice. Such conduct on the part of the police would lead to a grave suspicion that the police were concocting false evidence. **The Crown v. Balochkhan wd. Kadero**, 4 S.L.R. 38.

HAYWARD and LEGGATT, JJ.

(64-a) S. 157—See No. 62, *supra*.

(65) Ss. 157, 159, 476—Police report after investigation that an offence has been committed—Further enquiry of Magistrate—Order for prosecution of witnesses examined in the Magistrate's enquiry—Penal Code, S. 193.

Where a Deputy Magistrate held a magisterial enquiry into a case, after the Police had made an investigation at the direction of the District Magistrate, and subsequently ordered the prosecution for perjury of the witnesses examined before him, *held*, that the enquiry *held* by the Deputy Magistrate was without legal sanction, and that the orders for prosecution were consequently without jurisdiction. **Abdul Rahman v. King-Emperor**, 6 A.L.J. 963=32 A. 30=10 Cr. L. J. 424=3 Ind. Cas. 952.

RICHARDS and ALSTON, JJ.

(65-a) S. 159. See No. 65, *supra*.

(66) S. 162—Evidence Act (I of 1872), Ss. 91, 157—Statement made to investigating Police Officer, admissibility of—Interpretation of statutes—"Writing."

Per Knox, J.—The general provisions of the Evidence Act contained in S. 157 are controlled by the special provisions of S. 162, Crim.

Crim. Pro. Code—(Continued).

Pro. Code, which followed it, and which is a special enactment, as against the wider and more general enactment in the Evidence Act.

When a Police Officer makes use of a writing, whether in the special diary or on a separate piece of paper, to refresh his memory, and on the strength of it deposes to what he states was a statement made by a witness to him, he is in reality using that writing which he then made as evidence against the accused, and the Court, which accepts the statement made by the Police Officer in such circumstances, whether it be upon the basis of S. 157, Evidence Act, or otherwise, is really using that writing as evidence against the accused (a).

A literal construction of the word used in an Act has in general *prima facie* preference, but, in order to arrive at the real meaning of those words, it is equally necessary to get at the exact aim, scope and object of the law, to consider what was the law before the Act was passed, what was the mischief or defect for which the law did not provide, what is the remedy provided and the reason for the remedy.

*Per Karamat Husain, J.—(differing).—*S. 162, Crim. Pro. Code prohibits only the use, as evidence, of the writing which records the statements of the witnesses made to the investigating Police Officer; that section, so far as oral statements of the witnesses are concerned, is not in conflict with section 157, Evidence Act, and those oral statements made to the Police Officer may be proved by calling him as a witness in order to corroborate the testimony of the witnesses (b).

The present law is highly unsatisfactory and calls for immediate amendment.

The distinction between the oral statement made by a witness and the entry in the diary of the Police Officer is a distinction in substance rather than of form.

Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. The duty of a Court is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words (c).

The provisions of section 162, Act X of 1882, and of section 91 of Act I of 1872, discussed. **Rustam v. King-Emperor**, 7 A.L.J. 468 = 6 Ind. Cas. 101 = 11 Cr. L.J. 235.

RNOX and KARAMAT HUSAIN, JJ.

References:—(a) 36 C. 281, diss. (b) 36 C. 281, appr. (c) 23 C. 563 (P.C.), R.

Crim. Pro. Code—(Continued).

(67) S. 162—Statement made under—Cannot be made the subject of a prosecution under S. 211, I. P.C. See **PENAL CODE**, No. 40, 20 M.L.J. 132.

(68) S. 162—*Mashirnama*, evidentiary value. See **EVIDENCE**, No. 2, 4 S.L.R. 38.

(69) *Ss. 162, 172—Evidence Act, Ss. 157 and 161—Statements made by a witness to a Police Officer, admission in evidence of—Refreshing of memory by Police Officer from statements recorded by him—Criminal Procedure Code, S. 172.*

Held, that the express provisions of S. 162 of the Code of Criminal Procedure override the general provisions of section 157 of the Indian Evidence Act.

Held further, that the written record of statements made by a witness to a Police Officer cannot be used for the purpose of corroborating the testimony of those witnesses. Nor can the Police Officer be allowed to depose to the statements made to him by refreshing his memory by reference to the record made by him of such statements. **Bhulal Singh v. King-Emperor**, 13 O. C. 7 = 5 Ind. Cas. 357 = 11 Cr. L. J. 117.

SUNDAR LAL, J.C., and PIGGOT, A.J.C.

*References:—*32 B. 111; 9 Bom. L. R. 895; 36 C. 281; 33 C. 102, R.

(70) *Ss. 162, 298—Scope of S. 162—Value of statements made by investigating police officer. See EVIDENCE ACT*, No. 5, 12 Bom. L. R. 663.

(71) *Ss. 164, 235, 239, 196, 342, 364, 447, 450, 454, 532, 103—Jury, right of trial by—Cr. P.C., Ss. 447, 450, 454, 532—Interference with the right—European British subject—Waiver of rights under S. 454, Cr. P.C.—Provisions of S. 22, proviso, Indian Councils Act, 24 and 25 Vict. Ch. 67—Whether S. 454, Cr. P.C., ultra vires—Obiter dictum—Meaning and scope of—Offences under Ss. 121, 121-A, 122, 123, I.P.C.—Sanction under S. 196, Cr. P.C., authorising complaint of offences under specified sections and 'other' offences—Commitment for non-specified offence also—Jurisdiction—Legality—Whether cured by S. 532, Cr. P.C.—Delegation by local government of powers under S. 196, Cr. P.C.—Legality—Document containing sanction under S. 196, Cr. P.C.—Sufficiency of Chief Secretary's signature—Cr. P.C., Ss. 235, 239—Same transaction—Different charges against several persons in respect of—Joint trial*

Crim. Pro. Code—(Continued).

—*Multifariousness*—Cr. P.C., Ss. 164, 342, 364—*Confessions—Admissibility—Record of confessions by Magistrate who subsequently holds enquiry—Confession made during investigation—Examination of accused—Eliciting information by questions—Effect—Confession—Evidentiary value of, against co-accused—Ss. 21, 29, 30, Evidence Act—Cr. P.C., Ss. 164, 342, 364—Whether exhaustive—Effect upon S. 21, Evidence Act—Document relevant to prove knowledge of its contents—Whether relevant for proof of truth of contents—Admissions to the police—Effect upon voluntariness—Ss. 10, 29, Evidence Act—Conspiracy—Statements oral or written, when and how far amount to admission of—Operation of S. 10, Evidence Act—Restrictions upon—S. 73, Evidence Act.—Handwriting—Modes of proof of—Expert evidence—Value of—Leading questions—Permission of—Court's duty—S. 121, I.P.C.—Whether same as English Law of Treason—'Wages war,' meaning of—Elements.*

The right to trial by jury can be taken away by the Code of Criminal Procedure. Such a provision cannot be said to be *ultra vires*, as contravening the terms of the proviso to S. 22, Indian Councils Act, 1861 (a).

A person can relinquish his right to be dealt with as a European British subject (See S. 154, Cr. P. Code): and where a Magistrate asked, under S. 451, Cr. P.C., an accused person, who was a European British subject whether he claimed to be dealt with as a European British subject, explaining Ss. 447 and 450, and where the accused did not claim the right, *held*, that he had relinquished his right (b).

Meaning and scope of the term "*Obiter dictum*," pointed out (c).

The true implication of S. 196, Cr. P.C., is that the judgment of the Local Government should be specially directed to the particular sections of Chapter VI of the Penal Code, in respect of which proceedings are to be taken, and that the order or authority should be preceded by and be the result of, a deliberate determination that proceeding should be taken in respect of a particular section or particular sections of the Chapter and no other.

The provisions of S. 196, Crim. Pro. Code, do not authorise the local government by its order to give, or delegate to, its legal or other advisers, a roving power to determine, under what

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sections of the Chapter proceedings should be taken and abandon to them the discretion and responsibility that properly belongs to it.

Where an order of the local government under S. 196, Crim. Pro. Code, authorised a Police Officer to prefer complaint against and to prosecute certain persons for offences under Ss. 121-A, 122, 123, 124 of the Indian Penal Code, or under any other section of the said Code which may be found applicable to the case, and where the complainant in his sworn statement distinctly stated that sanction had been given to him to prosecute certain persons under Ss. 121-A, 122, 123, 124, I.P.C., *held* that the order did not authorise a complaint under S. 121, I.P.C., that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Court of Sessions, authorizing a complaint under the section which was not, as a matter of fact, made thereafter. *Held* also that the defect cannot be cured by the provisions of S. 532, Crim. Pro. Code (d).

The signature of the Chief Secretary on the document containing the authority of the Government under S. 196, Crim. Pro. Code, is sufficient (e).

Where several persons were charged under Ss. 121, 121-A, 123, I.P.C., and where the charge merely purported to place before the Court different aspects of the same transaction, *held* that the joint trial of the several accused on different charges was not bad for multifariousness.

A confession, to come within the scope of S. 164, Crim. Pro. Code, must be made either (1) in the course of an investigation under Ch. XIV, or (2) at any time afterwards and before the commencement of the enquiry or trial.

The condition requiring the confession to be prior to the commencement of the enquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the investigation (f).

Held, also, that it cannot be contended that a confession recorded by a Magistrate who afterwards conducts the enquiry is outside the provisions of S. 164 (g), Crim. Pro. Code.

Obiter. The argument that the confessions, if recorded after the commencement of the trial, would be inadmissible in evidence, cannot be sustained, because the argument seeks

Crim. Pro. Code—(Continued).

to derive from the provisions of the Code a limitation on the law of confession as defined by the Evidence Act, for which there is no sufficient warrant. Ss. 164, 342, 364, Crim. Pro. Code, are not exhaustive and do not limit the generality of S. 21, Evidence Act, as to the relevancy of admissions (*h*).

The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under S. 164, Crim. Pro. Code, or S. 29, Evidence Act, though such fact may be material on the question of its voluntariness (*i*).

Where, in conducting a search, the provisions of S. 103, Crim. Pro. Code, have been completely disregarded, held that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded.

From the fact that the document may be relevant for the purpose of affecting some one with the knowledge of its contents, it by no means follows that it is relevant also for the purpose of proving the truth of that which it contains.

A statement, whether oral or written, can be used against a person to prove the truth of the matter stated, if, as against him, it can be regarded as an admission. But the facts must be proved by virtue of which it can be regarded as an admission.

If an admission was actually written by him, the fact that it was so written must be proved by those methods which the law allows.

Methods of proving handwriting discussed.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

S. 73 of the Evidence Act does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next, the disputed writing must *itself purport* to have been written by the same person, that is to say, the writing must state or indicate that it was written by that person.

A comparison of handwriting is, at all times as a mode of proof, hazardous and inconclusive,

Crim. Pro. Code—(Continued).

and especially when it is made by one not conversant with the subject, and without such guidance as might be derived from the arguments of counsel and the evidence of experts (*j*).

The value of expert evidence of handwriting discussed (*k*).

To be an admission, it is necessary that a document should have been written by the person against whom it is sought to be used: it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this be done, the document cannot be used as proof of its contents.

What conduct would properly give rise to such inference depends upon the circumstances of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them.

The operation of S. 10, Evidence Act, is strictly conditional upon there being a reasonable ground to believe that two or more persons have conspired to commit an offence.

The confession by an accused is not evidence against his co-accused in the sense that a conviction on that alone could be supported; it can be only 'taken into consideration' under S. 30, Evidence Act, that is to say, it can lend assurance to other evidence.

The law contained in S. 121, I.P.C., is not a reproduction of the English law of treason in its entirety, that is to say, not only the statute law but also the interpretation placed upon it by the cases; nor did the framers of the section intend it to be so.

The expression "wages war," which is used in S. 121, I.P.C., must be construed in its ordinary sense as a phrase in common use in the English language, and it is impossible to hold that any of the overt acts alleged in this case (*e g.*, collection of ammunition, arms, etc.) amount to an offence under the section.

In a charge under S. 124-A, I.P.C., the question to be determined is, whether there was an agreement between two or more of the accused to do all or any of the unlawful acts charged (*l*). The fact that the purpose was not immediate, if it be a fact, would only be material in so far as it might bring the matter within the saving operation of S. 95, I.P.C.

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Though, to establish the charge of conspiracy, there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

It is not necessary that all should have joined in the scheme from the first; those who come in at a latter stage are equally guilty, provided that the agreement be proved.

It is the Court, and not the Counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for that permission rests with the Court. (*Vide S. 142, Evidence Act*).

Per Carnduff, J.—'Legal proof' is neither more nor less than what is indicated by the definition of the word "proved," which is to be found in S. 3, Evidence Act. Having regard to that definition, it is doubtful whether a distinction can possibly be drawn between 'legal proof' and 'moral conviction.'

Held also per Carnduff, J. that, except where an accused person is being examined under S. 342, Cr.P.C., a Magistrate is not precluded from eliciting information by independent enquiry so long as the information is voluntarily given.

Statements made to the police by accused persons, which tell against them but do not amount to admissions of guilt, are admissible in evidence. The question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession, depends upon the circumstances of each case (*m*).

Handwriting may, in addition to the usual methods, be proved by circumstantial evidence under S. 67, Evidence Act, which prescribes no particular kind of proof (*n*). **Barindra Kumar Ghose and others v. Emperor**, 37 C. 467 = 14 C.W.N. 1114 = 7 Ind. Cas. 359 = 11 Cr. L.J. 453.

JENKINS, C.J., and CARNDUFF, J.

References :—(*a*) 6 B.L.R. 392 and 459, *Appr.* (*b*) 6 C. 83; 12 B. 561; 16 M. 308, *F.* (*c*) 1905 A.O. 317, 390. (*d*) 1890, P.R. Cr. J. No. 16, *Appr.*; 9 B. 288, *Dist.*; 22 B. 112, *Diss. from.* (*e*) 35 C. 141, *F.* (*f*) and (*g*) 5 C. 954; 5 A. 253 and 10 Bom. H.C. 166, *Obsolete*; 33 C. 1085, *Dist.* (*h*) Rat. Un. Cr. C. 679, R. (*i*) 17

Crim. Pro. Code—(Continued).

W.R. Cr. 71, N.R. (*j*) 22 W.R. 274, R. (*k*) 11 Cox. C.C. 546, R. (*l*) 3 H.L. 306 (317), R. (*m*) 1 C. 207; 10 C. 1022; 15 C. 589; 6 B. 34 and 19 B. 363, *discussed and Dist.*; 10 B.L.R. App. 2; 6 C. 530; 9 B.L.R. 36, 72; 5 Bom L.R. 312, R. (*n*) 12 B.L.R. App. 18; 25 W.R. 429 and 19 B. 690, R.

(72) Ss. 164, 364—*Confession caused by illegal inducement is irrelevant—Conviction cannot be based on confession not recorded in the manner prescribed by law—Evidence Act (I of 1872), Ss. 24, 27—S. 27 is not a proviso to S. 24.*

A confession caused by illegal inducement or by illegal detention of the accused's relatives is irrelevant and the question of its truth is immaterial. Section 27 of the Evidence Act is not a proviso to section 24 (*a*).

Where the accused pleads not guilty, a conviction cannot be based on a confession which is not recorded in the manner prescribed in sections 164 and 364 of the Criminal Procedure Code. **Nga San Ya v. Emperor**, 11 Cr. L.J. 41 = 4 Ind. Cas. 759; U.B.R. 1909, I Evidence, p. 3.

SHAW, J.C.

References :—(*a*) 2 L.B.R. 168; U.B.R. (1892—1896), I, p. 83, *F.*

(72-*a*) S. 167—Government order prescribing rules as to modes of recording confession—Violation—Effect. See **CONFESSION**, No. 6, 33 M. 413.

(72-*a-i*) S. 172.—See No. 69, *supra*.

(72-*b*) S. 173.—See No. 82, *infra*.

(73) Ss. 174 and 175—Power of village head acting under—See **PENAL CODE**, No. 24, 8 M.L.T. 198 (Cr.).

(73-*a*) S. 175. See No. 73, *supra*.

(74) S. 177.—See **ACT XIII of 1859 (WORKMAN'S BREACH OF CONTRACT)**, No. 4, 13 P. W.R. 1910 (Cr.).

(74-*a*) S. 177.—See No. 75, *infra*.

(75) Ss. 179, 177—Meaning of "any consequence that has ensued" in S. 179. See **JURISDICTION (GENERAL)**, No. 1, 7 P.R. 1910 (Cr.).

(76) Ss 180, 185—*Dacoity committed in British India—Stolen property found in Native State—Native Indian British subject—Trials in a British Court—Certificate of Political Agent, necessary for.*

Crim. Pro. Code—(Continued).

Where a dacoity was committed in British territory and a Native Indian British subject was found in possession of stolen property, alleged to have been stolen at the dacoity in a Native State, and a charge under S. 412, Penal Code, was preferred against him: *Held* that, though under S. 180, Crim. Pro. Code, the offence could be tried at the place where the property was retained or where the theft or dacoity took place, yet under section 188 of the Code, a certificate of the Political Agent was necessary if the charge was to be tried in British India. A commitment without such certificate should be quashed. **The Sessions Judge, Tanjore v. Sundara Singh**, 6 Ind. Cas. 308=8 M.L.T. 54=11 Cr. L.J. 306.

ABDUR RAHIM, J.

(77) *Ss. 182, 531—Jurisdiction—Place of which consequence of act ensues—Criminal breach of trust—Penal Code (Act XLV of 1860), S. 409.*

The accused in the case was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various districts in Lower Bengal, and, from time to time, as he sold goods, he remitted money to his employers at Mirzapur. When called upon to furnish accounts, he offered to furnish Rs. 500 as a deposit, but did not submit any account. The embezzlements complained of occurred at various places in Lower Bengal. *Held* that the Magistrate at Mirzapur had jurisdiction to try the case (a).

Held further that, even if there were any irregularity, S. 531, Crim. Pro. Code, covered it, and that the offence was not one of a civil nature, as the conduct of the accused disclosed a dishonest intention. **Mahadeo v. King-Emperor**, 7 A.L.J. 319=6 Ind. Cas. 563=11 Cr. L.J. 372=32 A. 397.

TUDBALL, J.

Reference:—19 All. 111, F.

(78) *S. 184—Offence committed in a Native State—Certificate of the Political Agent.*

The certificate of a Political Agent, required under S. 189 of the Crim. Pro. Code, 1899, can be obtained after the complaint has been filed and the inquiry has begun. **Emperor v. Sakhrum Pandu**, 19 Bom. L. R. 667 (Cr.).

CHANDAVARKAR and HEATON, JJ.

(79) *S. 186—Certificate by Political Agent—Charge not mentioned in the certificate—Order of commitment, whether good.*

Crim. Pro. Code—(Continued).

Where a Political Agent, under S. 188, Cr. P.C., certified that the offence which the accused was alleged to have committed out of British India was one which ought to be inquired into in British India, and the accused was committed in connection with such offence, *held*, the order of commitment is good, notwithstanding it is an order of commitment on a charge which is not specified in the certificate. *In re The Sessions Judge of South Arcot*, 8 M.L.T. 203 (Cr.).

ARNOLD WHITE, C.J., and SUBRAMANIYA IYER, J.

(79-i) *S. 188—See No. 76, supra.*

(79-a) *S. 190—Complaint—Information to Magistrate—Initiation of criminal proceedings—Prosecution in conformity with an ultra vires order.*

When a District Judge directed the prosecution of a guardian of a minor, and the District Magistrate ordered the case to be tried by the Additional District Magistrate, the Chief Court on revision set aside the order of the District Magistrate as one passed without jurisdiction, on the ground that the order of the District Judge was illegal and there was no authority for the prosecution. The order of District Judge could not be regarded as "information" within the meaning of S. 190 (1) (c) of the Cr.P.C. **Sital Das v. The Crown**, 87 P.L.R. 1910.

CHEVIS, J.

(79-b) *S. 190.—See Nos. 4 and 63, supra.*

(80) *S. 190, cl. (1) (b).—Magistrate trying an accused person—Evidence of police officer during trial—Direction to put another person in dock as co-accused—Cognizance of offence—Conviction of both—Legality.*

Where a Magistrate directed the petitioner, who was present in Court during the trial of another on a charge of theft, to be put in the dock as co-accused on the strength of the evidence of a police Sub-Inspector given in the course of such trial, tried them both, and convicted them both.

Held, that the Magistrate took cognizance under S. 190, cl. 1 (b) and the conviction was legal (a). **Nga Po Yon v. King-Emperor**, U. B.R. 1910 (1st quarter), 2 (Cr.).

SHAW, J.C.

References:—(a) U.B.R. (1897—1901), I, 56, affirmed. 1 C.W.N. 105; 26 C. 786 and 4 C. W.N. XLV; Rat. Un. Cr. C. 961, *Ref. to*.

Crim. Pro. Code—(Continued).

(81) *S. 190 (1) (c)*—*Jurisdiction of a Magistrate to act on information transmitted to him in another public capacity—Cognizance of an offence of mischief under S. 426, Penal Code—Order of attachment—Legality.*

Held, Per Stephen, J.—(Carnduff, J., *dubitante*) that a Magistrate is not competent to act under S. 190 (1) (c), Cr. P.C., on any information which has been transmitted to him in another public capacity (a).

Held also, a Magistrate, who takes cognizance of an offence of mischief by cutting timber from the forest, has no jurisdiction to pass an order of attachment of the trees, which form the subject of the alleged offence. **Lakhi Narayan Ghose v. Emperor**, 37 C. 221 = 14 C.W.N. 589 = 11 C.L.J. 415 = 6 Ind. Cas. 276.

STEPHEN and CARNDUFF, JJ.

Reference :—(n) 10 C.W.N. 775, R.

(82) *Ss. 190 and 173*—*Police report if should set forth the information—Form, defective—Cognizance of a case, taking of, on police report—Accused's right to know the nature of the information against him at the initial stage.*

The police report under S. 173, Cr. P.C., should set forth the nature of the information against the accused.

Where the police report, on which the Magistrate took cognizance of the case, did not set forth the nature of the information against the accused.

Held that, in the circumstances of the case, the prosecution instituted against the accused on the police report should be set aside. **E. O. Lee v. H. L. Adhikary**, 14 C.W.N. 304 = 37 C. 49 = 5 Ind. Cas. 553.

JENKINS, C.J. and CARNDUFF, J.

(83) *Ss. 190, 191, 528*—*Notice to accused before transfer when necessary—Failure to record reasons for transfer, effect of.*

Where a Sub-Divisional Magistrate listened to information given by the police, and ordered them to *chalan* the accused under S. 143, I.P.C.

Held, that the Magistrate really proceeded under S. 190 (b) and not under S. 190 (c), and so was not bound under S. 191 to give the accused any option as to whether they would be tried by him or not.

7 Cr.

Crim. Pro. Code—(Continued).

The mere fact that the Magistrate asked the police to *chalan* the accused is absolutely no ground for any fear that they would not be impartially dealt with.

Held also that, where the District Magistrate *suo motu* transfers a case, no notice to the accused is necessary (a).

Where reasons for a transfer are not recorded under S. 528 (3), the result cannot be the absolute cancelment of the order; only the superior Court will call for reasons. **Abdulla and others v. The King-Emperor of India**, 3 P.R. 1210 (Cr.) = 35 P.W.R. 1910 = 4 Ind. Cas. 1025 = 11 Cr.L.J. 150.

JOHNSTONE, J.

References :—(a) 24 M. 317; 28 P.R. 1902 (Cr.); 22 B. 549, R.

(83-a) S. 191. See Nos. 4 and 83, *supra*.

(84) S. 193—Telegram sent—No complaint—No prosecution can be ordered. See **PENAL CODE**, No. 41, 7 A.L.J. 618.

(85) *S. 195—Penal Code (XIV of 1860), S. 193—Sanction to prosecute for perjury—Delay in making the application—Sanction to be granted by the same Judge.*

A prosecution for perjury should be instituted as soon as possible after the decision of the case. An officer other than he who tried the case in which perjury was committed does not act without jurisdiction, if he grants sanction to prosecute, but it is very much more satisfactory that sanction should be given by the very Judge in whose Court an offence—whether under S. 193 or S. 211, Penal Code—has actually taken place.

Where there was a delay of four months in making an application for sanction to prosecute under S. 193, Penal Code, the delay not being accounted for, and the sanction was granted by a Judge other than the one in whose Court the alleged offence actually had taken place, *held* that the sanction was not properly given. **Yad Ram v. Risal**, 7 A.L.J. 50 = 5 Ind. Cas. 469 = 11 Cr.L.J. 140.

RICHARDS, J.

(86) *S. 195—Presidency Court of Small Causes Act (XV of 1882), S. 38—Sanction to prosecute—Full Court's power to grant or revoke sanction—Full Court not an Appellate Court—Powers of Full Court.*

The Full Court of the Presidency Small Cause Court in Bombay has no power to grant

Crim. Pro. Code—(Continued).

or revoke a sanction to prosecute refused or granted by a single Judge of that Court.

Per Chandavarkar, J.—The language used in Ss. 37 and 38 of the Presidency Court of Small Causes Act, 1882, does not appear to be appropriated for the purposes of conferring appellate jurisdiction upon the full Court.

Per Batchelor, J.—The jurisdiction conferred by S. 38 of the Act upon the full Court is not appellate, but revisional only. *In re Shivlal Padma*, 12 Bom. L.R. 130=5 Ind. Cas. 862=11 Cr. L. J. 271=34 B. 316.

CHANDAVARKAR and BATCHELOR, JJ.

(87) S. 195—Sanction to prosecute for perjury, application for—Contradictory statements before committing Magistrate and Court—True story stated in Court—Statement before Magistrate not fairly induced—Sanction if should be granted.

On an application for sanction to prosecute a witness under S. 193, Penal Code, in respect of contradictory statements made by him before the committing Magistrate and the Court, it was found that the witness had made false statements before the committing Magistrate, but had deposed truly in Court:

Held that, having regard to the circumstances leading up to the examination of the witness before the committing Magistrate and the conditions under which the examination was conducted, the sanction should not be given.

‘It would be a dangerous doctrine to hold that the fact of a witness having made contradictory statements before the committing Magistrate and in Court would alone justify the granting of sanction to prosecute him for perjury.’

There may be exceptional conditions in which sanction should be granted in a case, in which the witness has told a false story before the committing Magistrate but a true story in Court, but to grant sanction in circumstances such as were found in the present case would only tend to defeat and not to further the ends of justice. *In the matter of Tripura Sankar Sarkar*, 14 C.W.N. 767=37 C. 618.

JENKINS, DOSS and TEUNON, JJ.

(88) S. 195—Cognizance of offence without the complaint of public servant with whom false information lodged. See PENAL CODE, No. 26, 14 W.N. 765.

Crim. Pro. Code—(Continued).

(89) S. 195 (1) (a)—False complaint to Police—Sanction for prosecution by District Magistrate, legality—Police Act V of 1861, S. 4.

The Magistrate of the District, in whom are vested under S. 4, Act V of 1861, powers of general control and direction over the police in his district, may sanction prosecution under S. 125 (1) (a), Cr. P.C. 1898, for the offence of preferring a false complaint to the police. *Shibbu v. The Crown through Chajju*, 6 P.R. 1910 (Cr.)=10 P.W.R. 1910=5 Ind. Cas. 829.

REID, C.J. and ROBERTSON, J.

References:—(a) 47 P.R. 1867 (Cr.)=9 P.R. 1868 (Cr.), F.; 27 C. 452, not F.; 32 C. 180, R.

(90) S. 195 (1) (c)—Sanction to prosecute—Forgery—Penal Code (Act XLV of 1860), Ss. 476, 40—Offence—Interpretation.

In S. 195 (1) (c), the word “offence” occurring as the third word is designedly used in a somewhat abstract manner. It is the “offence” in itself, not any particular offender’s offence, which the section aims at; and that is in accordance with S. 40, Penal Code, where “offence” is defined as the thing made punishable by the Code. In other words, the clause deals with the case where there is a substantive offence committed by a party to a suit. *In re Narayan Dhonddev Risbud*, 12 Bom. L.R. 383=6 Ind. Cas. 529=11 Cr.L.J. 368.

BATCHELOR and DAVAR, JJ.

(91) S. 195 (1) (c), (3)—Sanction to prosecute—Abetment of an offence specified in S. 195, cl. (c)—Abettor not party—No sanction necessary—Penal Code (Act XLV of 1860), Ss. 463, 471, 475, 476.

The offence or offences in which S. 195, cl. (1), Sub-cl. (c) read with cl. (3) requires that sanction should be given by a Court with respect to documents produced in Court, must be offences committed by parties to the proceeding, whether the offence be one of the substantial offences described in S. 463 or punishable under Ss. 471, 475, or 476 of the Penal Code, or only amounts to abetment of any such offences. *Chaudhri Ghansham Singh v. Emperor*, 4 Ind. Cas. 105 (Cr.)=6 A.L.J. 993=32 A. 74.

KNOX and KARAMAT HUSAIN, JJ.

(92) S. 195 (c)—Sanction—Indian Penal Code (Act XLV of 1860), Ss. 463, 467—Forgery—Sanction for prosecution, want of, effect of.

Crim. Pro. Code—(Continued).

On the prosecution of the accused for an offence under S. 467, I.P.C., alleged to have been committed in respect of a document, which was subsequently produced at the hearing of a suit tried on the original side of the High Court in which the accused was a party.

Held that the prosecution was incompetent, without the previous sanction of the Court which tried the suit or of the Court to which it was subordinate.

That S. 463, I.P.C., referred to in S. 195 (c) of the Criminal Procedure Code covers forgery of the description for which penalty is provided under S. 467, I.P.C. **Teni Shah v. Bolahi Shah**, 14 C.W.N. 479—5 Ind. Cas. 879=11 Cr. L.J. 280.

HARRINGTON and CHATTERJEE, JJ.

(93) S. 195 (c)—*Sanction to prosecute—Power of Appellate Court to order a re-trial by the first Court.*

An appellate Court, dealing with an application under S. 195 of the Crim. Pro. Code, has no power to order a re-trial by the first Court. **In re Kamma Narayanappa**, 8 Ind. Cas. 679.

KRISHNASWAMI AIYAR and AYLING, JJ.

References:—L.P.A. No. 37 of 1906; 30 M. 311; 2 M.L.T. 84; 17 M.L.J. 123; 5 Cr. L.J. 288; 33 M. 90; 7 M.L.T. 128; 20 M.L.J. 102; 5 Ind. Cas. 881; 11 Cr.L.J. 280, *R.*

(93-a) S. 195 (c)—See No. 93, *supra*.

(94) Ss. 195, 197, 215, 526—*Commitment under S. 526—Quashing of commitment—Nature of sanction accorded by Government under S. 197.*

S. 215, Crim. Pro. Code, is inapplicable to a case in which the commitment is not one made under any one of the four sections therein specified, but is one made under the direction of the High Court under S. 526 (1) (iv).

The sanction accorded by Government under S. 197 cannot be held to be null and void for the reason that no notice was given to the accused to show cause why such sanction should not be given. It is a matter left entirely to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution, and the Criminal Court before which he is prosecuted is not an appellate authority over Government in the matter of the sanction. There is a marked distinction between the classes of offences dealt within S. 195, clause 1 (a), (b) and (c), and it does so in

Crim. Pro. Code—(Continued).

connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore acts in its judicial capacity in granting the sanction upon legal evidence. But the Government in according or withholding sanction under S. 197—for the prosecution of a public servant in respect of an offence alleged to have been committed by him as public servant—acts purely in its executive capacity, and the sanction need not be based upon legal evidence. **In re Kalagara Bapiah**, 8 M.L.T. 205.

BHASHYAM IYENGAR, J.

References:—10 M. 232; 16 M. 468 *R.*

(95) Ss. 195 and 428—*Appeals under S. 195—Power of appellate Court to take or call for further evidence—Jurisdiction.*

The power to take, or call for, further evidence, given by S. 428, is expressly limited to appeals under that Chapter (*i.e.*) under chapter XXXI of the Code, S. 195 is not part of that chapter, nor does the section itself give any power to call for further evidence. So a District Magistrate has no power to make an order calling for further evidence in cases of appeals under S. 195. **In re Krishna Reddy**, 7 M.L.T. 128—33 M. 90; 20 M.L.J. 102.

BENSON, OFFG. C.J., and ABDUR RAHIM, J.

Reference:—30 M. 311, *applied*.

(95-a) Ss. 195, 439—*Sanction to prosecute—Procedure—Court if bound to take evidence—Revision of order of Civil Court refusing sanction—Civil Procedure Code (Act V of 1908), S. 115—High Court, original Side—Revisional jurisdiction over Presidency Small Cause Court—Practice—High Court Rules, appellate Side, Rule LV (a).*

There has been a well established practice of the High Court that applications for revision of orders by the Calcutta Small Cause Court are heard by a single Judge on the original side of the High Court (a).

Rule IV (a) of the Appellate Side Rules confirms the practice, and under its jurisdiction for revision of orders by the Small Cause Court is vested in a single Judge on the Original Side.

A Civil Court, in making an order under S. 195 of the Crim. Pro. Code, does not exercise criminal jurisdiction. The Criminal Revisional Bench of the High Court has therefore no jurisdiction to interfere with such an order (b).

Crim. Pro. Code—(Continued).

But the High Court can interfere with such order under S. 115 of the Civil Procedure Code.

The jurisdiction of the High Court to interfere under S. 115, Civ. Pro. Code, is not ousted by S. 195, Sub-sec. (6) of the Criminal Procedure Code, inasmuch as an application under the latter is not an appeal but a substantive application (c).

In disposing of the application for sanction to prosecute for bringing a false suit, under S. 195 of the Criminal Procedure Code, the Court has to decide whether the original suit was false, and whether, if it was false, sanction should be granted, and must make a full enquiry into the matter even if it involves trying the case *de novo*.

So where there was no evidence in the records of the original case to prove that it was false, and the Small Cause Court refused sanction on the ground that it was not bound to go beyond the record, the Court ordered the case to be sent back and tried according to law. **Sew Bollok Singh v. Ramdhin Balna**, 14 C.W.N. 806 = 6 Ind. Cas. 473 = 11 Cr. L. J. 357.

PUGH, J.

References :—(a) 29 C. 498 ; 30 C. 588 ; S.C. 7 C.W.N. 547 (1903) ; 30 C. 986 ; S.C. 7 C.W.N. 843 (1903), *discussed*. (b) 28 A. 554 ; 26 A. 249 ; 1 C.W.N. 400 (1897) ; 7 C.W.N. 112 (1902) ; 8 C.W.N. 73 (1903) ; 26 M. 98, R. (c) 26 A. 244 (247), R.

(96) *Ss. 195, 476—Sanction to prosecute—Complaint to a District Registrar—Enquiry held departmentally—Judicial proceedings—Penal Code (Act XLV of 1860), Ss. 182, 211.*

Where a person made a complaint to a District Registrar against the conduct of a subordinate officer, a Sub-Registrar, alleging that the latter had misappropriated a sum of money paid to him on account of fees for a commission, and the District Registrar after holding a departmental enquiry was satisfied as to the falsity of the complaint and made a report to himself as District Magistrate, and in this latter capacity passed the following order :

“ Read report of District Registrar, Prosecution of E. B. under Ss. 211 and 182, Penal Code, sanctioned. Summon E. B., Ss. 182 and 211, Penal Code.”

Held, it was not clear from the record whether the District Magistrate purported to act under S. 195 or S. 476 of the Crim. Pro. Code.

If he purported to act under S. 195, then the sanction would be without jurisdiction as to

Crim. Pro. Code—(Continued).

S. 182, Penal Code, inasmuch as he was not the public officer concerned or the public officer to whom he was subordinate ; and so far as the sanction related to S. 211, Penal Code, it was equally without jurisdiction, as there was no offence committed in or in relation to any proceeding in Court.

Nor could the District Magistrate take action under S. 476, Crim. Pro. Code, as the alleged offence or offences cannot be said to have been committed before him or brought under his notice as a Court in the course of a judicial proceeding. **Elahi Bux v. King-Emperor**, 11 O.L.J. 121 (Cr.) = 5 Ind. Cas. 721.

JENKINS, C.J. and WOODROFFE, J.

(97) *Ss. 195, 476—Penal Code (Act XLV of 1860), S. 175—Disobedience of Court's order—Sanction to prosecute—Proceedings under S. 476, Crim. Pro. Code, when to be taken—Jurisdiction.*

An application for sanction was refused by an Honorary Magistrate. Against the order of refusal an application was made to the District Magistrate, who set aside the order of refusal and sanctioned prosecution. The District Magistrate's order, however, was set aside by the High Court, on the technical ground that he had not issued notice to the accused before he sanctioned his prosecution : upon this the District Magistrate directed prosecution of the accused under S. 476, Crim. Pro. Code : *Held*, that it was open to the District Magistrate to send a notice and take up the revision again, but he had no power to institute an entirely fresh proceeding under S. 476 at that stage of the case.

Except under very special circumstances, proceedings under S. 476 should be taken at an early date after the decision of the original case.

Where an accused was called upon to produce a book in Court and he failed to do so, and the Court thought that the production of the book was not necessary for the decision of the case, it would be improper to prosecute the accused for intentionally disobeying the Court's order. **In re Mithan Lal v. Emperor**, 5 Ind. Cas. 17 = 11 Cr. L.J. 20.

TUDHALL, J.

(98) *Ss. 195, 476—Order under S. 476 infructuous—Order under S. 195 not illegal—Application under S. 195 presented by minor should be presented through next friend.*

Crim. Pro. Code—(Continued).

After action has been taken under S. 476, Crim. Pro. Code, and an order has been made, which proves infructuous because not made in accordance with that section or because it is defective in form, there is no reason why an application properly made under S. 195 should not be entertained. The possession would be different if the order under S. 476 was set aside on the merits.

An application presented under S. 195, Crim. Pro. Code, to a Civil Court, for sanction to prosecute a person, by a person who is an infant, ought to be presented on his behalf by a properly appointed next friend. The Court will not entertain an application which is not so presented.

The objection goes to the root of the matter, and may be taken successfully in the appellate or the Revisional Court. **Rajendra Nath Das v. Mukta Rani Dasi**, 6 Ind. Cas. 367=11 Cr. L.J. 327.

MOOKERJEE and TEUNON, JJ.

References :—19 M. 127; 22 C. 270, R.

(99) Ss. 195, 476—"Subordinate"—*Whether the successor of a Judge can take proceedings under the sections—Sanction to prosecute—Vague sanction.*

S, a Sub-Divisional Officer, commenced proceedings under S. 476, Crim. Pro. Code. Before passing the final orders, he reverted to his substantive post of a Deputy Magistrate in the same Sub-Division. His successor, C, thinking that S was subordinate to him, gave sanction under S. 195 (i) (b) of the Code.

Held, that C had no authority to proceed under S. 195 (1) (b), as S was not subordinate to him within the meaning of S. 195 (7).

C could, however, take action under S. 195 or 476 of the Code, as the offences had been committed in his own Court, though not when he was the presiding officer (a).

Where a sanction order said that the accused were to be prosecuted in respect of the complaint of a certain date and as a matter of fact there was no complaint of that date, *held*, that the order was bad for vagueness. **Rholu v. Emperor**, 7 Ind. Cas. 51 (Cr.).

CHAMIER, J.

References :—(a) 6 A.L.J. 392; 1 Ind. Cas. 306; 9 Cr. L.J. 209, F.; 34 C. 551; 5 O.L.J. 508; 11 C.W.N. 568; 5 Cr. L.J. 398; 2 M.L.T. 298 (F.B.), *not F.*

Crim. Pro. Code—(Continued).

(100) Ss. 195, 478—*Sanction to prosecute—Court's order to prosecute not barred by the sanction.*

Where sanction to prosecute is granted to a private individual under S. 195, Crim. Pro. Code, and no action is taken under the same, it is competent to the Magistrate to adopt proceeding against the offenders, through his Karkun, under S. 478 of the Code (a). **Emperor v. Nagji Ghelabhai**, 11 Bom. L. R. 855=34 B. 88=10 Cr. L.J. 431=3 Ind. Cas. 962.

SCOTT, C.J. and BATCHELOR, J.

Reference :—(a) 13 B. 384, F.

(100-a) Ss. 195, 526—*Effect—Applications for sanction to prosecute—Transfer to what Court to be made.*

Assuming that S. 526 of the Cr. P. C., gives the High Court power to transfer the application for sanction as being a criminal case, the language of S. 195 indicates that any transfer so made would be ineffective and futile, unless the transfer was made to a Court to which the Court before which the application is pending is subordinate; for no Court could take cognizance of the case on a sanction granted by any Court not mentioned in the section. **N. Ekambareswara Iyer v. M. Veerabhadra Thevan**, 8 M.L.T. 297.

MILLER and KRISHNASWAMI IYER, JJ.

(100-b) S. 196—Order under—Statement of facts—Non-specification of sections of Penal Code—Complaint—Sufficiency. See PENAL CODE, No. 13-a, 4 S.L.R. 55.

(100-c) S. 196—See No. 71, *supra*.

(100-d) S. 197—See No. 94, *supra*.

(101) S. 198—Person aggrieved in case of bigamy—Complaint by different person—Confinement bad. See PENAL CODE, No. 95, 7 A.L.J. 10.

(102) Ss. 201, 202, 203—Inquiry in granting sanction to prosecute—Duty of Magistrate. See PENAL CODE, No. 39, 12 Bom. L. R. 229.

(102-a) S. 202—See Nos. 61 and 102, *supra*.

(103) Ss. 202, 203—Complaint based upon official communication—No likelihood of proving complaint. Dismissal of complaint. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

(104) S. 203—Complaint—Order of dismissal—Grounds not recorded—Police report containing reasons—Sufficiency.

Where a Magistrate dismisses a complaint under S. 203, Crim. Pro. Code, merely stating

Crim. Pro. Code—(Continued).

that he agrees with the police report, without recording his reasons for dismissal and without even making the police report part of his order.

Held, that the order was improper and ought to be set aside. **Ahmed Bee v. Ameena Bee**, 7 M.L.T. 175 = 5 Ind. Cas. 926 = 11 Cr. L.J. 331.

SANKARAN NAIR, J.

(104-a) S. 203, revision of order passed under—Notice to opposite party not necessary.

Held that revision of an order passed under S. 203, Cr. P.C., can be made without notice to the person complained against (a). **Gada Hussain v. Janki**, 13 O.C. 289.

LINDSAY, J.C.

Reference :- 15 Cal. 624, followed.

(104-b) S. 203—See Nos. 102 and 103, *supra*, and No. 126 (b), *infra*.

(105) Ss. 203, 253, 403, 437, 438, 439—Revival of prosecution—Complaint dismissed—Petition for revision to the Sessions Judge also dismissed—Fresh complaint on the same facts not allowed.

Held, that a Magistrate cannot entertain as fresh complaint, when a previous one on the same facts has been dismissed and the order of dismissal has been upheld by the Sessions Judge. In such a case, the complainant's only remedy is to apply to the High Court for revising the lower Court's order. **Mohamed Yaqub v. The Crown**, 11 P.W.R. 1910 (Cr.) = 5 Ind. Cas. 991 = 11 Cr. L. J. 347.

SIR ARTHUR REID, C.J.

References :- No. 68 of 1902 P.L.R. 285; 5 A. 36; 28 C. 397, D.; A. 387.

(106) Ss. 204 and 205—Object of S. 205—Substituting summonses for warrants—Exempting accused from personal appearance—Pardanashin ladies.

Where some three female accused applied to the Magistrate for substituting summonses for warrants and for dispensing with their personal appearance on the allegation that they were *pardanashin* ladies, and the Magistrate dismissed the application, finding they were not *pardanashin*, *held*, that is not a sufficient reason for his refusal to allow them the benefit of S. 205, Cr. P. C.

That section is one which should be freely utilized in such a country as Sind, where so much prejudice exists against the appearance of females in public, and where the procedure

Crim. Pro. Code—(Continued).

law is so frequently abused in order to gratify private malice. **Crown v. Mahomed**, 3 Sind L.R. 167 = 4 Ind. Cas. 1152.

KNIGHT and LUCAS, J. CS.

(106-a) S. 205—See No. 106, *supra*.

(107) Ss. 208, 209, 211, 213—Framing of a charge—Order of commitment—Procedure—Magistrate's order—Power to change the order.

The applicant was being tried before a Magistrate. After the witnesses for the prosecution had been examined, and the Magistrate was about to frame charges against the applicant, his pleader pointed out to the Magistrate the propriety of committing the case for trial to the Court of Session. Yielding to that suggestion, the Magistrate framed certain charges, one of which was under S. 467, Penal Code, and directed that the case should be tried by the Court of Session. The applicant then raised the objection that the charge under S. 467, Penal Code, could not proceed for want of sanction under S. 195 of the Criminal Procedure Code. The Magistrate thereupon amended the charge and intimated his intention to try the case himself, instead of committing it to the Court of Session. The applicant applied to the High Court.

Held, that the Magistrate had merely framed the charge and arrived at the procedure so far only as S. 210 of the Criminal Procedure Code laid it down : but that did not divest him of his jurisdiction to proceed with the case. He had further procedure to adopt before passing his order of commitment ; and when that procedure had been followed, it was open to him to consider whether he ought to commit the case to the Court of Session or to try it himself. This discretionary power was given to the Magistrate by the provisions of S. 213 itself.

When the evidence referred to in S. 208 of the Criminal Procedure Code has been taken and the accused examined under S. 209, the Magistrate may either discharge the accused, or, if he finds there are sufficient grounds for commitment, he shall frame a charge, read and explain it to the accused. After that the Magistrate has to direct the accused to give in, orally or in writing, a list of his witnesses (S. 211). When the list has been given, the Magistrate may in his discretion summon and examine any witness named in it. It is only after all this procedure has been followed that

Crim. Pro. Code—(Continued).

the Magistrate can make an "order of commitment" recording briefly his reasons for it.

The mere framing of a charge against the accused, as required by S. 210, is distinct from and does not amount to an order of commitment, which has to be made under S. 213.

A Criminal Court has no power given to it by the Code of Criminal Procedure, to review and modify an order which it has once passed; the order, however, must be such as is contemplated by the Code. **Emperor v. Venkatesh Sadashiv Nargund**, 12 Bom. L. R. 521 = 7 Ind. Cas. 450 = 11 Cr. L. J. 486.

CHANDAVARKAR and HEATON, JJ.

(108) S. 209—*Jurisdiction of committing Magistrate to weigh evidence of direct witnesses.*

A committing Magistrate is entitled, at any rate to some extent, to weigh the evidence of direct witnesses and to pronounce as to their credibility (a).

The word credible means entitled to belief. **Sultani v. Emperor**, 11 Cr. L. J. 18 = 4 Ind. Cas. 612; 10 P.L.R. 1909 (Cr.) = 3 P.W.R. 1909 (Cr.) = 155 P.L.R. 1909.

WILLIAMS, J.

References:—(a) 5 A. 161; 21 A. 265; 26 A. 564, F.; 11 B. 372; 27 B. 84; 14 P. R. 1908 (Cr.); 30 P.W.R. 1908 (Cr.); 8 Cr. L.J. 263, R.

(108-i) S. 209—*Committing Magistrate—Committing a case to the Court of Session—Magistrate's discretion to discharge the accused.*

Where a Magistrate finds that there are no sufficient grounds for committing the accused person for trial—either because there is no evidence whatever or because the evidence appears to him to be totally unworthy of credit—it is his duty, under S. 209 of the Cr. P.C., 1898, to discharge the accused, since the grounds relied on for a commitment would, in his opinion, be insufficient.

Where, however, the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving that doubt and assessing the evidence should be left to the Court of Session. **In re Bal Parvati**, 12 Bom. L.R. 923.

BATCHELOR and RAO, JJ.

References:—11 Bom. 392; 9 Bom.L.R. 225; 5 All. 161, R.

(108-a) S. 209. See Nos. 29 and 107, *supra*.

(108-b) S. 211. See No. 107, *supra*.

Crim. Pro. Code—(Continued).

(108-c) Ss. 212, 237 (2), 437—*Committing Magistrate, powers of—Discharge—Further enquiry—Medical evidence—Expert—Opinion of.*

A Magistrate, holding enquiry into a case triable exclusively by a Court of Sessions, is entitled, at any rate to some extent, to weigh the evidence produced before him, and to pronounce as to its credibility and to discharge the accused if he is of opinion that there is no credible evidence to establish a *prima facie* case against him (a).

The accused was discharged by the District Magistrate. He could only be found guilty, if the medical evidence of the Assistant Surgeon examined by the Magistrate were held incredible. On revision in the Chief Court, notice was issued to the accused to show cause why further enquiry should not be ordered in the case. This was done by the Judge after discussing the case with the Civil Surgeon of Lahore, but no record was made of the opinion given by the Civil Surgeon. At the hearing the accused tendered written opinions of a large number of the leading medical men practising in the Punjab supporting the Assistant Surgeon's opinion.

Held, that the opinions were not admissible, nor was anything which the Civil Surgeon may have stated. As there were no reasons to suppose that the Assistant Surgeon was corrupted and the injuries described by him were not correct, the rule was discharged. **Mir Abdullah and others v. The Crown**, 215 P.L.R. 1910 (Cr.).

CHREVIS, J.

References:—(a) 10 P.R. 1909 = 24 P.L.R. 1909, F.; 27 Bom. 84; 14 P.R. 1908 = 107 P.L.R. 1908, R.

(108-d) S. 213. See No. 107, *supra*.

(108-e) S. 215. See No. 94, *supra*.

(109) Ss. 221, 535, 537—*Previous conviction intended to affect punishment—Form of charge—Omission to set out previous conviction in due form—Effect.*

Under S. 221, Cr. P. C., if the accused has been previously convicted of an offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction should be stated in the charge.

Mere omission to set out the previous conviction is not sufficient reason for interfering in appeal or revision with the sentence passed,

Crim. Pro. Code—(Continued).

unless there has been a failure of justice caused by the omission. (See Ss. 535, 537, Cr.P.C.).
In re Abbulu, 7 M.L.T. 77—5 Ind. Cas. 743.

MUNRO and ABDUR RAHIM, JJ.

(110) Ss. 222, 233, 234, 235, 236, 239, 403—*Criminal breach of trust—Indian Penal Code (Act XLV of 1860), S. 409—Trial of accused—Joinder of charges—Previous acquittal—Bar to trial.*

The accused was tried for the offence of criminal breach of trust as a public servant in respect of Rs. 12 odd, and was acquitted of the offence. He was again tried for the same offence in respect of another item of Rs. 19 odd, misappropriated during the same period as that to which the Rs. 12 related, and was convicted.

On appeal, the Sessions Judge acquitted the accused on the ground that his previous acquittal was bar to the second trial :

Held, reversing the order of acquittal, that the previous acquittal did not, under the circumstances, operate as a bar to the accused's conviction at the second trial.

S. 233, Crim. Pro. Code, contains the general rule, namely, that, for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately. To this rule there are several exceptions, viz., those contained in Ss. 234, 235, 236 and 239 of the Code.

S. 222, Crim. Pro. Code, is an exception to another general rule that, at a trial for an offence, certain particulars must be given in the charge. Clause 2 of S. 222 modifies that rule as to charges for criminal breach of trust, but does not restrict in any way the scope and object of S. 234 of the Code. *Emperor v. Kashinath Bagaji Sali*, 12 Bom. L.R. 226—5 Ind. Cas. 970—11 Cr. L.J. 937.

CHANDAVARKAR and KNIGHT, JJ.

(111) S. 222 (2)—*Charge for total item embezzled—Specific items proved—Joinder of charges—Statute—Construction of.*

Where a man in certain capacity is entrusted from time to time with various sums of money and commits criminal breach of trust in respect thereof, he may be charged with an offence with respect to the gross sum embezzled, and it is not necessary to specify the particular items embezzled or the exact date on which they were so embezzled, and the charge so framed shall be deemed to be a charge of one

Crim. Pro. Code—(Continued).

offence, provided the period within which such embezzlement has taken place is not more than one year (a).

Where the language of a Statute is plain and unambiguous, a Court cannot look at extraneous matters and read other language into the Statute, so as to give it a meaning which the Court believes the Legislature intended to give.
King-Emperor v. Ibrahim Khan, 7 A.L.J. 897 (Cr.).

TUDBALL and CHAMIER, JJ.

Reference :—(a) 24 All. 254, F.

(111-a) S. 226—See No. 10, *supra*.

(112) Ss. 227, 537—*Charge—Addition of a further charge by Sessions Judge as to offence committed independent of the charge on which committal is based—Illegality—Dying declaration—Acquittal—Appeal by Government—Evidence of witnesses disbelieved as against some accused not to be believed as regards the other co-accused—Re-trial refused when evidence untrustworthy and discrepant—Penal Code, Ss. 302, 321 and 326.*

Four persons J.S., S.D., and S.N., were charged with the murder of one J.M. Of these J was discharged by the committing Magistrate, and the rest committed to the Sessions for an offence under S. 302, I.P.C.

In the Sessions Judge's opinion the whole of the prosecution evidence was untrustworthy and materially discrepant. He accordingly acquitted all three accused of the murder of J.M., but convicted S.D. on the charge under S. 326, Penal Code, added by himself during the course of the trial, of having caused grievous hurt by means of a stabbing instrument to another person A., and sentenced him to transportation. But S.D., had not been committed for causing injury to A. In a note, subsequently added to his judgment, the Sessions Judge observed that the injury did not amount to grievous hurt under S. 326, Penal Code, but the offence did amount to one under S. 324, Penal Code, for which he inflicted the maximum punishment awardable under S. 326, Penal Code, because "he was certain that S.D. had had a hand in the killing of J.M."

Held, that :

(1) The Sessions Court is not a Court of original jurisdiction, and, though vested with large powers for amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal

Crim. Pro. Code—(Continued).

and not with regard to the matter not covered by the indictment; and, therefore, the conviction of S. D. of an offence under S. 326 alleged to have been committed on A, is illegal and must be set aside (a).

(2) The addition of the second charge was not a mere irregularity but an illegality not covered by S. 597, Crim. Pro. Code (b).

(3) The evidence was untrustworthy, and materially discrepant, on which it was not proper to order a re-trial.

(4) An accused should not be convicted on the strength of evidence, which is disbelieved so far as other co-accused are concerned, if the ground for disbelieving it is common to all of them.

(6) A dying declaration inconsistent with the other prosecution evidence, full of material contradictions and discrepancies, is as valueless as the evidence itself.

In awarding punishment it is illegal to pay any regard to the offence of which an accused was charged but acquitted. **Shah Din v. The Crown**, 20 P.W.R. 1909 (Cr.) = 4 Ind. Cas. 993 = 11 Cr. L.J. 131.

REID and RATTIGAN, JJ.

(112-a) S. 233—Charges—Joinder of—Penal Code (Act XI, V of 1860), S. 411—Stolen property—Possession of the property stolen from several persons at different times—Charge, defect in.

Unless it appears that articles for the possession of which the accused is charged under S. 411, I.P.C., came in his possession on different occasions, the trial is not irregular on account of the fact that the articles were stolen from several persons at different times (a).

When it is not shown that the accused is prejudiced on account of a defect in the charge, the Court of appeal cannot interfere with the conviction. **Wasawa Singh v. The King-Emperor of India**, 36 P.L.R. 1910.

CHEVIS, J.

References :—(a) 10 C.W.N. 520; 11 C.W.N. 1128; 13 C.W.N. 418 and 1067, R.

(112-b) S. 233—See No. 110, *supra*.

(118) Ss. 233, 234, 235, 236, 239—Misjoinder of charges—Irregularity—Fresh trial—Counts charging continued acts of criminal breach of trust and forgery—Penal Code, Ss. 408 and 467.

The accused was charged and tried at one and the same trial for three offences under

8 Cr.

Crim. Pro. Code—(Continued).

S. 408, Penal Code, and three offences of forgery under S. 467 of the Code, and was convicted and sentenced in respect of all the six offences.

Held that the trial of any person in respect of six offences at one and the same trial, although they may have been committed within the space of 12 months, contravened the rule laid down in S. 233, even when read with S. 234, Crim. Pro. Code, and as clause (1), S. 235 and S. 234 of the Code must be mutually exclusive, to hold that S. 234 covered all the offences committed in the course of three similar but separate transactions, when the number of offences was more than three, would be straining the language of the section beyond all bounds. The trial, therefore, of any person in respect of six offences, three of embezzlement and three of forgery, was an irregularity sufficient to make a re-trial necessary. **Shao Saran Lal v. King-Emperor**, 7 A.L.J. 225 = 32 A. 219 = 5 Ind. Cas. 896 = 11 Cr. L.J. 285.

TUDBALL, J.

References :—25 M. 61, F.; 33 Bom. 221, R. and discussed.

(114) Ss. 233, 234, 236, 239, 537. See MISJOINDER OF CHARGES, No. 1, 11 C.L.J. 182.

(115) Ss. 233 and 239—What persons may not be tried jointly—Misjoinder.

A, B and C passed certain resolutions defamatory of the complainant and published those resolutions, and D transmitted the resolutions to a newspaper. All the four persons were tried together and convicted. But it was not shown that A, B and C instigated D to write the letter to the paper or that they had any common purpose. Nor was there any evidence to show that the offences were all committed in one and the same transaction.

Held, S. 239 not being applicable to the case, S. 233 prohibits the joint trial of A, B and C along with D. **In re Purushottam Mulji**, 7 M.L.T. 127.

MUNRO and ABDUR RAHIM, JJ.

Reference :—25 M. 61, applied.

(116) Ss. 233, 239—Distinct offences—Joint trial—Defamatory resolutions—Transmission of resolutions to a newspaper—Concert.

Where accused Nos. 1 to 3, who were charged with passing and publishing resolutions defamatory of the complainant, were tried jointly with the fourth accused, who was charged with transmitting the resolutions to a newspaper :

Crim. Pro. Code—(Continued).

Held, that, in the absence of a concert between all the accused, their joint trial was illegal, as the offences committed by accused Nos. 1 to 3 and the offence committed by the 4th accused were not committed in the same transaction within the meaning of S. 239, Crim. Pro. Code. **Krishna Dass Vital Dass v. Emperor**, 11 Cr. L.J. 135=5 Ind. Cas. 436=7 M.L.T. 127.

MUNRO and ABDUR RAHIM, JJ.

(116-a) S. 231 See Nos. 110, 113 and 114, *supra*.

(117) Ss. 231, 235, 236, 239 and 403—*Acquittal of an offence under S. 182, I.P.C., whether bars prosecution under S. 500, I.P.C., arising out of the same transaction.*

Where the accused who had, in a petition to a Tahsildar under the Court of Wards, falsely made certain defamatory allegations against a Sub-Inspector of Police, was tried for an offence under S. 182, I.P.C., on the sanction of the Manager of the Court of Wards, but was acquitted on the ground that the person to whom the petition was made was not a public servant,

held—On a subsequent prosecution of the accused under S. 500, I.P.C., on the complaint of the Sub-Inspector, that the acquittal of the accused in the previous prosecution was no bar to his trial for the offence of defamation.

Per Holmwood, J.—That the case fell under S. 235 (1) of the Code of Criminal Procedure and under no other of the exceptions in Ss. 234, 235, 236 and 239, and therefore the prosecution under S. 500, I.P.C., was clearly saved by the provisions of S. 403 (2), Cr. P.C. **Ram Sekak Lal v. The Emperor**, 14 C.W.N. 839=12 C.L.J. 15=6 Ind. Cas. 352=11 Cr. L.J. 325.

HARINGTON and HOLMWOOD, JJ.

(118) Ss. 231, 535, 537—*Joinder of charges—Irregularity—Penal Code, S. 477-A.*

The joinder of charges contrary to the provisions of the Code of Criminal Procedure is not merely an irregularity which can be remedied under S. 537. Hence where the accused was charged with having altered and mutilated certain accounts between the years 1907 and 1909, *held* that the charge was bad, inasmuch as he could have been tried at one trial, only for three separate offences committed within the space of twelve months from first to last. **Sallimullah Khan v. Emperor**, 6 A.L.J. 977=32 A. 57=4 Ind. Cas. 808=11 Cr. L.J. 53.

RICHARDS, J.

Crim. Pro. Code—(Continued).

(119) S. 235—*Several offences committed on several times covering a period of nearly two years—Bad for multifariousness—'Same transaction' meaning of—Scope of S. 235.*

Six accused were charged as Directors of the Circars Provident Fund, Bapatla, with having committed breaches of trust in respect of three sums of money alleged to belong to the company on several times covering a period of nearly two years. The 4th and 6th accused were also charged with having falsified certain accounts by making false entries therein on 20th and 25th April, 1905, and these two and the 1st accused with having falsified another document on 24th June, 1905. The 6th accused was further charged with having cheated two persons, one on the 6th March, 1905 and another on the 29th March, 1905, and the fourth accused with having cheated a third person on the 17th June, 1905. Those among the six accused persons, who were not charged with the substantive offences of falsification of accounts and cheating, were charged with having abetted the commission of these offences:

Held, (1) *prima facie*, the trial is open to objection on the ground of multifariousness:

It violates the express injunctions of the legislature prohibiting the trial of several offences covering a period of more than one year at one trial, and the trial together of a number of offences which are not of the same kind within the meaning of the Code.

The acquittal of the accused on some of the charges, which the prosecution failed to prove, cannot make valid the trial which was illegal *ab initio*.

S. 235, Cr. P.C., 1898, allows of a number of offences, even if exceeding three and extending over a period of more than twelve months, being tried at one trial, if they are committed "in one series of acts so connected as to form the same transaction."

Community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction (a). **In re Choragudi Yenkatadri**, 7 M.L.T. 299=20 M.L.J. 220=5 Ind. Cas. 847=11 Cr. L.J. 58.

BENSON and ABDUR RAHIM, JJ.

References :—(a) 27 B. 135; 30 B. 49; 15 B. 491; 16 B. 414; 26 M. 125, R.

(119-a) S. 235—See Nos. 71, 110, 113 and 117, *supra*.

Crim. Pro. Code—(Continued).

(120) Ss. 235 and 239—"Same transaction" what is—Permitting cattle to trespass—Impounding of cattle—Subsequent rioting in rescuing cattle—Offences committed in the same transaction.

Certain parties were charged and tried for permitting cattle to trespass, and the same parties with others were charged and tried together for rioting in rescuing the cattle after they had been impounded at another time and in another place. But it was not found that the parties, when they permitted the cattle to trespass, intended that, if the cattle were impounded, they would rescue them.

Held, the acts of permitting cattle to trespass and the rescuing of cattle are not so connected together as to form the same transaction (S. 235), and the "different offences" were not committed in the same transaction (S. 239), and that the accused ought not therefore to be tried together either under S. 235 or S. 239. *In re Muslapa*, 7 M.L.T. 367 = 6 Ind. Cas. 242 = 11 Cr. L.J. 293.

WHITE, C.J.

References:—26 M. 454; 29 C. 385; and 30 B. 49, R.

(120-a) S. 236—See Nos. 110, 113, 114 and 117, *supra* and 143, *infra*.

(120-b) S. 237—See No. 145, *infra*.

(120-c) S. 238—See No. 145, *infra*.

(121) S. 239—Joint trial for two different offences—One offence committed by all the accused, the other by some—Penal Code (Act XLV of 1860), S. 411—Stolen property—Possession—Accused pointing out where property concealed, effect of.

Where it appeared that the three accused, in the presence of *maskirs* went into a patch of jungle and brought out a box containing aniline dyes and the accused Nos. 2 and 3 on another occasion took out of some *lai* bushes a tin of coal tar and all the accused were jointly tried and convicted under S. 411 of the Penal Code, the allegation being that both the box and the tin had been stolen from a train:

Held, (1) that the joint trial of the accused was illegal;

(2) that the mere fact that the accused apparently knew where the stolen property was concealed did not establish that they were in possession of stolen property. *Emperor v. Umar Walad Sidik*, 11 Cr. L.J. 4 = 4 Ind. Cas. 481; 3 S.L.R. 136.

LUCAS, J.C., and CROUCH, A.J.C.

Crim. Pro. Code—(Continued).

(121-a) S. 239 — Misjoinder of charges — Dacoity—Offence committed on different days—One trial—Illegality.

Where four accused were charged and tried together for two offences of dacoity committed on 30th May and 2nd June, 1909, not forming part of the same transaction:

Held that the trial was bad and that the convictions should be quashed (a). *Shanmooga Tevan, Sinnan Thevan v. Emperor*, 7 Ind. Cas. 390.

MUNRO and ABDUR RAHIM, JJ.

References:—33 C. 292; 10 C.W.N. 32; 3 Cr. L.J. 126, *followed*.

(121-b) S. 239—See Nos. 71, 110, 113 to 117 and 120, *supra*.

(121-c) S. 242—See No. 26, *supra*.

(122) Ss. 245, 253, 437—Summons case tried as warrant case—Discharge of accused, effect of—Acquittal.

If a Magistrate trying a summons case, whatever procedure he adopts, finds no case made out against the accused, and lets him go unconditionally, he acquits him, though he styles his order an order of discharge and tacks on to it the number of some section of the Code which deals with discharges. The accused is, none the less, in law acquitted, for the Code contemplates no other order in summons cases. Under such circumstances, the Sessions Judge has no power to take action under S. 437, Crim. Pro. Code, on the Magistrate's order. *Thetharappa Pilla v. Yencatrama Aiyar*, 6 Ind. Cas. 385 = 8 M.L.T. 78 = 11 Cr. L.J. 350.

MILLER, J.

(122-a) Ss. 245, 438—Revision—Interference with acquittal on reference by the District Magistrate.

As the Criminal Procedure Code provides for an appeal against acquittal by Government, the High Court will not interfere under S. 438.

The High Court has no power in revision to convert an acquittal into a conviction. *Sangili Naicken v. Emperor*, 8 M.L.T. 380.

SANKARAN NAIR, J.

(123) S. 250 — Complaint — Accused of an offence.

By S. 250, Crim. Pro. Code, an order or compensation can only be made in a case instituted by a complaint to a Magistrate or information given to a police officer that certain person has committed an offence, with a view

Crim. Pro. Code—(Continued).

to his taking action. When a complainant filed a petition asking the Court to take security from the accused to keep the peace, but the allegations were found to be untrue, held that the complainant could not be required to pay compensation to the accused, inasmuch as he did not charge him with any offence. **Ram Sukh Rai v. Mahadeo Rai**, 7 A.L.J. 743 = 7 Ind. Cas. 290 = 11 Cr. L. J. 446.

BANERJI, J.

References:—25 Bom. 48, *Appr.*; 15 A. 365, *R.*

(123-a) S. 250—*Report of process server—Prosecution instituted by District Judge on such report—Acquittal of accused—Process server—Liability to pay compensation.*

The process server, on whose report that the accused had obstructed him while executing a warrant in execution of a decree for custody of a wife and had removed that woman from his custody, the Court instituted criminal proceedings against the accused, is not a person upon whose complaint or information the accusation was made and is not liable to pay compensation under S. 250, Cr.P.C. **The Crown v. Abdul Ghani**, 25 P.R. 1910, *R.*

REID, C.J.

References:—26 A. 183; 20 C. 481, *F.*

(123-b) S. 250—*Case compounded—Award of compensation—Illegal.*

When a criminal case is compounded, a Magistrate cannot allow compensation to the accused under S. 250, Cr.P.C. **The Crown v. Sundar Singh**, 30 P.R. 1910.

SCOTT-SMITH, J.

Reference:—19 P.R. 1888 (Cr.), *F.*

(123-c) S. 250—See No. 62, *supra*.

(124) Ss. 250, 30—*Incompetency of Magistrate exercising powers under S. 30, Crim. Pro. Code, to award compensation.*

Held, that a Magistrate, when exercising his powers under S. 30, Crim. Pro. Code, 1898, in a case triable by the Court of Session, is incompetent to award compensation under S. 250 of the said Code. **Ramzan v. Mussammat Rajan**, 21 P.W.R. 1910 (Cr.) = 6 Ind. Cas. 735 = 11 Cr.L.J. 396.

JOHNSTONE, J.

Reference:—Cr. 14 P.R. 1902, *F.*

(125) Ss. 250 (3), 423—*Compensation, appeal against order granting—Notice to accused, necessity of.*

Crim. Pro. Code—(Continued).

In cases of appeals under S. 250 (3), Crim. Pro. Code, which provides that there shall be an appeal from an order under that section, it is necessary to give notice of the appeal to the accused, as he is the party prejudiced, if the appeal be allowed and the order for compensation rescinded. **Ambakkagari Nagi Reddi v. Bapappa of Medimakkulappalli**, 5 M.L.T. 262 = 9 Cr.L.J. 150 = 19 M.L.J. 130 = 1 Ind. Cas. 79 = 33 M. 89.

WALLIS and MUNRO, JJ.

Reference:—29 M. 187, *D.*

(126) Ss. 250, 423 (1) (d)—*Compensation for making a frivolous or vexatious complaint—Appellate Court's power to award—S. 423, Sub-S. 1, cl. (d)—Power of the appellate Court under.*

An appellate Court can pass an order against the complainant, awarding compensation to the accused under S. 250, Cr.P.C.

Such an order may very reasonably be regarded as a consequential order within the meaning of S. 423, Sub-S. 1, cl. (d). **Kari Singh v. Tufani Dhanuk**, 14 C.W.N. 212 = 5 Ind. Cas. 72 = 11 Cr. L.J. 46.

COXE and RYVES, JJ.

Reference:—28 A. 625, *Diss.*

(126-a) S. 253—*Complainant, dismissal of—Complaint de novo on same facts, dismissed—Revival of first complaint—Court's discretion.*

M and others were prosecuted by A for robbing A of his mare under cover of levying a debt due to them, and were discharged under S. 253, Cr. P.C. Subsequently A prosecuted them for cheating him by refusing to hand over the mare and a receipt for the debt under an alleged agreement. This complaint also was dismissed. On such dismissal, A again filed a complaint of robbing him of his mare against M and others, and process was ordered to be issued against them.

Held, on revision, that, though the Magistrate had jurisdiction to entertain this renewed complaint, he failed to exercise a sound judicial discretion in proceeding with it on the facts set forth above. **Mahomed Hashim v. The Crown**, 4 S.L.R. 52.

HAYWARD, J.C., and CROUCH, A.J.C.

(126-a-i) S. 253—See Nos. 29, 105 and 122, *supra*.

Crim. Pro. Code—(Continued).

(126-b) *Ss. 253, 203, 437—Complaint, dismissal of—Renewed complaint after long delay—Discretion—Sufficient ground for dismissal under S. 203—Proper remedy.*

Where a complainant withdrew the rest of the witnesses after examining one witness and himself on a former complaint, and permitted five months to elapse before filing the renewed complaint,

Held that his conduct was sufficient for declining under S. 203 to proceed with the complaint;

Held also that, though the Magistrate had jurisdiction to entertain the renewed complaint, he failed to exercise a sound judicial discretion in proceeding with it under the circumstances set forth above.

The appropriate remedy for complaints wrongly dismissed is vested solely in the higher grades of Magistrates and the Sessions Court under S. 437, Cr. P.C. **Gulu Tirith v. Chatunmal Menghomal**, 4 S.L.R. 53.

HAYWARD, J.C., and CROUCH, A J.C.

(127) *Ss. 253, 435, 439—Retrial—Discharge after full enquiry—Evidence—Magistrate's personal knowledge and personal inspection of a spot not evidence.*

Held, that, where there is a body of evidence which, if believed, justifies conviction, it is far better, as a rule, to draw up and charge and dispose of the case finally. But if a competent Magistrate, after hearing all the evidence for the prosecution and thoroughly discussing it, does dismiss the charge, a High Court should not set aside the order of dismissal and direct further enquiry, unless new and cogent evidence is forthcoming.

Held, that a Magistrate commits serious irregularities:

(1) If he bases any of his findings on his own personal knowledge, and

(2) If he treats his own memo, made after the examination of a spot as evidence in the case, instead of having any facts, brought to light by that examination, duly brought on the record by the testimony of witnesses subject to cross-examination, rebuttal and explanation. **Radhi v. Pal Ghand**, 18 P.W.R. 1909 (Cr.)=4 Ind. Cas. 990=11 Cr. L.J. 110.

ROBERTSON, J.

(127-a) *Ss. 253, 437 and 439—Revision—Discharge of accused by first Court—Retrial on the same evidence ordered by District Magistrate if prejudicial to the accused—Power of Chief Court to go into evidence,*

Crim. Pro. Code—(Continued).

The accused one H was tried by a first class Magistrate for an offence under S. 406, I.P.C., and was discharged on the ground that the prosecution had not made out a case. On appeal to the District Magistrate, he ordered a retrial, by another Magistrate, on the ground that a document for the defence had not been considered.

On revision to the Chief Court that order was confirmed. Then the accused was tried by the other Magistrate and convicted; the Sessions Judge upheld the conviction. On revision to the Chief Court.

held, that the order of the District Magistrate ordering a retrial on the same evidence was seriously prejudicial to the accused and was opposed to principle though not illegal (a).

A Criminal Court cannot review its own order passed with jurisdiction.

Where an order for retrial was prejudicial to the accused, and he was convicted at the retrial, the correct course for the Chief Court to follow is to hear the case as if an appeal lay to that Court. **Hlara v. King-Emperor**, 8 P.R. 1909 (Cr.)=38 P.L.R. 1910.

ROBERTSON and RATTIGAN, JJ.

References :—(a) 8 P.R. 1900 (Cr.); 2 P.R. 1901 (Cr.).

(128) *S. 256—Warrant case—Accused pleading not guilty, if must ask to cross-examine prosecution witnesses immediately—Cross-examination before charge framed if affects right to cross-examine after charge—Waiver.*

When, on framing charges in a warrant case, the accused having pleaded not guilty, the Magistrate called upon them to state whether they wished to cross-examine any of the prosecution witnesses, but they did not reply immediately, but before the close of the trial they applied to be allowed to cross-examine some of them, and the application was refused on the grounds (1) that they had waived their right and (2) that the witnesses had been sufficiently cross-examined before the charges were framed.

Held, that the order was against the wording and spirit of S. 256, Crim. Pro. Code, and the conviction of the accused must be set aside. *In the matter of Inder Rai v. The Emperor*, 14 C.W.N. 280=5 Ind. Cas. 408=11 Cr. L.J. 128=37 C. 236=11 C.L.J. 418.

CHATTERJEE and RYVES, JJ.

Crim. Pro. Code—(Continued).

(128-a) S. 256—*Criminal trial—Close of some evidence for prosecution—Accused praying to re-call some witnesses—Examination as regards letter alleged to have been written by prosecution witnesses—Letter showing unreliability of evidence—Court's duty.*

Where an accused presented, after the close of the evidence of some prosecution witnesses, a petition for the admission of a letter alleged to have been written by some of the prosecution witnesses, which would show that the evidence given by the prosecution witnesses was unreliable, and also prayed for permission to re-call those prosecution witnesses to be examined about the letter.

Held that the Magistrate ought to have allowed the accused to recall those witnesses and examine them. *In re Krishnaswami Udayan*, 8 M.L.T. 367.

SANKARAN NAIR, J.

(129) S. 258—*Penal Code (XLV of 1860)—Ss. 104, 504—Acquittal, order of—Interference by High Court at the instance of a private prosecutor—Acquittal on an erroneous view of the law—Using abusive language—Right of private defence.*

Case where the High Court interfered in revision, on the application of a private prosecutor, with an order of acquittal passed on an erroneous view of the law.

S. 104, Penal Code, can have no application by way of defence to a charge under S. 504, Penal Code. *Rakhal Dass Roy v. Kailash Banu*, 11 C.L.J. 113=5 Ind. Cas. 721=11 Cr. L.J. 213.

JENKINS, C.J., and CHATTERJEE, J.

(129-a) S. 259—See No. 29, *supra*.

(129-b) S. 288—See No. 70, *supra*.

(130) Ss. 292, 298—*Charge to jury—Confession of accused implicating himself and co-accused—Absence of direction that confession should be corroborated—Misdirection.*

Where a Sessions Judge charged the jury as follows:—"It is a rule of law that, where a person confesses a crime and implicates himself, if he implicates the persons who have been tried along with him to the same extent as he implicates himself, then if you accept his statement as being true and voluntarily given as against himself, you can safely accept it as true as against the other persons."

Held, that, as the Judge did not caution the jury that such confessions should be corroborated

Crim. Pro. Code—(Continued).

before it could be accepted, it amounted to a misdirection. *In re Giddigadu*, 9 Cr. L. J. 404=1 Ind. Cas. 867=33 M. 46.

BENSON and SANKARAN NAIR, JJ.

References:—7 M.H.C.R. App. 15; 1 M. 163; 4 C. 483 (F.B.), R.

(130-a) S. 293—See No. 64, *supra*.

(130-b) S. 294—See No. 61, *supra*.

(131) S. 297—*Jury, trial by—Misdirection—Three persons accused of culpable homicide—Deceased dying of fatal injury received in a fracas—One accused pleading alibi—Omission of this fact in summing-up—Judge directing jury to find all accused guilty if injury caused by one—Penal Code (Act XLV of 1860), S. 34.*

In a trial by jury, the Judge in charging the jury said: "If you hold it proved that the three accused all set upon Gulam Husain with the intention of beating him and that one of them struck the fatal blow; you will be justified in finding them all guilty of culpable homicide not amounting to murder, even if there is no evidence to show which of the three struck the blow" and then read and explained to them the provisions of S. 34 of the Penal Code:

Held, that the Judge misdirected the jury in stating that any one of the accused might be found guilty of culpable homicide, even though his individual intention and the common intention was merely to beat.

One of the accused denied his presence at the scene and was supported in his statement by evidence. In summing up evidence, the Judge omitted to make all mention of this fact.

Held, that the omission of this part of the case constituted a misdirection. *Emperor v. Murid*, 11 Cr.L.J. 15=4 Ind. Cas. 608; 3 S.L.R. 125.

CROUCH, A.J.C., and KNIGHT, A.J.C.

(132) S. 29.—*Direction to jury—Failure to explain the law to the jury—Omission to explain the definition of robbery.*

When, in a sessions trial, the accused are charged with robbery, the omission on the part of the Judge to explain to the jury the meaning of the term robbery vitiates the trial, and a re-trial should be ordered in the case.

Under S. 297, Crim. Pro. Code, the Judge must explain to the Jury the law by which they are to be guided. *In re Suratti*, 6 Ind.

Crim. Pro. Code—(Continued).

Cas. 14=11 Cr. L. J. 222=8 M.L.T. 82=7
Ind. Cas. 401=11 Cr. L. J. 482.

MILLER and MUNRO, JJ.

References:—30 M. 44; 5 M.L.T. 399;
5 Cr. L.J. 78, F.

(132-a) S. 297—See No. 131, *supra*. •

(133) Ss. 297, 423 (2)—*Jury—Misdirection—Error in summing up—Non-direction when misdirection—Reference to arguments of pleaders.*

The expression "misdirection," as used in the Crim. Pro. Code, includes not only an error in laying down the law by which the jury are to be guided, but also an error in summing up the evidence (a).

In summing up it is open to the Judge to refer the jury to the arguments of pleaders; but he should not omit matters of prime importance. A non-direction is not a misdirection unless it is on a matter of prime importance; and especially if it tells in favour of the accused. **Imperator v. Minhwasayo**, 11 Cr. L.J. 13=4 Ind. Cas. 597; 3 S.L.R. 102.

PRATT, A.J.C. and CROUCH, A.J.C.

Reference:—(a) 5 B.H.C.R. 85, 94, F.

(134) Ss. 297, 537 (d)—*Charge to the Jury—"Laying down the law" what is—Effect of failure—Misdirection—Whether defect cured by S. 537 (d).*

Where the Sessions Judge, both before and after summing up the evidence, placed certain questions of fact before the jury and directed them that, if they found certain facts proved, they were to convict, and that, if, on the contrary, they found certain other facts proved, they were to acquit, *held*, (*Ormond, J., dissenting*) there was no laying down of the law as required by S. 297, that the essential elements of the offence with which the accused was charged ought to have been explained, and that there was therefore a grave misdirection which would not be cured by S. 537 (d). **Briscoe Birch v. King-Emperor**, 5 L.B.R. 149.

FOX, C.J., ORMOND and ROBINSON, JJ.

References:—25 M. 61 and 3 L.B.R. 75, R.

(134-a) S. 298—See No. 130, *supra*.

(134-b) Ss. 326, 537—Person not summoned to act as assessor acting as such—Defect in constitution of Court—Material irregularity. See **ASSESSOR**, No. 1, 13 O.C. 337.

(135) Ss. 337 and 339—*Tender of pardon—Fulfilment of condition by witness by making*

Crim. Pro. Code—(Continued).

true disclosure—Contradictory statement subsequently made in another case—Forfeiture of pardon—Committal to Sessions—Trial and conviction—Tender of pardon, a plea in bar of trial—Duty of jury in a jury case to decide the issue—Recantation whether amounts to giving false evidence and works a forfeiture of the pardon.

During the preliminary enquiry into a certain dacoity case, A was tendered a pardon under S. 337. He accepted the pardon and, when examined as a witness in the case, made a full and true disclosure of what was known to him in connection with the dacoity. But a few days afterwards, while he was examined as a witness in another case connected with the same transaction, he made a statement which was totally contradictory of the evidence given by him in the previous case. A was therefore recalled by the Magistrate before whom the first statement was made, and, when further examined, he adhered to the statement made in the other Court. He was then committed to the Sessions on a charge of having taken part in the dacoity and was convicted.

A appealed on the ground that, the condition on which the pardon was granted having been fulfilled, the pardon could not be subsequently revoked, and that his resiling from the first statement would not work a forfeiture of the pardon, and also contended that, had he been examined at the trial in the Sessions Court, he was prepared to adhere to the first statement, and that opportunity ought to have been given him of doing so.

Held, that the prosecution was not bound to examine the accused as a witness in the Sessions Court, after he has resiled from his original statement before the Magistrate and thereby shown that he was a witness on whose evidence no reliance could be placed (a).

Held also, when a person has been pardoned and has afterwards been placed on his trial for the offence, on an allegation that he has forfeited the pardon, it is open to him to plead the pardon in bar of the trial, and the Court (*i.e.*, the jury in a jury case, and the Judge in other cases) must first try the issue as to whether the accused has, in fact, forfeited the pardon (b).

Held further, that a witness who, after accepting a tender of pardon, makes a full and true disclosure, is not at liberty to subsequently

Crim. Pro. Code—(Continued).

contradict his statement or deny its truth, without any fear of forfeiting his pardon; that as A, in the present case, after having made a true disclosure, had at a late stage recanted, the recantation amounted to giving false evidence within the meaning of S. 339 and worked a forfeiture of the pardon (c). *In re Alligiri-sami Naicken*, 7 M.L.T. 121=5 Ind. Cas. 831.

BENSON and SANKARAN NAIR, JJ.

References:—(a) 24 M. 321, F. (b) 30 B. 611, R. (c) 32 M. 173, F.; and 24 M. 321, R.

(135-a) S. 339—See No. 135, *supra*.

(136) S. 342—Lengthy examination of accused before prosecution evidence is over—Legality. See PENAL CODE, No. 55, 1 P.W.R. 1910 (Cr.).

(136-a) S. 342—See No. 71, *supra*.

(137) S. 345—Compounding of offence before police—Effect—Subsequent trial—Legality. See PENAL CODE, No. 97, 22 P.L.R. 1910.

(137-a) S. 349—See No. 11, *supra*.

(138) Ss. 350, 145—Case under S. 145—Enquiry—Evidence partly recorded by one Magistrate and partly by another.

S. 350, Crim. Pro. Code. is in its terms wide enough to cover every trial or enquiry under the Code, and the proceedings under s. 145 is an enquiry, because in it the Magistrate's duty is to enquire who is in possession of the disputed area.

Therefore, the terms of S. 350 apply wherever a Magistrate has ceased to exercise jurisdiction therein. *Anu Sheikh v. Jitu Sheikh*, 7 Ind. Cas. 54 (Cr.).

HARRINGTON and TEUNON, JJ.

(138-a) S. 354—See No. 10, *supra*.

(139) S. 360—Deposition irregularly recorded—Effect—Witness acknowledging correctness of deposition—Conviction for perjury—Validity.

A deposition irregularly recorded without compliance with the provisions of S. 360, Crim. Pro. Code, is not necessarily to be treated as a nullity for all purposes, even as against the man who made it and who has admitted that it represents what he said. If the deposition has been read over to the witness and he has admitted it to be correct, a conviction for perjury may be upheld, though the reading over was not in the presence of the Judge, the accused and the pleaders on both sides. *In re*

Crim. Pro. Code—(Continued).

Bogra, 8 M.L.T. 117=7 Ind. Cas. 414=11 Cr. L.J. 482.

MILLER, J.

References:—23 M. 308, Diss.; 2 Weir 435, R.

(139-a) S. 364—See No. 72, *supra*.

(139-b) S. 367—See No. 22, *supra*.

(140) Ss. 367 and 424—Appeal—Judgment, contents of—Charges of theft and unlawful assembly—Ss. 379 and 143, Penal Code—Points for determination.

The judgment of any appellate Court other than a High Court must, under S. 367 read with S. 424, Crim. Pro. Code, contain, among other things, the point or points for determination, the decision thereon and the reasons for the decision.

In case of a charge under S. 379, Penal Code, one of the points for determination is, whether there was a dishonest intention on the part of the person taking away the property, especially when the taking away of the property is admitted and the accused sets up a *bona fide* claim of right thereto. And in case of a charge under S. 143, I.P.C., one of the points for determination is, whether there was an unlawful assembly, and the judgment should therefore contain a statement as to the presence of the conditions which constitute the unlawful assembly in the particular case. *Ram Lak Singh v. Hari Charan Ahir*, 37 C. 194=11 C.L.J. 410=5 Ind. Cas. 999=11 Cr. L. J. 348.

JENKINS, C.J. and CHATTERJEE, J.

(141) S. 367(5)—Conviction for offence punishable with death—Not passing sentence of death, reasons to be assigned for.

Under S. 367 (5), the Sessions Judge should state his reasons for not passing sentence of death, in a case in which he convicts an accused person of an offence punishable with death. *In re Kurumba Hosakeri*, 8 M.L.T. 81=7 Ind. Cas. 397=11 Cr. L.J. 481.

MILLER and MUNRO, JJ.

(141-a) S. 397—See Nos. 15 and 32, *supra*.

(142) S. 403—Acquittal—Some accused charged with others—Acquitted in previous trial—Whether bars trial of others subsequently captured—Same transaction—High Court—Powers of interference.

Where some out of several persons charged with offences under Ss. 148, 326 and 302, I.P.C., were placed on trial and acquitted, and

Crim. Pro. Code—(Continued).

where subsequently five others implicated in the same transaction were captured and put upon their trial.

Held, that the acquittal under S. 403, Crim. Pro. Code of the accused who were tried previously, is no bar for the trial on the same charges of the persons subsequently arrested.

Where, in the first trial, the Sessions Judge, having disbelieved the evidence, acquitted the accused and expressed an opinion that the facts and circumstances suggested to him a very strong doubt as to the truth of the prosecution story, but nevertheless came to the conclusion that a riot did take place in which one person was killed, the High Court refused to interfere with the pending prosecution of the persons who were subsequently captured and put upon trial (*a*). **Kokal Sardar v. Mehar Khan**, 37 C. 680.

HARRINGTON and HOLMWOOD, JJ.

Reference :—(*a*) 17 C.W.N. 493, D.

(142-*a*) S. 403.—See Nos. 105, 110 and 117, *supra*.

(143) Ss. 403, 236—*Acquittal of accused of an offence under S. 149 (Penal Code), whether bars subsequent trial of accused for an offence under S. 211, Penal Code.*

Where the accused was tried and acquitted of an offence under S. 182, Penal Code, *held*, the acquittal is no bar to the subsequent trial of the accused for an offence under S. 211, I.P.C., since those offences are essentially distinct (*a*) and Ss. 236 and 403, Crim. Pro. Code, have no application because in this case there has been no doubt as to which of the offences has been committed, and there could have been no charge in the alternative. **Thakar Singh v. Chatter Pal**, 20 P.R. 1910 (Cr.) = 30 P.W.R. 1910 = 6 Ind. Cas. 944 = 11 Cr. L.J. 420.

SCOTT-SMITH, J.

References :—(*a*) 32 C. 180 and 31 B. 204, R.

(144) Ss. 408 and 562, 439 (5)—*Conviction for theft and release under S. 562 upon probation of good conduct—Whether appeal lies against—Whether the proceedings can be revised under S. 439.*

Where A was convicted of theft on a regular trial held by a first-class Magistrate and was released upon probation of good conduct under S. 562, *held*, an appeal lies under S. 408 against a conviction without a sentence under S. 562 (*a*), and the proceedings by way of revision cannot be entertained under S. 439 (5).

9 Cr.

Crim. Pro. Code—(Continued).

Ma Chit Su v. King-Emperor, 5 L.B.R. 129 = 4 Ind. Cas. 1027 = 11 Cr. L.J. 162.

PARLETT, J.

References :—(*a*) 1 U.B.R. (1904—1906) and 7, 39 B.R. 64, F.

• (144-1) Ss. 410, 4 (*j*)—*European British Subject in Oudh—Appeal—Jurisdiction. See EUROPEAN BRITISH SUBJECT*, No. 1, 13 O.C. 385.

(144-*a*) S. 421—*Summary dismissal of appeal—Discretion, exercise of—Circumstantial evidence, conviction based on—Revision by High Court—Evidence Act, S. 27—Statements made by accomplice elsewhere than before the Court, admissibility of.*

Although it is not required by law that a Sessions Judge should write a regular judgment when exercising the powers of summary dismissal given to him by S. 421, Cr. P.C., still the matter being one for discretion on the part of the subordinate appellate Courts, it is very important that such discretion should be exercised upon sound and reasonable lines.

Where a conviction is based upon circumstantial evidence, the question always remains whether the evidence which has been believed by the Court which heard it is of such a nature that it ought to have been accepted as establishing the guilt of the accused person beyond reasonable possibility of doubt, and that is a question which may be dealt with by a High Court upon an application for revision.

Held further, that S. 27, Evidence Act, is a proviso to the preceding sections which deal with what may or may not be proved as against the person making a confession. It has nothing whatever to do with what may or may not be proved as against other persons, when the person who made the alleged confession is not himself on his trial but is appearing as a witness in the case.

Held also, that hearsay evidence of any statement whatsoever, made at any time, under any circumstances, by any accomplice, cannot be produced as against the accused before the Court. Statements made by an accomplice elsewhere than before the Court and not in the presence of the accused can be proved only to corroborate, to contradict or to impeach the credit of the accomplice. In no case can they be put forward as substantive evidence of the truth of the facts therein stated. **Aman Ali v. King-Emperor**, 13 O.C., p. 309.

PIGOTT, J.C.

Crim. Plo. Code—(Continued).

(144-b) S. 422. See No. 125, *supra*.

(144-c) S. 423. See No. 157, *infra*.

(144c-i) S. 423 (b) (2)—*Powers of appellate Court.*

In this case the charge against the accused was under Ss. 148 and 325, I.P.C. The Magistrate acquitted the accused under S. 148 but convicted them under S. 325. The accused then appealed to the Sessions Judge who was of opinion that the accused should have been convicted under S. 147, I.P.C., but thought he could not interfere with the acquittal.

Held that the appellate Court may alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction. **Appanna v. Pethani Mahalakshmi**, 8 M.L.T. 313.

MUNRO and KRISHNASWAMI IYER, JJ.

Reference :—23 C. 975, *Appr.*; 27 C. 566, *D.*; 26 M. 478, *Diss.*

(141-d) S. 423 (1) (d)—See No. 126, *supra*.

(141-e) S. 423 (2)—See No. 133, *supra*.

(145) Ss. 423, 237, 238—*Alteration of finding—Power of appellate Court under S. 423—How to be exercised—Power to find accused guilty of abetment, on a charge of principal offence.*

No doubt under S. 423, Cr. P.C., the appellate Court has power to alter a finding, but the power cannot be used arbitrarily, but only in accordance with the other provisions of the Code to be found in Ss. 237, 238 thereof.

It is not open to a Court to find a man guilty of the abetment of an offence, on a charge of the offence itself. **In re Pandmanabha Panji Kannaya**, 7 M.L.T. 79=5 Ind. Cas 145=11 Cr. L.J. 49=20 M.L.J. 84.

MUNRO and ABDUR RAHIM, JJ.

Reference :—11 Bom. H.C.R. 240, *applied*.

(145-a) Ss. 423, 435, 437—*Re-trial of accused after conviction—Inapplicability of sections—New trial when properly ordered—Want of jurisdiction—Misjoinder—Superficial enquiry.*

Ss. 435 and 437 do not empower a Court, in an appeal from a conviction, to order a re-trial of the appellant.

The power of ordering a re-trial under S. 423 of the Cr.P.C., should be exercised with discretion. A re-trial may properly be ordered, when the original trial is void for want of jurisdiction or for misjoinder or when the enquiry has been

Crim. Pro. Code—(Continued).

obviously superficial and material witnesses have not been examined.

A re-trial should not be ordered with the object of enabling the prosecution to fill up deficiencies in the evidence of the prosecution. **Hamdu Meah v. Emperor**, 8 Ind. Cas. 594 (Cr.).

MOORE, J.

(145-a-i) S. 424. See Nos. 22 and 140, *supra*.

(145-b) S. 428. See No. 95, *supra*.

(145-c) Ss. 428, 423—*Duty of appellate Court—Admission of additional evidence—Reliance upon matters not in evidence before appellate Court—Effect.*

The Sessions Judge in appeal, acting under S. 428, might take additional evidence or order it to be taken by the Magistrate, but he must record his reasons for admitting additional evidence and comply with the provisions of Ch. XXV as if the taking of such evidence was an enquiry.

An appellate Court should not rely upon matters which are not in evidence before it. **In re Chinthalapudi Kotiah**, 8 M.L.T. 428.

ABDUR RAHIM, J.

(145-d) Ss. 428, 540—*Power of appellate Court to take additional evidence—Penal Code, S. 411—Dishonestly receiving or retaining stolen property—Article of small value—Recent possession—Burden of proof—Evidence Act, S. 111 (a).*

The powers of a Criminal Appellate Court, under S. 428 of the Cr.P.C., are not analogous to those conferred on a Civil Appellate Court under S. 568 of the Cr. P.C. (1892). A Court of criminal appeal can take additional evidence at any time; only it must record its reasons for so doing.

Where the accused was convicted under S. 411, I.P.C., of having been in dishonest possession of stolen property, *viz.*, a copper vessel, which was discovered seven months after its loss.

Held, that the conviction was bad, as the *onus* was on the prosecution to prove guilty knowledge, and the failure of accused to account for his possession did not relieve the prosecution of the burden of proving that his possession was dishonest. **In re Bhami Luxuman Shanbaga**, 8 M.L.T. 418.

ABDUR RAHIM, J.

1 **Crim. Pro. Code—(Continued).**

(146) S. 429—Opinion of third Judge when to be obtained. See ACT VII OF 1908 (NEWS-PAPERS), No. 1, 12 C.L.J. 294.

(147) S. 435—*High Court—Criminal revision jurisdiction—Penal Code, S. 124-A—Sedition—Attempt to publish seditious—Intention in seditious is a question of fact.*

It is the settled practice of the High Court to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as mis-statement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence (a).

To constitute an attempt punishable under the Penal Code, all that is necessary is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish seditious is complete as soon as the copy containing it is sold. It is none the less an attempt because something external to the accused happened, which prevented a perusal of the article by the buyers or any other member of the public.

In offences punishable under S. 124-A, Penal Code, the question of intention is one of fact.

Held, on construction of the article in question, that its object and intention was to bring the Government contemplated by S. 124-A into hatred and contempt. **Emperor v. Ganesh Balwant Modak**, 12 Bom. L.R. 21=5 Ind. Cas. 612=11 Cr. L.J. 180.

CHANDAVARKAR and HEATON, JJ.

(148) S. 435—Fine imposed by Joint Magistrate under Beng. Reg. VI of 1825—Power of Sessions Judge to make reference. See REGULATION (VI OF 1825, BENGAL), No. 1, 7 A.L.J. 989.

(148-a) S. 435—Revisional powers. See ACT IV OF 1890 (BOMBAY DT. POLICE) No. 1, 12 Bom. L.R. 1029.

(148-b) S. 435. See No. 127, *supra*.

(149) Ss. 435, 439—Conviction for two offences—Conviction for one offence set aside without reduction of the sentence—Effect.

Held that, where the accused has been convicted for two offences, and an appeal the conviction for one is set aside, there must be a reduction of the sentence, except where the Magistrate did not mean to pass any sentence

Crim. Pro. Code—(Continued).

for the offence, the conviction for which has been set aside. *In re Marl and others*, 7 M. L.T. 81=6 Ind. Cas. 754.

MILLER, J.

(150) Ss. 435, 439—Appeal—Disposal by appellate Magistrate on prosecution evidence only—Legality.

Where an appellate Magistrate dealt with the prosecution evidence only, and did not even allude to the evidence of the defence or the nature of the defence, *held*, that the Magistrate did not give the evidence the consideration which he was bound to give it, and that his order ought to be set aside.

If the appellate Magistrate gives a judgment, which makes it appear probable that he has not fully heard and considered the appeal, his disposal of the appeal ought not to be allowed to stand. *In re Superumal Udayan and others*, 7 M.L.T. 182.

MILLER, J.

Reference :—35 C. 138, R.

(151) Ss. 435, 439—Administrative circular of a District Magistrate—Prohibiting uncertificated pleaders from practising in the Criminal Courts of the District—Procedure for aggrieved party.

A circular by a District Magistrate, prohibiting uncertificated pleaders from practising in the Criminal Courts in his District, is not open to revision by the High Court. The proper course for the pleader, who has been refused appearance in the particular case by a Magistrate in pursuance of such circular, is to apply for the revision of the illegal or improper order of the Magistrate refusing to allow him to appear. **Chinnasawmy Iyer v. Emperor**, 4 Ind. Cas. 876 (Cr.) - 19 M.L.J. 566=11 Cr. L.J. 69.

BENSON, O.C.J. and ABDUR RAHIM, J.

(152) Ss. 435, 439—High Court's power under. See ACT II OF 1907 (EASTERN BENGAL AND ASSAM), No. 1, 14 C.W.N. 404.

(153) S. 437—Power of appellate Court to take further evidence—Sessions Judge referring to documents not on the record of Magistrate's proceedings. See APPEAL (GENERAL), No. 2, 6 Ind. Cas. 12.

(153-a) S. 437—See No. 29, 105, 122, 126 (b) and 127-A, *supra*.

(154) S. 438—Offences not exclusively triable by Court of Session, disclosed in preliminary enquiry—Commitment—Whether ought to be quashed.

Crim. Plo. Code—(Continued).

The fact that the offences disclosed by the evidence taken at the preliminary enquiry are not exclusively triable by a Court of Session is no ground for quashing a commitment. *In re The Sessions Judge of Trichinopoly*, 7 M.L.T. 186=5 Ind. Cas. 992=11 Cr. L.J. 339.

MILLER, J.

(155) *S. 438—Commitment to Court of Session of some accused—Other accused not arrested—Whether commitment to be quashed.*

The mere fact that the accused who have been committed to the Court of Session were acting in concert with those who have not yet been arrested is no reason for quashing the commitment; nor the inconvenience, if any, which will be caused by the trial in the Sessions Court of the accused already committed, before that of others, is of serious importance, *In re Ramasami and others*, 7 M.L.T. 187.=5 Ind. Cas. 993=11 Cr. L.J. 339.

MILLER, J.

(155-a) *S. 438.* See Nos. 105 and 122-A, *supra*.

(156) *S. 439—Revision—Power of Court to give leave to compound.*

The power conferred on a Court exercising its powers of revision are wide enough to allow to give leave to the parties to compound an offence. *Ram Piyari v. King Emperor*, 7 A.L.J. 103=5 Ind. Cas. 696=11 Cr. L.J. 203=32 A. 153.

KNOX and KARAMAT HUSAIN, JJ.

(156-a) *S. 439—Sentence, enhancement of—Defamation—Unjustifiable and calculated to incite resentment between communities—Nature of punishment—Lapse of time—Imprisonment—Not necessary.*

Where the accused, in reply to a private notice to show cause why he should not be excommunicated from the Khoja Panjibhai community, published, in two newspapers conducted by him, a violent attack declaring that excommunication was merely a prelude to the murder and assassination of seceders to the Khoja Pirai community, and where the publication was found by the Courts not only to have been unjustifiable, but also to have been calculated greatly to enhance the fanatical resentment of the Khoja Panjibhai community, against seceders to the Khoja Pirai community, held that, on conviction, a sentence of a fine of Rs. 400 was inadequate, and that, in view of the lapse of over three years after the offending publication, a substantive sentence of imprison-

Crim. Pro. Code—(Continued).

ment was unnecessary, but that an enhanced fine of Rs. 1,000 would be sufficient. *Hoosaini Allahrakhio v. Jaffar Fadu*, 4 S.L.R. 86.

HAYWARD, J.C., and CROUCH, A.J.C.

(156-b) *S. 439.* Power of High Court to interfere in a pending case. See ACT VI OF 1882 (COMPANIES), No. 1, 35 P.W.R. 1910 (Cr.).

(156-c) *S. 439.* See Nos. 19, 20, 55, 56, 98, 105, 127, 127-A, and 149 to 152, *supra*.

(156-d) *S. 439 (5).* See No. 144, *supra*.

(157) *Ss. 439, 423—Revision, power of High Court in—Conviction, setting aside of, on compounding of the offence—Penal Code, (Indian), Ss. 323 and 114.*

The applicant was convicted by a Magistrate under S. 109 read with S. 325, Penal Code. On 11th April, 1910, the Sessions Judge on appeal altered the conviction to one under S. 323 read with S. 114 of the Code, but maintained the sentence passed by the Magistrate. The Sessions Judge at the end of his judgment recorded "that no application for permission to compound has been made nor has it been stated that the complainant is willing to compound." On 13th April, 1910, the present application for revision was made on the ground that the complainant is willing to compound the offence but no opportunity was given by the Judge for the purpose. Simultaneously with this an application was put in by the complainant stating that the dispute had been compromised and asking the Court to allow the offence to be compounded.

Held, that under S. 439 read with S. 423 of the Crim. Pro. Code the Court has power to pass any order that may be just and proper, and the offence having been compounded the conviction should be set aside. *Ram Sarup v. King Emperor*, 13 O.C. 161=7 Ind. Cas. 539 11 Cr. L.J. 496.

EVANS, J.

(158) *Ss. 439 and 476—Proceedings of Court taking action under S. 476—Revision by High Court—Jurisdiction.*

The High Court, as a Court of Revision, has power under S. 439, to interfere, on grounds other than want of jurisdiction, when a Criminal Court has taken action under S. 476. *In re Narayan Somaya Jipad*, 6 M.L.T. 327 (F.B.)=33 M. 48.

BENSON, O.C.J., MILLER, MUNRO, SANKARAN NAIR and ABDUR RAHM, JJ.

References:—26 M. 98, overruled; 21 M. 124, R.

Crim. Pro. Code—(Continued).

(158-a) S. 447. See No. 71, *supra*.

(158-b) S. 450. See No. 71, *supra*.

(158-c) S. 454. See No. 71, *supra*.

(159) S. 476—*Stay of Criminal Proceedings pending civil suit between the parties—Ordinary prosecution under Ss. 182 and 211, Indian Penal Code—Report to Police of theft when no theft took place—Suspicion against opposite party.*

The petitioner laid an information to the Police to the effect that there had been a burglary in his house. The Magistrate directed judicial enquiry by a Deputy Magistrate who came to the conclusion that the report of burglary was false and submitted his report to the Magistrate who ordered the prosecution of the petitioner under S. 211, Indian Penal Code. That order was set aside by the High Court, as being made without jurisdiction, and the record was returned to the Deputy Magistrate who again enquired into the matter and ordered the prosecution of the petitioner under Ss. 182 and 211, Indian Penal Code.

Held, that this order is illegal under S. 476, Criminal Procedure Code (a).

No hard and fast rule can be laid down to the effect that a criminal trial or enquiry should of necessity be stayed simply because a civil suit has been instituted between the parties in which some or all the matters materially in issue in the criminal case would have to be determined, until the civil litigation was finally decided (b).

A Court may well hesitate to give sanction to a private individual to prosecute his adversary for an offence alleged to have been committed during the pendency of a civil litigation. But it is very desirable in the ends of justice that when a competent Court has taken upon itself the responsibility of ordering a prosecution under S. 476, Crim. Pro. Code, that that prosecution should be entertained as speedily as possible while the evidence on both sides is fresh (c).

Where the petitioner reported to the Police the fact of a theft having taken place in his house, and although he did not name any one as being the actual offender, yet he stated his suspicion that the opposite party had instigated it, and it was found by the Court that as a matter of fact there was no theft at his house as alleged by him.

Held, that the Court was quite justified in ordering the prosecution of the petitioner under

Crim. Pro. Code—(Continued).

Ss. 182 and 211, Indian Penal Code. **Brojobashi Panda v. Emperor**, 11 Cr.L.J. 4—4 Ind. Cas. 485; 13 C.W.N. 398.

HOLMWOOD and RYVES, JJ.

References :—(a) 34 C. 551; 11 C.W.N. 568; 3 C.L.J. 508; 5 Cr.L.J. 398; 2 M.L.T. 298; 31 M. 140; 7 Cr.L.J. 54; 3 M.L.T. 79 (F.B.); 17 M.L.J. 584, R. (b) 34 C. 848; 11 C.W.N. 712; 5 Cr.L.J. 480; 6 C.L.J. 531, R. (c) 35 C. 909; 8 Cr.L.J. 435, *F.

(160) S. 476—*Judicial proceedings—Proceedings by a Revenue Officer as distinguished from a Revenue Court—Land Revenue Act (III of 1901), Ss. 4 (9) and 46.*

Where, under orders of the Deputy Commissioner, a Deputy Collector made inquiries, which resulted in the finding that the applicant was in the habit of giving no receipts for rents received and did not record the correct realizations in the Patwari's papers, and the Deputy Collector thereupon passed an order under S. 476, Crim. Pro. Code, directing that proceedings under S. 177, Indian Penal Code, should be instituted against the applicant, *held*, that the inquiry was one under S. 46 of the Land Revenue Act, and the Deputy Collector in making the inquiry was acting merely as a Revenue Officer as defined in S. 4 (9) of U.P. Act III of 1901, and not as a Revenue Court, nor were his proceedings judicial proceedings within the meaning of S. 476, Crim. Pro. Code. The order passed by the Deputy Collector was therefore without jurisdiction and must be set aside. **Prag Tewari v. King-Emperor**, 13 O.C. 198.

EVANS, J.

(160-a) S. 476. See Nos. 2, 33, 65, 96, 97, 98, 99 and 158, *supra*.

(161) Ss. 476, 4 (m)—*Execution proceeding, resisting process in—Report to Munsif—Order for prosecution by his successor in office—"Court" meaning of—Execution proceeding if "Judicial proceeding"—Order under S. 476 to be promptly made.*

The word "Court" in S. 476, Cr. P.C., is to be understood as bearing its natural meaning, with the sense of continuity this implies notwithstanding any change of officers.

An execution proceeding is a "judicial proceeding" within the meaning of S. 476 of the Code, the definition in S. 4 cl. (m) being clearly not exhaustive.

Crim. Pro. Code—(Continued).

Action under S. 476, Cr. P. Code, should, as far as possible, be prompt and expeditious. **Shaikh Bahadur v. Shaikh Eradutulla Malik**, 14 C.W.N. 799=12 C.L.J. 45=6 Ind. Cas. 801=11 Cr. L.J. 407.

JENKINS, C.J., BRETT, WOODROFFE, MOOKERJEE, HOLMWOOD, SHARFUD-DIN, DOSS, J.J.

References:—34 C. 551; s. c. 11 C.W.N. 568 (1907), *reconsidered*.

(162) S. 476—*Limit of time for passing an order under S. 476 directing the prosecution of a person for an offence under S. 193, I.P.C.*

Where a Sessions Judge passed an order under S. 476, Crim. Pro. Code, directing the prosecution of a person for an offence under S. 193, I.P.C., *held*, the order must be set aside, if there is nothing to show that it was made in such circumstances that it can be said to have been a continuation of the proceedings in which the evidence was given. **In re Ramakrishnamma**, 8 M.L.T. 81=7 Ind. Cas. 398=11 Cr. L.J. 479.

MILLER and MUNRO, J.J.

Reference:—32 M. 49, F.

(162-a) S. 478. See No. 100, *supra*.

(162) S. 488—*Meaning of child*.

Held, that the word "child" as used in S. 488 of Act V of 1898, simply means son or daughter, and reference to age is purposely omitted therein; therefore any son or daughter is entitled to claim maintenance, whatever his or her age may be, so long as he or she is unable to maintain himself or herself. **Bhagat Singh v. The Crown**, 28 P.W.R. 1910.

CHEVIS, J.

(164) S. 488—*Maintenance—Divorce of parents—Children living separately—Husband's remedy*.

Where the parents have divorced and live separately, and the children are in the mother's custody, the husband cannot justly refuse to maintain the children, on the plea that they will not live with him (a).

If the husband wishes the children to live with him, his obvious course is to get an order from the proper authority giving him the custody of them. **Mi Saw v. S—**, U.B.R. 1910 (1st Quarter), 1 (Cr.).

SHAW, J.C.

References:—(a) U.B.R. 1902—03, 1 Cr. P. 7 and U.B.R. 1904—1906, 1 Cr. P. 39, *affirmed*. 16 W.R. 62 (72), R.

Crim. Pro. Code—(Continued).

(165) Ss. 488, 489—*Maintenance does not include schooling fees*.

"Maintenance," as used in Ss. 488, 489 of the Crim. Pro. Code does not include children's schooling fees. **Nga Hla v. Mi Hla Kyu**, 11 Cr. L.J. 40=4 Ind. Cas. 758; U.B.R. 1909, 1 Cr. P. p. 17.

SHAW, J.C.

References:—45 L. J. Ch. 191; 1 Ch. D. 226; 24 W.R. 200, *not followed*; U.B.R. 1897-1901, 37 I, p. 106, R.

(165-a) S. 489. See No. 165, *supra*.

(166) S. 491—*Habeas Corpus—Minor's capacity to bind himself by contract—Whether action lies against minor for breach—Contract with guardian—Remedy on breach—Parental authority—Delegation—Whether revocable—Power of Court to revoke—Welfare, meaning of the term*.

Where the defendant had no personal interest in the children whom the plaintiff sought to be delivered up to himself, or in their services, and no right to their custody, and where the only object of the defendant was to send back the children to their parents or natural guardians, the proceedings should be treated as on *Habeas Corpus* under S. 491, Cr. P.C., for the purpose of determining the custody of the children. A minor may bind himself by a contract of apprenticeship, if it be for his benefit, but no action will lie against him for failing to serve as such. If such a remedy is desired, it is necessary to get a covenant from the guardian on which the guardian himself may be made liable (a).

The delegation of parental authority is revocable at any time, and it is the duty of the parents and guardians to revoke it if used to the detriment of the children. It is also open to the Court, within whose jurisdiction the children are found, to revoke it at any time, if sufficient cause be shown for interference, especially when the parents have it out of their power to interfere themselves for the protection of their children by sending them touring round the world in the custody of strangers.

The main consideration for the Court to be acted upon in the exercise of such power is the benefit or "welfare" of the child. The term "welfare" must be read in the largest possible sense (b). **A.H. Pollard v. F. Rouse**, 8 M.L.T. 47.=6 Ind. Cas. 754=33 M. 288.

WALLIS, J.

References:—(a) (1890) 43 Ch. D. 430, R. (b) (1893) 2 Q.B. 232 (248); (1893) 1 Ch. 143 (148); (1898) 4 A. & E. 643 and (1899) 1 Ch. 719, R.

Crim. Pro. Code—(Continued).

(166-a) *S. 491—Writ of Habeas Corpus—Illegal or improper detention—Powers of father over his daughters—Right to sustain prosecution under S. 361, I.P.C.—Power of Court under S. 491. (2), Cr.P.Code.*

This was an application under S. 491, Cr.P.C., in the nature of a writ of *Habeas Corpus* by a father, M, against his brother N, for the custody of his two daughters in their fourteenth and sixteenth years respectively. M became a sanyasi and relinquished his rights as head of the family to N in 1901. In 1906 he became Brahmo and again lived with his wife and children till the wife's death in 1910. His sons were all along living with his brother N who educated them. The object of the petitioner in obtaining the writ was to prevent the marriage of his daughters before they complete their sixteenth year; there was no question of morality or corruption.

Held that the petitioner is quite free to keep his daughters unmarried till their sixteenth year or even after that age, even though he may put his daughters not only to great inconvenience but to danger of excommunication. The fact that he has become a Brahmo does not affect the matter. He will not thereby lose any rights he had before.

Held also that, if a man *bona fide* goes through the necessary ceremony, renounces his family ties, lives a sanyasi life honestly believing he is a sanyasi, he is not any the less a sanyasi on account of the invalidity of his initiation. *Held* therefore that, as he had previously become a sanyasi, he was not in 1906, when he became a Brahmo, the guardian in Hindu Law of the children.

The facts that M was the *de facto* guardian of the children from 1906 till his wife's death would be sufficient to sustain a prosecution under S. 361, I.P.C., and as against strangers would entitle him to an order for restoration to his custody under S. 491, Cr.P.C.

Held also that S. 491 (1) (b), Cr. P.C., does not apply, as the children have not been illegally or improperly detained.

Where a man has lost his rights when he became a sanyasi, it is not open to him to resume them. The ordinary rule of Hindu Law is that rights once vested are not divested, and he does not regain his status in his natural family he has renounced. **Muthusamy Sastry v. Narayana Sastry**, 8 M.L.T. 300,

SANKARAN NAIR, J.

Crim. Pro. Code—(Continued).

(166-b) *S. 491—Writ of Habeas Corpus—Bombay High Court Rules, r. 794—Court—Discretion—Mahomedan Law—Custody of male children up to seven years—Mother entitled to custody.*

Under Mahomedan Law, the mother is, during the subsistence of marriage, entitled to the guardianship or custody of male children up to the age of seven years. This right of hers survives even separation or divorce.

The underlying principle of every writ of *Habeas Corpus* (and proceedings under S. 491 of the Cr.P.C. of 1898) is to ensure the protection and well-being of the person brought before the Court under that writ. The real interest and well-being of the person ought to be not only the determining but the sole consideration.

S. 491 of the Cr.P.C., leaves it entirely to the discretion of the Court, whether it should or should not direct the person brought before it to be dealt with according to law: where as Rule 794 of the Bombay High Court Rules, in dealing with a person so brought before it, deprives the Court of all further discretion, and commands that, in the absence of cause being shown against the rule, which is a very different thing from allowing the Court to exercise its discretion even where technically the cause is inadequate, it shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody. **Zarabibi v. Abdul Rezzak Nakshbandi**, 12 Bom.L.R. 891.

BEAMAN, J.

(167) *Ss. 494 (a), 537—Withdrawal of prosecution—Formal order of discharge not passed—Accomplice—Evidence—Admissibility—Irregularity.*

The applicants and one Majida were prosecuted for an offence under S. 401, Penal Code. In the course of the trial, but before any charge was framed, the Public Prosecutor withdrew from the prosecution of Majida, and tendered him as a witness against the other accused. As a matter of fact, no formal order of discharge was passed in respect of Majida under S. 494 (a), Crim. Pro. Code.

Held, that, in view of the fact that there had been a valid and effective withdrawal of the prosecution as against Majida, and that his position as a witness could not be adversely affected even though the Court did not comply with the clear provisions of S. 494 (a), Crim.

Crim. Pr. Code—(Continued).

Pro. Code, his evidence as a witness was admissible as against the other accused.

Where an accused person is in fact discharged from custody by virtue of a withdrawal of his prosecution, and the Magistrate trying the case takes judicial notice of such withdrawal, the omission to use the formal words "I discharge this accused" would be at most an irregularity curable by the provisions of S. 537 of the Code. **Muhammad Nur v. Emperor**, 5 Ind. Cas. 21 = 7 A.L.J. 86 = 11 Cr. L.J. 21.

PIGGOT, J.

References :—33 C. 1353 ; 10 C.W.N. 962 ; 4 Cr.L.J. 145 ; 16 B. 661 ; 28 B. 213, D.

(168) Ss. 497, 498—Power to grant bail. See ACT XIV OF 1908 (CRIMINAL LAW AMENDMENT), Nos. 2 and 1, 14 C.W.N. 516 and 512.

(168-a) S. 498. See No. 168, *supra*.

(169) Ss. 514 and 516—Surety bond to produce accused before Sessions Court—Proceeding for forfeiture if may be taken by a Magistrate—Delegation of power—Validity.

Where a surety bond has been executed for the appearance of an accused person before a particular Court, under S. 514 of the Cr. P.C. proceedings to have the bond forfeited can be initiated only by that Court.

S. 516 of the Code does not authorise the delegation of power to initiate forfeiture proceeding. It is only concerned with the power to direct levy of the amount due on a forfeited bond. **Hara Lal Shahu v. The Emperor**, 14 C.W.N. 259 = 2 Ind. Cas. 113 = 10 C.L.J. 248.

JENKINS, C.J. and CASPERSZ, J.

(169-a) S. 516. See No. 169, *supra*.

(170) S. 517—Disposal of property—Order to recipient to produce property when called upon.

An order under S. 517, Crim. Pro. Code, cannot direct the party to whom property is delivered to produce it when called upon to do so. **Yeggu Manikyam v. Emperor**, 4 Ind. Cas. 875 = 19 M.L.J. 516 = 11 Cr. L.J. 68.

MUNRO, J.

(171) S. 517—Accused charged with theft of jewels—Discharge—Delivery of possession of jewels ordered on joint receipt of accused and complainant—Legality.

K charged her daughter R and another with theft of jewels. R was discharged. The jewels were ordered to be delivered on the joint receipt of R and K. It was found that part of

Crim. Pro. Code—(Continued).

the jewels was the self-acquisition of R and the rest formed the joint family property of R and K.

Held, that, under the provisions of S. 517, a Magistrate has jurisdiction to pass an order in favour of the daughter or of the mother or in favour of both, and that, on the finding of the Judge that part of the property was self-acquisition of the daughter and part was joint family property, the order was right. *In re Kanagasabai and Ramamani*, 7 M.L.T. 179 = 5 Ind. Cas. 468 = 11 Cr.L.J. 138.

WHITE, C.J.

Reference :—2 M.H.C.R. 56, D.

(172) S. 523—Magistrate—Order as to delivery of property—Delivery—Disposal.

S. 523 says that a Magistrate may order its delivery, if he thinks fit, to the person entitled thereto. The Magistrate does not decide the question of title, but merely decides the question of possession. The fact that the accused had been in possession of the property when the charge was made is not conclusive. The question is, who is entitled to its possession. **Hushensha Rahima Sha v. Mashaksha Mujafasha**, 12 Bom. L.R. 232 = 5 Ind. Cas. 972 = 11 Cr. L.J. 339.

CHANDAVARKAR and KNIGHT, JJ.

(173) S. 526—Transfer of Criminal case—Failure to give notice of transfer application—Order—Legality.

Although, as a general rule, notice of the application for transfer of a criminal case should be given (a), the failure to give notice does not render an order of transfer illegal. *In re Masha Sabjee Sahib*, 8 M.L.T. 222.

SIR ARNOLD WHITE, C.J. and SUBRAMANIA IYER, J.

Reference :—(a) 26 M. 41, *Ref. to*.

(173-a) S. 526—Transfer—Prejudging a counter case—Sufficient ground.

Where a Magistrate in a counter case has clearly formed an opinion strongly against a party, the High Court will, in the interests of justice, transfer the case to some other Court. **Abdul Aziz Sahib v. Emperor**, 8 Ind. Cas. 721 (Cr.).

MUNRO and SANKARAN NAIR, JJ.

(173-b) S. 526. See Nos. 94 and 100 (a), *supra*.

(174) Ss. 526, 110—Transfer of proceedings under S. 190 to another District—Jurisdiction of Court to which case is transferred.

Crim. Pro. Code—(Continued).

S. 526 enables the High Court to transfer criminal proceedings instituted under S. 110 of the Code, once they have been properly instituted, from one district to another, to a Court of superior or equal jurisdiction, and the order of the High Court will give jurisdiction to the Court to which such proceedings are transferred (a).

A District Magistrate admitted, in his reply to an application for transfer of a case, that he had taken a keen personal interest in the case and was satisfied of the applicant's guilt; *held*, that this was sufficient to arouse in the minds of the applicant a reasonable apprehension that he would not have a fair and impartial trial in the district. **Wahid Ali Khan v. King-Emperor**, 7 A.L.J. 818—6 Ind. Cas. 874 = 11 Cr. L.J. 412.

TUDBALL, J.

Reference :—16 A. 9, *not F.*

(174-a) S. 526 (8)—(Grounds of transfer. See TRANSFER OF CASES. No. 1, 4 S.L.R. 42.

(174-b) S. 528—See No. 83, *supra*.

(174-c) S. 528 (3)—See No. 4, *supra*.

(174-d) S. 531—See No. 77, *supra*.

(174-e) S. 532—See No. 71, *supra*.

(174-f) S. 535—See Nos. 109 and 118, *supra*.

(174-g) S. 537—See Nos. 5, 109, 112, 114, 118 and 167, *supra*.

(174-h) S. 537 (d)—See No. 134, *supra*.

(175) S. 550—*Appen'—Acquittal—Enhancement of sentence—First report—High Court's power to acquit an innocent person without appeal.*

Held that :—

(1) The initial report of an offence to the Police is always of great importance in every criminal case. Where it has been made a considerable time after the occurrence and by a person who is in a position to know all the facts and persons concerned, no person should be convicted whose name is not mentioned therein as one of the offenders, particularly when there is no likelihood of his name being omitted.

(2) A severe sentence is not called for where an offence has been committed on a considerable provocation caused by an unjustifiable act.

(3) Enhancing a sentence is not permissible when the convicted person has duly served the sentence before the application for enhancement is preferred (a).

10 Cr.

Crim. Pro. Code—(Continued).

(4) S. 550 of Act V of 1898, no doubt, give the Police very wide powers with regard to the seizure of cattle alleged or suspected to have been stolen, but it does not extend to the taking away other cattle, simply because they are mixed up with the stolen ones.

(5) The High Courts, when dealing with cases in appeal or revision, are competent to acquit an innocent person, although he has failed to exercise the right of appeal.

(6) It is no doubt the duty of the Courts to uphold the acts of the executive and ministerial officers, but it is equally their duty to keep a jealous eye upon these acts and to see that nothing done contrary to law under the cloak of authority. **The Crown v. Sada**, 14 P.W.R. 1909 (Cr.) = 4 Ind. Cas. 980 = 11 Cr. L.J. 99.

RATTIGAN and SHAH DIN, JJ.

Reference :—7 P.R. 1889 (Cr.), *F.*

(176) S. 556—*Magistrate ordering prosecution as president of octroi sub-committee—Personally interested—Jurisdiction.*

A Magistrate, as the president of octroi sub-committee, ordered the prosecution of the accused, and, with the consent of the accused, tried the case himself. *Held*, that the Magistrate must be deemed to have been personally interested within the meaning of S. 556, Crim. Pro. Code, and was not qualified to try the case of the applicant, whose consent could not confer jurisdiction upon him. **Bisheshar Bhattacharya v. King-Emperor**, 7 A.L.J. 749.

CHAMIER, J.

(176-a) S. 556—See Nos. 38 and 61, *supra*.

(177) S. 562—*Applying this section to S. 457 of the Indian Penal Code (Act XLV of 1860)—Revision.*

Held, that, although S. 562, Crim. Pro. Code, cannot properly be used in cases falling under S. 457, I.P.C., yet, where it has been wrongly applied by a Magistrate, it is optional for the High Court on revision side to interfere or not, as it thinks fit upon a consideration of all the circumstances, with the discretion thus used by the Magistrate. **Abdul v. The Crown**, 19 P.W.R. 1910 (Cr.).

JOHNSTONE, J.

(178) S. 562—See No. 144, *supra*.

(179) S. 565—I.P.C. (Act XLV of 1860), S. 75—*Whipping Act (IV of 1909)—*

Crim. Pro. Code—(Concluded).

Sentence of whipping—Order for notifying address of previously convicted offender.

The order contemplated by S. 565 of the Crim. Pro. Code., can only be passed where the convict is sentenced either to transportation or imprisonment. The section does not extend to cases where the Court, instead of passing that sentence, passes a sentence of whipping. **Emperor v. Fulji Ditya**, 12 Bom. L.R. 901.

BATCHELOR and RAO, JJ.

(180) S. 565—*No previous conviction—Order to notify residence—Legality.*

Where there is no previous conviction, an order directing the accused to notify his residence is illegal and must be set aside. **Kottaparambil Kunhammad v. Emperor**, 8 M.L.T. 352.

SANKARAN NAIR, J.

Crim. Pro. Code (Mysore).

(1) Section 4 (r)—Mukhtar.

When a Magistrate is of opinion that the interests of a party justify the appointment of an uncertificated criminal 'mukhtar,' permission to appear and act should not be arbitrarily withheld. **In re K. Yasudeva Rao**, 15 M.C.C.R. 231 (Cr.) (F.B.).

• STANLEY ISMAY, C.J., KRISHNA RAO, J., and CHANDRASEKHARA AIYAR, OFFG. J.

(1-a) S. 195—*Sanction to prosecute—Appeal.*

An appeal from an order made by a Munsiff under S. 195 of the Code of Criminal Procedure lies to the Court of the District Judge, and cannot legally be referred for disposal to the Court of the Subordinate Judge. **Koti Setty v. Baltu Mindoss**, 15 M.C.C.R. 73 (Cr.).

STANLEY ISMAY, C.J.

(1-b) S. 195—*Sanction to prosecute.*

The sanction referred to in S. 195 should not ordinarily be given to a person who has no concern with the offences alleged (a). **Yirachari v. Government of Mysore**, 15 M.C.C.R. 263 (Cr.).

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

Reference :—(a) (1909) 14 Mysore C.C.R. 103, F.

(2) S. 197—*Meaning of the expression "as such public servant"*

The language of S. 197 indicates that the offence charged must involve, as one of its elements, that it was committed by a person

Crim. Pro. Code (Mysore)—(Continued).

filling the character of Judge or public servant. **In re Narasimhachar**. 15 M. C. C. R. 134 (Cr.).

STANLEY ISMAY, C.J.

(3) S. 221, cl. (7)—*Previous conviction—Charge.*

When an accused person has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. **Mudli v. Government of Mysore**, 15 M.C.C.R. 107 (Cr.).

STANLEY ISMAY, C. J., and KRISHNA RAO, J.

(3-a) S. 234—*Joinder of charges—Breach of trust.* See PENAL CODE, No. 80, 15 M.C.C.R. 271.

(4) S. 255—*Errors in the charge—Penal Code, S. 147—Rioting.*

When a number of persons are charged with rioting or with being members of an unlawful assembly, it is necessary that the common object alleged should be distinctly set out in the charge as this is of the essence of the offence, and, in the absence of such information, the accused persons may be seriously prejudiced in their defence.

The omission to do so, added to the omission to find as a fact the existence of any such common object on the part of the accused, is sufficient to vitiate the trial. **Abdul Aziz v. Razulkhan Sab**, 15 M.C.C.R. 68 (Cr.).

CHANDRASEKHARA AIYAR, J.

(5) S. 437—*Order for further enquiry—Notice to show cause.*

When a further enquiry is contemplated into the case of an accused person who has been discharged, a Court would not, under ordinary circumstances, be exercising a proper discretion, if it did not first give the accused an opportunity of showing cause against such order being made (a). **Ramaseshayya v. Lakshma**, 15 M.C.C.R. 70 (Cr.) (F.B.).

STANLEY ISMAY, C.J., KRISHNA RAO, and CHANDRASEKHARA AIYAR, JJ.

References :—(a) (1905) 32 C. 1090; (1898) 20 A. 339; and (1902) 26 M. 41, F.

(6) S. 480—When applicable. See DEFAMATION, No. 2 15, M.C.C.R. 9.

(7) Ss. 517 and 523—*Disposal of property.*

Crim. Pro. Code (Mysore)—(Concluded).

S. 523 of the Code does not relate to the disposal of property which has been the subject of a criminal trial; that is a matter to be dealt with under S. 517.

Where an accused was convicted under the Mysore Mines Regulation for having unwrought gold in his possession, and the superintendents of the five Kolar Gold Fields Mines claimed that the gold should be made over to their common agent as being the produce of one of the said mines, *held*, that the petition should be inquired into and disposed of on its merits. **W. Frit-chard v. Government of Mysore**, 15 M.C.C.R., 299.

ISMAY, C.J., and KRISHNA RAO, J.

(8) S. 523. See No. 7, *supra*.

Criminal proceedings.

Stay of—Pendency of civil suit—General Rule.

The general rule is that, where a civil suit is brought subsequently to criminal proceedings, there should not be any stay of the latter. **Hari Pada Pal v. Jothish Chandra Chatterjee**, 6 Ind. Cas 181=11 Cr. L.J. 291.

STEPHEN and CARNDUFF, JJ.

Cross-examination.

Accused pleading not guilty—Right to cross-examine—Cross-examination before charge framed, if affects right to cross-examine after charge—Waiver. See CRIM. PRO. CODE, No. 128, 14 C.W.N. 280.

Customs (Punjab).**—Marriage.**

Thanjrara marriages void in the Kangra District—Divorcing and selling a wife illegal. See PENAL CODE, No. 96, 22 P.W.R. 1909 (Cr.).

Dacoity.

(1) Evidence of—Conviction of accused. See EVIDENCE, No. 3, 8 M.L.T. 244.

(2) "Belonging to gang of dacoits" meaning of. See PENAL CODE, No. 73, 13 O.C. 235

Decree.

Jurisdiction of executing Court to decide question of genuineness of—*Onus* of proof. See CRIM. PRO. CODE, No. 2, 1 P.R. 1910 (Cr.).

Defamation.

- (1) *Defamation—Dismissal of complaint—Malicious report by a Police officer—His liability—Accused to prove exception—Privileged communication—How far Magistrate bound to enquire—Ultra vires—Indian Penal Code (Act XLV of 1860), Ss. 77, 499*
 • *and 500—Criminal Procedure Code (Act V of 1898), Ss. 202 and 203—Indian Evidence Act, I of 1872, Ss. 105, 123, 124 and 125—Act XVIII of 1850—Act V of 1861, Ss. 4, 7, 24 and 42—Chief Court Circular No. 849 G, dated 15th February, 1900—Police Rules.*

Held, that a Police Officer is liable to be prosecuted and convicted under S. 500, Penal Code, if he maliciously makes to his superior a defamatory report against any person, unless he can show that he is protected by some statutory privilege. But there is absolutely no such privilege for a Sub-Inspector of Police. A malicious report intended to result in the entry of a person's name in Police Surveillance Register No. X is in itself defamatory.

Such a case is not covered by the maxim—

"*Omnia presumuntur rite esse acta.*" (a).

Held, also, that, where a complaint is based upon some official communication, whether oral or in writing, falling within the scope of either Ss. 123, 124 or 125, Evidence Act, and there is no likelihood of proving the communication by primary and direct evidence, the Magistrate is fully justified in dismissing the complaint under S. 203, Crim. Pro. Code, 1898.

Held, further, that, although the general rule in all the criminal proceedings is that the *onus* of proving everything essential to the establishment of a charge against an accused lies on the prosecution, yet S. 105 of the Evidence Act constitutes a departure from that rule and makes it obligatory upon the Courts to presume the absence of such circumstances as may bring the accused within some general or special legal exception, unless or until their existence is shown by the accused or is admitted by the prosecution itself. So, in a defamation case, when once the complainant has proved that the accused has made a *prima facie* defamatory imputation, it rests with the accused to show that he is justified in doing so (b).

Per *Johnstone, J.*—The Punjab Chief Court Circular No. 849-G of 15th February, 1900, is *ultra vires*. It lays down a principle and test

Defamation—(Concluded).

which are inconsistent with the Statute Law, S. 202, Crim. Pro. Code, 1898.

Per *Williams, J.*—Whether the circular is *ultra vires* or not, the course indicated by it is pre-eminently one which it is desirable and even necessary to adopt in the cases contemplated therein.

Per *Johnstone, J.*—Where the facts can hardly be known with precision to the complainant, it is the duty of the Magistrate to explain the facts and, in view of that explanation, to call upon him to state precisely what the charge is.

Per *Williams, J.*—But there is no such duty of the Magistrate, where the complainant has the benefit of legal assistance and the facts stated by him do not constitute an offence for which the accused may be considered responsible. *Abdul Razak v. Gauri Nath*, 4 P.W.R. 1910 (Cr.) = 5 Ind. Cas. 714 = 11 Cr. L.J. 205.

JOHNSTONE and WILLIAMS, J.J.

References :—(a) 23 P.R. 1880, *D.* (b) 36 C. 449, *R.* (c) 20 M. 397, *F.*; 13 Bom. 590; 9 C. W.N. 199, *R.*

- (2) *Indian Penal Code*, S. 228—*Insult to a public servant in a stage of judicial proceeding—Criminal Procedure Code*, S. 480—*Summary procedure in contempt cases.*

When parties to a criminal proceeding make use of objectionable or defamatory expressions against the trying Magistrate, either in the course of their pleadings or in a petition presented by them, the proper course to be adopted by the Magistrate is to take proceedings against them for defamation, not in his capacity as a judicial officer, but in his personal capacity, since the said statements cannot be said to have been made in the view and presence of the Magistrate, or with the object of intentionally insulting him, as contemplated by S. 228, *Indian Penal Code*; and the summary procedure prescribed in S. 480 of the *Code of Criminal Procedure* does not apply to such cases (a). *Imam Sa v. The Government of Mysore*, 15 M.C.C.R. 9 (Cr.).

KRISHNA RAO, J.

Reference :—(a) (1903) 4 P.L.R. 583, *F.*

- (3) *Punishment for—Effect of delay in proceedings.* See CRIM. PRO. CODE, No. 156^a, 4 S.L.R. 86.

Defence.

Commitment proceedings—Defence reserved—Presumption. See COMMITMENT, No. 1, 15 M.C.C.R. 265.

Detective.

(1) *Position of—Value of his evidence.* See ACCOMPLICE, No. 1, 8 Ind. Cas. 119.

Discharge.

(1) *after full enquiry—High Court's power to interfere.* See CRIM. PRO. CODE, No. 127, 18 P.W.R. 1909 (Cr.).

(2) *Withdrawal of prosecution—Formal order of, not passed—Effect.* See CRIM. PRO. CODE, No. 167, 5 Ind. Cas. 21.

District Magistrate.

Sessions Court superior to, *Duty of.* See ACT XIV OF 1908 (CRIMINAL LAW AMENDMENT), No. 2, 14 C.W.N. 516.

Document.

—*relevant to prove knowledge of its contents—Whether relevant also for proof of truth of contents.* See CRIM. PRO. CODE, No. 71, 37 C. 467.

Dying declaration.

—*inconsistent with other prosecution evidence—Evidentiary, value of.* See CRIM. PRO. CODE, No. 112, 20 P.W.R. 1909 (Cr.).

Eastern Bengal and Assam Act.

See ACT II OF 1907 (BENGAL).

Ejusdem generis.

Application of principle of. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

Embezzlement.

Charge for total item embezzled—Specific items proved—Joinder of charges. See CRIM. PRO. CODE, No. 111, 7 A.L.J. 897.

European British Subject.

- (1) *Appeal against conviction by Court of Session—Judicial Commissioner's power to entertain such appeal—High Court, meaning of, in reference to proceedings against European British subjects—Cr. P. C., Ss. 4 (j) and 110.*

The appellant, whose claim to be dealt with as a European British subject was admitted both by the committing Magistrate and the Court of Session, was convicted under Ss. 417 and 474, I. P. C. He filed an appeal against

European British Subject—(Concluded).

his conviction in the Court of the Judicial Commissioner of Oudh.

Held, that the appeal in this case, under S. 410 of the Cr.P.C., lay to the High Court.

The "High Court," in reference to proceedings against European British subjects in Oudh means the High Court of Judicature for the North-Western Provinces. **Thomas Bradshaw v. King-Emperor**, 13 O.C. 385 (Cr.).

CHAMBER, J.C.

(2) Right of trial by jury—Waiver of rights under S. 454, Crim. Pro. Code. See CRIM. PRO. CODE. No. 71, 37 C. 467.

Evidence.

(1) *Criminal trial—Relevant evidence—Duty of Crown to produce—Duty of Court.*

The doctrine that the Crown is not bound to call witnesses on whom it does not rely must not be pressed too far. It is its clear duty to produce all persons who lay claim to a first-hand knowledge of the incidents under trial; and if the prosecution do not choose to place them in the witness box, it must at least tender them to the defence for cross-examination. The Crown is not so much concerned to prove a particular theory as to acquaint the Court with all the relevant evidence; and it is for the Court to determine how much of that evidence is to be credited, and what inferences it warrants. **Imperator v. Jumo and others**, 3 S.L.R. 200; 6 Ind. Cas. 847 = 11 Cr.L.J. 410.

KNIGHT and HAYWARD, J. C.S.

(2) *Mashirnama—Evidentiary value.*

The "Mashirnama" is, at best, a statement to the Police; and such a writing cannot, under S. 162, Cr.P.C., be admitted as corroborative evidence. Such writing may, however, be used for the purpose of refreshing memory under S. 169, Evidence Act. **The Crown v. Balochkhan wd. Kadero**, 4 S.L.R. 38.

HAYWARD and LEGGATT, JJ.

Reference :—30 B. 111, R.

(3) *Of dacoity—Conviction of accused.*

The evidence of a witness who knew the accused previously and who had ample opportunity of observing him at the dacoity, and who immediately named him to the other villagers as one of the dacoits and also named him to the Police some few hours after the dacoity, is admissible. **In re Rama Muppan**, 8 M.L.T. 244.

BENSON and SANKARAN NAIR, JJ.

Evidence—(Concluded).

(3-a) Evidence of witness disbelieved as against some accused not to be believed as regards the other co-accused. See CRIM. PRO. CODE, No. 112, 20 P.W.R. 1909 (Cr.).

(4) Magistrate's personal knowledge and personal inspection of a spot—Evidentiary value. See CRIM. PRO. CODE, No. 127, 18 P.W.R. 1909 (Cr.).

(5) Conviction based on circumstantial evidence—Duty of prosecution. See EXPERT, No. 1, 13 O.C. 1.

(6) Withdrawal of prosecution—Formal order of discharge not passed—Evidence of such accused—Admissibility. See CRIM. PRO. CODE, No. 167, 5 Ind. Cas. 21.

(7) Conviction based on circumstantial evidence—Legality—High Court's power to go into evidence on revision side. See REVISION, No. 2, 25 P.W.R. 1910 (Cr.).

(8) Power of appellate Court to take further evidence. See APPEAL (GENERAL), No. 2, 6 Ind. Cas. 12.

(9) Dispute as to possession of immoveable property—Evidence as to title—Admissibility. See CRIM. PRO. CODE, No. 59, 6 Ind. Cas. 398.

(10) Conviction based on circumstantial—Revision by High Court. See CRIM. PRO. CODE, No. 144-a, 13 O.C. 309.

(11) Exceptions to general rules of evidence—How to be applied. See CRIMINAL PROCEDURE CODE, No. 1, 8 M.L.T. 347.

(12) Reasons by Magistrate for discharge—Reasons by Sessions Judge for commitment—Admissibility in. See MISDIRECTION TO JURY, No. 3, 7 Ind. Cas. 915.

(13) First information, value of. See MISDIRECTION TO JURY, No. 4, 8 Ind. Cas. 52.

Evidence Act.

(1) S. 8—Fact that complainant at first said that a certain person was the real culprit—Relevancy. See REVISION, No. 2, 25 P.W.R. 1910 (Cr.).

(2) Ss. 10, 21, 29, 30, 73. See CRIM. PRO. CODE, No. 71, 37 C. 467.

(2-a) Ss. 11, 30—Statement by a person not implicating himself—Admissibility. See CONFESSION, No. 3, 38 P.W.R. 1910 (Cr.).

(3) S. 14—Value of previous convictions. See PENAL CODE, No. 74, 18 P.L.R. 1910.

(4) Ss. 14, 15, 54—Evidence of previous and subsequent conduct of accused when relevant. See PENAL CODE, No. 83, 26 P.W.R. 1910 (Cr.).

Evidence Act—(Continued).(4-a) S. 15. See No. 4, *supra*.(4-b) S. 21. See No. 2, *supra*.

- (5) Ss. 21, 157—*Criminal Procedure Code (Act V of 1898), Ss. 162, 289—Admissible evidence—Statements made by witness to the Police and to Panch—Statements made by the witness as accused before the Committing Magistrate—Use of these statements for corroborative purposes—Statements made by co-accused—Investigating Police officer—Deposition as to statements made to him by witnesses—Practice and procedure.*

In the course of the trial of an accused person, the trying Judge admitted into evidence against the accused (1) statements made by a witness to the Police implicating the accused; (2) statements made by the witness to the Panch; (3) statements made by the witness as an accused person before the committing Magistrate; and (4) statements made by the co-accused to the Police. When the trying Judge in the Court of Session found that the witness had completely changed his statement No. 3 while deposing in his Court, he used statements Nos. 1 and 2 as corroborative of statement No. 3 which he believed. Relying upon these statements Nos. 1—4, the Judge came to the conclusion of the accused's guilt.

Held, reversing the conviction and sentence, that the Judge was wrong in admitting into evidence statements Nos. 1 and 2 in the way he had done. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. The object of referring to such statements should have been to see whether they contained anything which could be used for the purpose of cross-examining, on behalf of the accused, the witnesses examined for the prosecution.

Held, also, that statement No. 4 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the accused.

The Investigating Police Officer should not be allowed to depose in examination-in-chief to what the witnesses said to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover, it is contrary to the plain

Evidence Act—(Continued).

intention of S. 162 of the Code of Criminal Procedure, which is, that such statements should be used, if at all, on behalf of, and not against, the person under trial. **Emperor v. Akbar Badu**, 12 Bom. L. R. 663 (Cr.).

CHANDAVARKAR and HEATON, JJ.

- (6) S. 25—"Confession" definition—Whether confession made to a Police Officer admissible in evidence.

Confession is an admission made at any time by a person charged with a crime, stating, or suggesting the inference, that he committed that crime. Not only statements which amount to a direct acknowledgment of guilt are confessions, but also inculpatory statements which, although they fall short of being actual admission of guilt, yet suggest an inference of guilt and from which an inference of guilt follows. The factor determining whether a statement amounts to a confession or not is not the motive of the party making it, but the fact that it leads to an inference of guilt (a).

Statements made to the Police by accused persons as to the ownership of property, which is the subject matter of proceedings against them, are inadmissible as evidence against them at the trial for the offence with which they are charged (b). **Mi Ein Tha v. King-Emperor**, 5 L. B. R. 131 = 11 Cr. L. J. 153 = 4 Ind. Cas. 1028.

PARLETT, J.

References:—(a) 6 A. 509; 7 A. 646; 6 B. 34; 9 B. 131 and 14 B. 260, F. (b) 10 C. 1022; 15 C. 589, and 19 B. 363, F.

- (6-a) S. 25—Confession—Police, confession made to—Co-accused, admissibility of confession against.

The confession made to a police officer by an accused is not admissible against him under S. 25, Evidence Act; *a fortiori* it is inadmissible against a co-accused. **Emperor v. Harisingh Ganpatsingh**, 12 Bom. L. R. 899.

BATCHELOR and RAO, JJ.

Reference:—2 Bom. 61, R.

- (7) Ss. 25, 167—Trial by jury—Misdirection—Improper admission of evidence—Retrial.

Three persons were tried jointly for rioting. During the trial, an information lodged by one of them with the Police was proved, and, in his charge to the jury, the Judge, said "It (the information) contains an admission that all three accused persons were present at the occurrence."

Evidence Act—(Continued).

Held, the information was not a confession under S. 25 of the Evidence Act, and, as against the persons other than the informant, it amounted to an improper admission of evidence against them.

"When a case has been tried before a jury, and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried by a jury, and, as a matter of procedure, and in justice to the accused, this course should be adopted" (a).

Acting on this principle, the Court declined to exercise its powers under S. 167 of the Evidence Act, and sent the case back for retrial. **Sheik Hazir v. The King-Emperor**, 11 C.L.J. 301 = 14 C.W.N. 493 = 5 Ind. Cas. 315 = 11 Cr. L.J. 96.

STEPHEN and CARNDUFF, JJ.

Reference :—(a) 4 C.W.N. 576.

(8) S. 27—Statement of accused as to place of concealment—Independent discovery by Police—Admissibility of statement. See MIS-JOINDER OF CHARGES, No. 1, 11 C.L.J. 182.

(8-a) S. 27—Scope of. See CRIM PRO CODE, No. 144-a, 13 O.C. 309.

(8-b) S. 29. See No. 2, *supra*.

(9) S. 30—Confessions made by accomplices at previous trials—Effect. See PENAL CODE, No. 74, 18 P.L.R. 1910.

(9-a) S. 30—Confession of accused—Whether can constitute corroboration of testimony of approver. See PENAL CODE, No. 74-a, 13 O.C. 243.

(9-b) S. 30. See Nos. 2 and 2-a, *supra*.

(9-c) S. 54. See No. 4, *supra*.

(9-d) S. 73. See No. 2, *supra*.

(9-e) S. 91—Applicability of, when writing is not evidence of matter recorded. See CONFESSION, No. 6, 33 M. 413.

(10) Ss. 91, 157—Statement made to investigating Police officer, admissibility of. See CRIM. PRO. CODE, No. 66, 7 A.L.J. 468.

(11) S. 105—Onus—Statement of witness and of accused person made to Police officer during investigation cannot be taken in evidence—Admissibility of evidence—Special diary—Presumption—Cr. P.O., S. 162.

The burden of proving the existence of circumstances bringing a case within any special exception or proviso contained in any part of the Penal Code is upon the person accused, and the Court shall presume the absence of such circumstances.

Evidence Act—(Continued).

Statements made to a Police Officer by witnesses during investigation and reduced to writing cannot be used as evidence against the accused. Nor can the statements of accused persons under arrest made to a Sub-Inspector of Police and reduced to writing and put in a special diary be used against the accused. **Emperor v. Chandan Singh**, 8 Ind. Cas. 259 (Cr.).

KNOX and KARAMAT HUSAIN, JJ.

(11-a) S. 105—Pleadings inconsistent with the defence—Presumption under S. 105. See PENAL CODE, No. 6, 7 A.L.J. 438.

(12) Ss. 105, 123, 124, 125—Accused to prove exception under S. 105. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

(12-b) S. 114 (a)—Burden of proof. See CRIM. PRO. CODE, No. 145-d, 8 M.L.T. 418.

(12-a) Ss. 114, 133—Evidence—Accomplice—Corroboration—Murder—Evidence Act, Ss. 114, Illus. (b) and 133—Discrepancies between the statements of witnesses before the Police and Court.

Held that it is an established principle of law and practice that no accused can be convicted on the bare testimony of an accomplice, unless it has been corroborated by independent reliable evidence in material particulars directly connecting the accused with commission of the crime. So where material discrepancies occur between the statements of the corroborating witnesses before the Police and their depositions in the Court, either of inquiry or trial, there is no corroboration and consequently the prosecution must fail. **Amar Das v. The Crown**, 36 P.W.R. Cr. 1910 (Cr.).

SHAH DIN and CHILVIS, JJ.

(12-b) S. 123. See No. 12, *supra*.

(12-c) S. 124. See No. 12, *supra*.

(12-d) S. 125. See No. 12, *supra*.

(13) Ss. 132, 148—Incriminating questions—Objection overruled by Court—Witness compelled to answer—Answer not to be proved against him.

The accused verified and filed a written statement in a certain suit. Subsequently in another suit, in which he was the defendant, he gave evidence and was cross-examined with a view to show that certain statements, which he had made in the written statement filed in the first suit, were false. His pleader objected when the questions were put, but the objection was overruled, and the accused admitted that those

Evidence Act—(Concluded).

statements were false, and on the strength of that admission he was prosecuted and convicted of perjury.

Held, that the accused was "compelled to answer" the questions within the meaning of the proviso to S. 132 of the Evidence Act, and that the answers could not be proved against him on a charge of having made false statements in the verified written statement filed by him in the first suit, and that the conviction was bad. **Deputy Superintendent v. Promotha Nath Sen**, 6 Ind. Cas. 782 (Cr.) = 14 C.W.N. 957 = 11 Cr. L.J. 403.

HARINGTON and TEUNON, JJ.

(13-a) S. 133. See No. 12-a, *supra*.

(13-b) S. 148. See No. 13, *supra*.

(13-c) S. 157. See Nos. 5 and 10, *supra*.

(14) Ss. 157, 161—Statements made by a witness to a police officer, admission in evidence of—Refreshing of memory by Police officer from statements recorded by him. See CRIM. PRO. CODE, No. 69, 13 O.C. 7.

(15) S. 159—Mashirnama, use of, to refresh memory. See EVIDENCE, No. 2, 4 S.L.R. 38.

(16) S. 161. See No. 14, *supra*.

(17) S. 167. See No. 7, *supra*.

Evidence Act (Mysore).

(1) Ss. 32 (2), 159—Evidence—Articles sent to the Chemical Examiner—Inquest and post-mortem reports.

When articles are sent to the Chemical Examiner for analysis, it is absolutely necessary that evidence should be taken to connect the articles reported on with the case before the Court; every step taken with regard to such articles, from their discovery, to their receipt by the Chemical Examiner, must be formally proved.

Inquest reports and post-mortem reports are not admissible in evidence except under S. 32, Cl. (2), of the Evidence Act. A Medical Officer, when giving his evidence, may refresh his memory by referring to the post-mortem report, but the report itself is not evidence, and no facts can be taken therefrom (a). **Yeerappa Sastri v. Government of Mysore**. 15 M.C.C.R. 1 (Cr.).

STANLEY ISMAY, C.J. and KRISHNA RAO, J.

References :—(a) 9 C. 455; 27 C. 295, F.

(2) S. 159. See No. 1, *supra*.

Excise Act.

See ACT XII OF 1896.

Excise Regulation (V of 1901, Mysore).

(1) S. 56 (b)—Breach of the conditions of the license—Holder of license—Servant.

A vendor under the holder of an arrack license was charged with being in possession of a dram measure and half dram measure below the standard, and with having arrack in the shop 3/74 below proof in infringement of rules 15 and 26 of the arrack license—Acts liable to punishment under S. 56 (b) of the Excise Regulation.

Held, that the accused, being only a servant, was not liable, and that it is only the license-holder that can be prosecuted (a). **Government of Mysore v. Venkatappa**, 15 M.C.C.R. 136 (Cr.).

KRISHNA RAO, J. and CHANDRASEKHARA AIYAR, OFFG., J.

References :—(a) (1897) 21 M. 63, Diss. from; (1890) 15 Bom. 45, F.

Execution proceedings.

(1) Resisting process in—Report to Munsif—Order for prosecution by his successor in office—Execution proceedings if judicial proceeding. See CRIM. PRO. CODE, No. 161, 14 C.W.N. 799.

(2)—whether judicial proceedings for purposes of S. 476, Cr.P.C. See CRIM. PRO. CODE No. 2, 1 P.R. 1910 (Cr.).

Execution Sale.

Sale of more than what the decree allowed—Criminal intention. See PENAL CODE, No. 37, 7 A.L.J. 93.

Executive and ministerial officers.

Duty of Courts with reference to acts of. See CRIM. PRO. CODE, No. 175, 14 P.W.R. 1909 (Cr.).

Expert.

(1) *Expert in handwriting, evidence of—Conviction based on opinion of expert—Circumstantial evidence, conviction based on.*

In the case of a prosecution based upon circumstantial evidence, it is incumbent on the prosecution to show that it is impossible to explain the circumstances otherwise than upon the hypothesis of the accused being the guilty person.

Held that, as a general rule, it is very unsafe to base a conviction upon the opinion of an expert in handwriting.

Expert—(Concluded).

Where according to the opinion of the expert there was no marked peculiarity in the handwriting of the accused, nor anything rare in style, *held*, that in such a case a conviction could not be based upon the opinion of the expert. **Lalta Prasad v. King-Emperor**, 13 O.C. 1=5 Ind. Cas. 355=11 Cr. L.J. 214.

SUNDER LAL, J.C.

References:—(i) 2 A.L.J. 444; (ii) 6 A.L.J. 184, R.

(2) Value of expert evidence. See CRIM. PRO. CODE. No. 71, 37 C. 467.

Explosives Act.

See ACT IV OF 1884.

Explosive Substances Act.

See ACT VI OF 1908.

Factories Acts.

See ACT XV OF 1871.

Factory.

Permission obtained to establish one kind of —Establishment of another kind of factory—Offence. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPAL), No. 3, 12 Bom. L.R. 122.

Father.

Powers of, over his daughters—Power to keep them unmarried. See CRIM. PRO. CODE, No. 166-a, 8 M.L.T. 300.

Ferries Act.

(1) See ACT V OF 1895 (BENGAL).

(2) Private ferry plying within specified distance of public ferry—Conviction. See ACT I OF 1885 (FERRIES), No. 1, 6 Ind. Cas. 198.

Fine.

Continuing offence—Likely to be committed, after date of proceeding—Daily fine—Legality. See ACT III OF 1885 (BENGAL LOCAL SELF GOVERNMENT), No. 1, 37 C. 671.

Fireworks.

Patakhas or Crackers, whether. See ACT IV OF 1884 (EXPLOSIVES), No. 1, 8 P.R. 1910 (Cr.).

Fishery.

Dispute as to fishery rights—Jurisdiction of Magistrate. See CRIM. PRO. CODE, No. 49, 11 C.L.J. 412.

Forest Act.

See ACT VII OF 1878.

Forgery.

Interpolation of the name of a person as an attesting witness, if. See PENAL CODE, No. 2, 14 C.W.N. 1076.

Fugitive Offenders Act (44 & 45, Vic. Cap. 49).

S. 13—S. 19 (c), Act XV of 1903—Powers of Magistrates.

It is only a first class Magistrate or any Magistrate empowered by the Local Government in that behalf, who has been authorised by S. 19, cl. (c) of Act XV of 1903 to enforce the provisions of the Fugitive Offenders Act. So where a warrant was issued under S. 13 of the Fugitive Offenders Act and a Sub-Magistrate enforced the warrant without making any endorsement thereon, *held* that the arrest and the subsequent proceedings were not in accordance with law. **Syed Kadir Hussain v. Emperor**, 8 M.L.T. 352.

SANKARAN NAIR, J.

Gambling Act.

See ACT III OF 1867.

Gaming.

Cr. P. C. (Act V of 1898), Ss. 435, 440—Revision—Gaming in one room—Adjacent room found to contain articles of gaming—Conviction of persons sitting in the latter room—Legality.

Where certain persons were actually gaming in a room, and certain others were sitting in another room, the things found wherein showed that it was part of the gaming house, and where the persons sitting in the latter room were convicted.

Held, that the conviction was right and ought not to be interfered with in revision. *In re P. Srinivasa Rau*, 7 M.L.T. 189.

MILLER, J.

Government.

Delegation by, of powers under S. 196, Crim. Pro. Code—Legality. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Government Order.

Value of—. See CONFESSION, No. 6, 33. 413.

Guardian.

Prosecution of—*Ultra vires* order—Effect. See CRIM. PRO. CODE, No. 79-a, 87 P.L.R. 1910.

Habeas Corpus.

(1) Proceedings when to be treated as on. See CRIM. PRO. CODE, No. 166, 8 M.L.T. 47.

(2) Writ of—Illegal or improper detention—Power of father over his daughter. See CRIM. PRO. CODE, No. 166-a, 8 M.L.T. 300.

(3) Scope of writ of—Custody of Mahomedan children. See CRIM. PRO. CODE, No. 166-b, 12 Bom. L.R. 891.

Handwriting.

Modes of proof of—Value of expert evidence. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Hearsay evidence.

Value of. See PENAL CODE, No. 41, 7 A.L.J. 618.

Heir.

(4)—not justified in taking forcible possession of deceased's property. See PENAL CODE, No. 77, 11 P.L.R. 1910 (Cr.).

High Court.

(1) Power of, to interfere in a pending case. See ACT VI OF 1882 (COMPANIES), No. 1, 35 P.W.R. 1910 (Cr.).

(2) When will interfere with verdict of jury. See JURY, No. 1, 13 O.C. 295.

(3) Interference with pending prosecution. See CRIM. PRO. CODE, No. 142, 37 C. 680.

(4) Meaning of, in respect of proceedings against European British Subjects in Oudh.—See EUROPEAN BRITISH SUBJECT, No. 1, 13 O.C. 335.

(5) Magistrate acting according to law—Denial of justice—Interference of—. See CRIM. PRO. CODE, No. 49-b, 7 Ind. Cas. 798.

High Court Rules (Bombay).

(1) Rule 794—Scope of—. See CRIM. PRO. CODE, No. 166-b, 12 Bom. L.R. 891.

Hill Municipalities Act.

See ACT II OF 1907 (MADRAS).

Hindu Law (General).

Rights of sanyasi over his children—Right to resume his former status—Effect of invalidity of initiation. See CRIM. PRO. CODE, No. 166 a, 8 M.L.T. 300.

Husband and wife.

(1) Defamation. See PENAL CODE, No. 99, 6 P.W.R. 1910 (Cr.).

(2) Complaint against husband for keeping wife in confinement—Procedure to be adopted by Magistrate. See CRIM. PRO. CODE, No. 6, 29 P.W.R. 1910 (Cr.).

Hypothetical case.

Conviction based upon a—Legality. See PENAL CODE, No. 17, 11 C.L.J. 270.

Inquest reports.

(1) Value of—. See EVIDENCE ACT (MYSORE), No. 1, 15 M.C.C.R. 1.

(2) Refusal to sign—Whether an offence under S. 180, Penal Code. See PENAL CODE, No. 24, 8 M.L.T. 198 (Cr.).

Intoxication.

(1) In reference to intention. See PENAL CODE, No. 7-a, U.B.R. (1910), 2nd Qr. 17.

Joinder of charges.

Joinder of charges—Crim. Pro. Code, (Act V of 1898), S. 235—Order for retrial—Another Magistrate.

Where the accused were charged with eight separate and distinct offences and tried at one trial for the same, held, that the trial was illegal (a). When the Magistrate, who tried a case, has already formed an opinion on the evidence on the record and has expressed the same, and the cases are sent back for re-trial, it is only fair to the accused that they should be tried by a different Magistrate who has formed no opinion. **Umed Singh v. King-Emperor**, 7 A.L.J. 19=5 Ind. Cas. 178=11 Cr. L.J. 51.

TUDBALL, J.

Reference :—25 M. 61 (P.C.), F.

Joint penalty.

—imposed on several accused—Legality. See ACT III OF 1899 (CALCUTTA MUNICIPAL), No. 3, 14 C.W.N. 911.

Judgment.

—in appeal, contents of. See CRIM. PRO. CODE, No. 140, 7 C. 194.

Judicial Officer's Protection Act.

See ACT XVIII OF 1850.

Jurisdiction.

1.—GENERAL.

2.—(OF CIVIL COURTS).

3.—(OF CRIMINAL COURTS).

—1.—General.

(1) *Crim. Pro. Code. (Act V of 1898), Ss. 177, 179—Jurisdiction—Goods despatched from Delhi for sale on commission to the accused at Calcutta—Misappropriation—Jurisdiction—The words "any consequence that has ensued" in S. 179—Meaning.*

Jurisdiction—(Continued).**—1.—General—(Continued).**

Where the complainant despatched goods from Delhi to the accused at Calcutta for sale on commission, and the accused mortgaged the goods and appropriated the money to their own use.

Held, that the offence alleged was complete as soon as the money had been misappropriated, and that the Calcutta Court alone had jurisdiction.

Held also, the fact that the money should have been, and was not, sent to Delhi, did not give the Delhi Court jurisdiction, the accused having put the money into his own pocket at Calcutta.

A Court which has no jurisdiction *to try* has no jurisdiction *to acquit* the accused, and the proper order is one of discharge.

The words "any consequence that has ensued" in S. 179, Crim. Pro. Code, mean some consequence modifying or completing the act or acts constituting the offence, and do not include the loss resulting to an employer from criminal breach of trust by his servant. **Gokal Chand v. Phul Chand and Kanhaya Lal**, 7 P.R. 1910 (Cr.)=7 P.W.R. 1910=5 Ind. Cas. 830.

REID, C.J.

References:—67 P.L.R. 1901, *F.*; 7 P.R. 1900 (Cr.), *D.*; 19 A. 111, *Diss.*; 67 P.L.R. 1901, *F.*

(2) Jurisdiction—Criminal breach of trust—Property must be received or retained within jurisdiction of the trying Court.

In order to confer on a Court jurisdiction to try a case of criminal breach of trust, it must be shown that either the whole or part of the property, in respect of which the charge is laid, was either received or retained by the accused within the jurisdiction of the trying Court.

An accused cannot be said to retain within the jurisdiction of the trying Court the unaccounted for balance, which he is alleged to misappropriate, merely because he sent accounts and remittances to the complainant within the jurisdiction of that Court. **M.A. Shakur v. Nga Me Gyl alias Mi. Gyl**, 8 Ind. Cas. 595.

PARLETT, J.

(3) Execution of decree—Jurisdiction—Onus of proof. See CRIM. PRO. CODE, No. 2, 1 P.R. 1910 (Cr.).

Jurisdiction—(Concluded).**—1.—General—(Concluded).**

(4) Emigration—Assam Labour and Emigration Act, S. 184—Place of trial—Where inducement made. See ACT VI OF 1901 (ASSAM LABOUR AND EMIGRATION), No. 2, 37 C. 27.

(5) Place at which consequence of act ensues—Embezzlement—Jurisdiction. See CRIM. PRO. CODE, No. 77, 7 A.L.J. 319.

(6) Jurisdiction of Chief Court. See PUNJAB CHIEF COURT, No. 1, 20 P.W.R. 1910 (Cr.).

(7) See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 4, 13 P.W.R. 1910 (Cr.).

(8) Offence exclusively triable by sessions—Jurisdiction of first class Magistrate. See PENAL CODE, No. 91 31 P.R.-b, 1910 (Cr.).

(9) Magistrate personally interested—Whether consent of accused would confer jurisdiction upon him. See CRIM. PRO. CODE, No. 176, 7 A.L.J. 749.

—2.—(Of Civil Courts).

(1) Where it is difficult to draw the line between criminal offence and actionable wrong. See PENAL CODE, No. 84-a, 8 M.L.T. 385.

—3.—(Of Criminal Courts).

(1) Committing Magistrate entitled to weigh evidence in cases triable by the Sessions, and to pronounce as to their credibility.

Held, that a committing Magistrate is entitled, at any rate to some extent, to weigh the evidence of direct witnesses, and to pronounce as to their credibility. Provided that he uses caution, and that, where the question is one of probabilities only, he leaves the decision to the Sessions Court, he is entitled to use his discretion and discharge the accused, if he disbelieves the evidence. **Sultani v. The Crown**, 10 P.R. 1909 (Cr.)=155 P.L.R. 1909=11 Cr. L.J. 18=4 Ind. Cas. 612=32 P.W.R. 1909.

WILLIAMS, J.

References:—21 A. 265; 26 A. 564, *appl.*; 11 B. 372; 27 B. 84; 14 P.R. 1908 (Cr.), *R.*

Jury.

(1) Jury, powers of—Verdict with respect to an offence of which the accused was not charged, validity of—High Court, interference by, with the verdict of a jury.

Where an accused, who was tried with the aid of a jury, was charged of an offence of rape, and the verdict of the jury was to the

Jury—(Concluded).

effect that the charge of a rape was not proved, but that the prisoner was guilty of an attempt to commit rape which verdict was accepted by the Sessions Judge, *held* that it was competent to the jury to return a verdict of guilty with respect to an offence of which the accused was not formally charged.

Held further, that a High Court will not interfere with the verdict of a jury, unless it is shown to be clearly and manifestly wrong. **Shubrati v. King-Emperor**, 13 O.C. 295.

LINDSAY, J.C.

References:—3 C. 189; 5 C. 871; 20 B. 215, R.

(2) Right of trial by—Interference with the right. See CRIM. PRO. CODE, No. 71, 37 C. 467.

(3) Five persons named as jurors—One ill—Report by four—Legality. See CRIM. PRO. CODE, No. 39, 6 Ind. Cas. 777.

(4) See MISDIRECTION TO JURY.

(5) Address to—Nature of address. See MISDIRECTION TO JURY, No. 3, 7 Ind. Cas. 915.

(6) Questioning jury after unanimous verdict—Legality. See MISDIRECTION TO JURY, No. 4, 8 Ind. Cas. 52.

Kallan.

Status of—Village Magistrate—Power to confine a kallan in stocks. See REG. XI OF 1816 (MADRAS), No. 1, 7 M.L.T. 305.

Knife.

What are arms—Cook's knife, whether is an arm. See ACT XI OF 1878 (ARMS), No. 2, 5 L.B.R. 130.

Land Alienation Act.

See ACT XIII OF 1900 (PUNJAB).

Land Revenue Act.

See ACT III OF 1901 (N.W.P.).

Lead.

—moulded into bullets is ammunition. See ACT XI OF 1878 (ARMS), No. 3, 23 P.W.R. 1910 (Cr.).

Leading questions.

Permission of—Court's duty. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Legal Practitioners Act.

See ACT XVIII OF 1879.

Letters Patent.

S. 10. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

Letters Patent (Madras).

Cl. 15—Order refusing bail—Judgment—Appeal, whether lies from order of a single Judge of the High Court to a Division Bench.

An order of a High Court Judge refusing to grant bail to an accused person is an order in a criminal trial. It is not a judgment within the meaning of Cl. 15 of the Letters Patent and is not appealable to a Division Bench. **Subramanya Aiyar v. Emperor**, 4 Ind. Cas. 871 (Cr.) = 19 M.L.J. 478.

MILLER and ABDUR RAHIM, JJ.

Libel.

(1) *Language, interpretation of—Charge by writer in newspaper of tampering with loyalty of soldiers—Penal Code (Act XLV of 1860), S. 131—Fair comment—Mis-statements of fact in comment—Parliament, statements made in, put forward as writer's own, if privileged—Parliamentary debates, relevancy of—"Hansard's Reports," admissibility of—Judicial notice of facts of public history—Evidence Act (I of 1872), Ss. 57 and 78 (2)—S. 55—Damages—Character, evidence of—Political reputation, inquiry to deportation of Plaintiff under Reg. III of 1888 and reasons given therefor, if mitigate damages—Official acts—Presumption of regularity—Costs.*

Where a writing in a newspaper contained the statement that the plaintiff "has been guilty of tampering with the loyalty of the Punjab sepoys."

Held that the statement amounted to an imputation that the plaintiff had been guilty of a criminal offence (S. 131, Penal Code).

Per Harington, J.—In deciding whether the allegation was libellous, the meaning put on the word "tamper" in the dictionary was of little importance. The question was what would a reasonable man understand to be conveyed by the statement, taken with the rest of the writing.

Per Curiam.—When what purports to be a comment on a matter of public interest contains a false allegation of fact, such statement is not protected as fair comment (a).

It was urged in defence that the allegation of fact, *viz.*, that the plaintiff was guilty of tampering with the loyalty of sepoys, was a repetition of statements made by a responsible Minister in Parliament, and that in any case

Libel—(Continued).

the statements made in Parliament in connection with the deportation of the plaintiff by Government under Reg. III of 1818, and the fact of deportation itself went in mitigation of the damages :

Held that a statement which was put forward as the writer's own cannot claim to be privileged as a fair and accurate report of a proceeding in Parliament ; and that moreover the statement was not in fact a reproduction of the statements in Parliament.

Per Harington, J.—That what was said in Parliament cannot, in the circumstances, be relevant to the issue of privilege.

That the statements were not also admissible in mitigation of damages, as evidence of plaintiff's bad character, since evidence of rumours or suspicions to the same effect as the defamatory matter cannot be given (*b*).

That even if relevant, the speeches made in Parliament could not be proved by the mere production of Hansard's reports without formal proof by examining the reporter, nor could they be referred to by the Court as relating to a matter of public history under S. 57 of the Evidence Act.

Per Woodroffe, J. (contra).—That although the penultimate clause of S. 57 does not absolve a party from proof of any fact which does not fall within the provisions of cls. 1 to 13 of the section, the facts of which the Court may take judicial notice are not limited to those clauses.

That the facts that there were debates in Parliament in which plaintiff's deportation and conduct were discussed was a matter of public history and of such notoriety that it was reasonable to assume their existence without formal proof ; and Hansard's reports were properly referred to to enable the Court to take judicial notice of the facts relating to the debate.

Per Curiam.—The debates in Parliament were not covered by the expression course of proceeding in cl. (4).

Per Woodroffe, J.—The debates were relevant as disclosing the reasons for the deportation, which were such as could be relied on in mitigation of damages. They were also relevant as furnishing matter for comment.

Held (per Harington, J.)—That the fact that the Plaintiff was deported taken in conjunction with the events which preceded it, and the part which he took in the agitation at

Libel—(Concluded).

a time of political unrest, should be taken into consideration in estimating the injury done to his reputation by the particular allegation, though if the fact of the deportation had stood alone it would not probably weigh heavily in reduction of damages.

Per Woodroffe, J.—The fact that the Government thought fit to deport the plaintiff, the reasons therefor as inferrible from the preamble to Reg. III of 1818* and from the answers given in Parliament, and the plaintiff's conduct in so far as it appeared to justify the action of the Government, were matters to be considered in estimating the injury caused by the particular libel to his political reputation which alone was affected by the libel, but which had probably already suffered greatly from the action of Government and statements publicly made by responsible Government officials.

Per Curiam.—That the decision of a Judge as to the amount of damages is open to review on appeal.

That although the amount was materially reduced on appeal, the respondent was in the circumstances entitled to the costs of the appeal. **The "Englishman," Limited v. Lala Lajpat Rai**, 14 C.W.N. 713=6 Ind. Cas. 81.

HARINGTON and WOODROFFE, JJ.

References :—(a) 20 Q.B.D. 275, 282 (1887) ; (1909) 1 K.B. 239, R. (b) 8 Q.B.D. 491 (1882), R.

Licensee.

Whether he comes within the definition of tenant in S. 3 of Madras Act I of 1900. See **ACT I OF 1900 (MADRAS)**, No. 1, 7 M.L.T. 121.

Local inquiry.

(1) *Local inquiry, by the trying Magistrate, whether vitiates the trial—Purposes for which it may be held—To understand and test evidence given—Duty of Magistrate to record opinion formed on local inquiry—Criminal Procedure Code (Act V of 1896), Ss. 148, 202, 293, 294, 556—Indian Penal Code (Act XLV of 1860), S. 147—Unlawful assembly—Common object charged and common object proved—Variance between, when not material.*

Where, in a prosecution for an offence under S. 147, I.P.C., the common object charged was

Local Inquiry—(Continued).

"by means of criminal force to obtain possession of certain lands which comprised two plots, one of fifteen cottahs and the other of five cottahs, and it was found by the Court that the offence was committed for obtaining possession of the 5 cottahs plot :

Held, that the variance between the common object alleged and that found was not such as to invalidate the conviction.

Where the trying Magistrate, on the consent of both parties, made a local inquiry in their presence in order to test the evidence adduced before him in Court, and made use of the impression made on his mind by what he saw in deciding the case :

Held (per Stephen, J.)—That the course adopted by the Magistrate was not illegal, and that, although the Code of Criminal Procedure does not expressly authorise such a local enquiry, the Code is not exhaustive in dealing with the powers of a Magistrate, and it cannot, by omitting to justify a certain course of action on his part, deprive him of powers which he otherwise possesses. A trying Magistrate may visit the scene of an alleged offence to test the evidence he has heard in Court, and act on the opinions he has formed from what he has seen, in adjudicating between the parties.

Per Woodroffe, J.—That a Court cannot take a view of the locality for any purpose other than that of understanding the evidence adduced in Court.

The Court ought, in every case, in which it has held a local inspection, to acquaint the parties with the opinion it has formed.

Per Chatterjee, J. (on reference).—That a Magistrate may inspect the *locus in quo* in cases where he cannot follow or understand the evidence without himself seeing the features of the land, and he does not by merely so doing disqualify himself from trying the case. As local inquiry is permissible, the Magistrate may use his own observation for testing the evidence adduced before him with regard to the features of the locality.

The disadvantages of a local inquiry discussed.

While however the law allows a view of the locality by the trying Magistrate, and it is in some cases not only convenient but necessary for the ends of justice, every possible precaution should be taken that such a view should be nothing but a view of the local features, and an

Local Inquiry—(Concluded).

immediate report of what is seen should be placed on the record, and laid open to the scrutiny of the parties.

Where it was contended that, apart from the Magistrate's own observation, there was sufficient evidence on the record to support the conviction, *held*,

Per Woodroffe, J.—Such a contention must fail, for it is a matter of entire speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to by witnesses.

Per Chatterjee, J.—That as the Magistrate in this case had done much more than viewing the place for the purpose of following or understanding the evidence and testing it, the conviction was bad. **Babbon Sheikh v. The King-Emperor**, 14 C.W.N. 422 = 5 Ind. Cas. 365 = 11 Cr. L.J. 121 = 37 C. 340.

STEPHEN, WOODROFFE and CHATTERJEE, JJ.

(2) Personal inspection of a spot by a Magistrate—Value. See PENAL CODE, No. 28, 55 P.W.R. 1910 (Cr.).

Local Self-Government Act.

See ACT III OF 1885 (BENGAL).

Lottery.

What is—Keeping a lottery office—Offence. See PENAL CODE, No. 36, 14 P.W.R. 1910 (Cr.).

Magistrate.

(1) Jurisdiction of a Magistrate to act on information transmitted to him in another public capacity—Cognizance of an offence of mischief under S. 426, Penal Code—Order of attachment—Legality. See CRIM. PRO. CODE, No. 81, 37 C. 221.

(2) Powers of committing Magistrate. See CRIM. PRO. CODE, No. 108 C. 215 P.L.R. 1910.

Mahomedan Law (Guardianship).

(1) Who is entitled to custody of male children—Habeas Corpus. See CRIM. PRO. CODE, No. 166, C. 12 L.R. 891.

Maintenance.

(1) *Right of wife to—Effect of decree for restitution of conjugal rights—S. 488, Crim. Pro. Code.—Maintenance of children.*

The wife's application for maintenance should not be granted where a decree for restitution is in full force against her and no new cause for living apart is alleged.

Maintenance—(Concluded).

A father is not at liberty to refuse to maintain his children on the ground that they are not living with him. If he does not wish to provide them with separate maintenance, it is his business to apply to the proper authority and get the custody of them. *Nga Po Saw v. Mi Thet*, U.B.R. 2nd Qr., 34.

SHAW, J.C.

References :—(1898) 23 Bom. 484; (1904) U.B.R. 1904-06, 1 Cr. Pro. 10; (1902) U.B.R. 1802-03, 1 Cr. Pro. 7; (1905) U.B.R. 1904-06, 1 Cr. Pro. 39; U.B.R. 1910, Vol. I., p. 1.

Malabar Compensation for Tenants Improvements Act.

See ACT I OF 1900 (MADRAS).

Mashirnama.

—Use of, as evidence. See EVIDENCE, No. 2, 4 S.L.R. 38.

Master and servant.

Compensation—Order if can be made against servant for information given on behalf of master. See CRIM. PRO. CODE, No. 62, 14 C. W.N. 326.

(2) Breach of conditions of license—Liability of. See EXCISE REGULATION (V OF 1901, MYSORE), No. 1, 15 M.C.C.R. 136.

(3) Master cannot sue for defamation of servant. See PENAL CODE, No. 98 C., 8 Ind. Cas. 220.

Medical opinion.

Value of. See CRIM. PRO. CODE, No. 103 C. S. 21, 5 P.L.R. 1910 (Cr.).

Merchandise Marks Act.

See ACT IV OF 1889.

Minor.

(1) Minor—Capacity to bind himself by contract—Parental authority—Delegation—When revocable—Court's power to revoke. See CRIM. PRO. CODE, No. 166, 8 M.L.T. 47.

(2) Application under S. 195, Crim. Pro. Code, presented by minor—Procedure, See CRIM. PRO. CODE, No. 98, 6 Ind. Cas. 367.

Misappropriation.

(1) Duty of prosecution in cases of. See PENAL CODE, No. 80 a-i, 8 Ind. Cas. 687.

Mischief.

(1) Elements of the offence. See PENAL CODE, No. 85, 11 Cr. L.J. 168.

(2) Damage of one's own property by himself—Effect. See PENAL CODE, No. 87 E, 7 Ind. Cas. 812.

Misdirection to jury.

(1) *Jury, trial by—Sessions Judge telling jury that there was no force in a certain argument of accused—Misdirection—Conviction under Ss. 395, 109, I.P.C.—Maintainability.*

Where the Sessions Judge told the jury that there was no force in the argument that the accused may not have foreseen and may not have intended that a dacoity should take place, and where the accused was convicted of having committed offences under Ss. 395, 109, I.P.C. *Held*, that the Sessions Judge should not have taken the matter out of the hands of the jury in this way, and that the conviction of the accused should be set aside. *In re Shivappa Hegade*, 7 M.L.T. 191=5 Ind. Cas. 935=11 Cr.L.J. 334.

MUNRO and ABDUR RAHIM, JJ.

(2) *What amounts to.*

It would be a material misdirection to the jury to tell them to leave out of consideration the evidence of a witness and the retracted confession of the accused. The Sessions Judge, after commenting upon the evidence of the witness, should leave it to the jury to act upon that evidence or not as they thought right.

As to the retracted confession, *held* that he should have told them that they should consider, in view of all the circumstances in the case, whether the confession or the statement retracting it was true and to act accordingly. *The Public Prosecutor v. Papakka*, 8 M.L.T. 372 (Cr.).

MUNRO and KRISHNASWAMI IYER, JJ.

(3) *Misreception of evidence—Reasons given by Magistrate for discharge in the first instance—Reasons given by Sessions Judge in directing commitment—Setting out nature of defence—Judge's address to jury—What should nature of address be—Crim. Pro. Code. S. 423, Cl. (2).*

The reasons given by a Magistrate in discharging the accused at first and the contents of the Sessions Judge's order in directing further enquiry and the commitment of the accused, that is to say, the opinions of these two officers should not be admitted in evidence.

Failure to set out clearly the nature of the defence of the several accused, and failure to warn the jury, in dealing with the retracted confession of one of the accused, that, if the jury found they could not act upon it as against that accused, they must wholly disregard it as against the others, will vitiate the trial.

Misdirection to jury—(Continued).

A Sessions Judge in addressing a jury should endeavour to speak in a simple and direct manner. The charge to the jury should not be extravagant, so that the jury may not experience any difficulty in appreciating his true intention and meaning. **Harendra Pal v. Emperor**, 7 Ind. Cas. 915.

CHATTERJEE and TEUNON, JJ.

- (4) *Crim. Pro. Code (Act V of 1898), S. 303—Jury—Unanimous verdict of jury—Questioning jury—First information, use to be made of, whether evidence—Misdirection—Omission—Absconding of accused, value of.*

A Judge is not justified in questioning the jury after they have given an unanimous verdict.

The first information is not evidence in the case. It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. The most use which a Judge can make of it is to say that, although it gave a different account of the occurrence from that in the evidence, yet it can be reconciled with the evidence. It is misdirection on the part of the Judge to ask the jury to accept the statement in the first information in preference to the evidence in the case.

Where the Judge thought it necessary to put the fact that no evidence was adduced for the defence prominently before the jury, he was bound to qualify it by pointing out to the jury that the defence was not bound to call any evidence, that they could rely on the prosecution evidence, as far as it could help them, and that they were entitled to the benefit of any doubt.

Where it was proved that, after the alleged occurrence the accused and the villagers absconded, the Judge should point out to the jury that absconding is a matter which is equally consistent with innocence as with guilt, and that it could only be considered in connection with the rest of the evidence and that it is in itself a circumstance of no weight. **Asfar Sheik v. Emperor**, 8 Ind. Cas. 52 (Cr.).

HOLMWOOD and DOSS, JJ.

- (5) Failure to explain the law to the jury—Omission to explain definition of robbery. See **CRIM. PRO. CODE**, No. 132, 6 Ind. Cas. 14.

- (6) Charge to the jury—"Laying down the law" under S. 297, **Crim. Pro. Code**, what is—

Misdirection to jury—(Concluded).

Effect of failure—Whether defect cured by S. 537 (d), **Crim. Pro. Code**. See **CRIM. PRO. CODE**, No. 134, 5 L.B.R. 149.

- (7) Imperfect statement of elements constituting offence—Failure to direct that every man is presumed to intend natural consequences of his act—Misdirection. See **PENAL CODE**, No. 51, 6 Ind. Cas. 251.

- (8) Improper admission of evidence—Retrial. See **EVIDENCE ACT**, No. 7, 11 C.L.J. 301.

Misjoinder of charges.

- (1) *Evidence, misreception of—Crim. Pro. Code (Act V of 1898), Ss. 233, 234, 236, 239, 537—Statement of accused as to place of concealment—Independent discovery by police—Statement as to conduct—Evidence Act (I of 1872), S. 27.*

There is no misjoinder of charges where some of the accused charged under S. 395, **Penal Code**, were also charged under Ss. 411 and 412 of the Code, on the strength of an incident which was part of the evidence against them on the charge under S. 395.

A statement made by the accused to the Police officer, after the discovery was made, as to the place where the stolen property was concealed, is admissible in evidence under S. 27 of the **Evidence Act**; but the reception of the statement as to the pointing out by the accused of the place of concealment, though not illegal is improper. **Janki v. Emperor**, 11 C.L.J. 182—5 Ind. Cas. 769.

JENKINS, C.J., and MOOKERJEE, J.

- (2) Under Ss. 3 and 4, **Gambling Act**. See **ACT III OF 1867 (GAMBLING)**, No. 2, 5 P.W.R. 1910 (Cr.).

- (3) See **JOINDER OF CHARGES**.

Mortgage (Gene al).

Mortgage of a mortgage—Effect—Mortgagor not disclosing his defective title—Whether cheating. See **PENAL CODE**, No. 83-a, 40 P.W.R. 1910 (Cr.).

Motive.

- (1) *Proof of, if necessary to fix guilt on accused.*

It is not always possible or necessary for the prosecution to prove the motive of the accused in committing the crime, and the absence of any proof of motive is not in itself sufficient to justify the rejection of evidence, which, otherwise, is reliable. **The Crown v. Balochkhan wd. Kadero**, 4 S.L.R. 88 (Cr.).

HAYWARD and LEGGATT, JJ.

Mukhtiarakar.

Reports of—If evidence. See CRIM. PRO. CODE, No. 81, 4 Sind L.R. 18.

Municipal Act.

See ACT XX OF 1891 (PUNJAB).

See ACT I OF 1900 (N.W.P. AND OUDH).

Murder.

(1) Firing two shots—Intention to. See PENAL CODE, No. 55, 1 P.W.R. 1910 (Cr.).

(2) Circumstantial evidence not satisfactorily explained—Conviction for. See CONFESSION, No. 3, 98 P.W.R. 1910 (Cr.).

Native State.

(1) Native Indian subject committing offence in—Jurisdiction. See PUNJAB CHIEF COURT, No. 1, 20 P.W.R. 1910 (Cr.).

(2) Dacoity committed in British India—Stolen property found in—Trial in a British Court—Certificate of Political Agent necessary. See CRIM. PRO. CODE, No. 76, 6 Ind. Cas. 308.

Newspaper.

What is a—. See ACT VII OF 1908 (NEWSPAPERS), No. 1, 12 C.L.J. 294.

Newspapers (incitement to offences) Act.

See ACT VII OF 1908.

Notice.

Peon entrusted with service of—Representation that the notice was a warrant and arrest—Conviction. See PENAL CODE, No. 18, 7 M. L.T. 429.

Nuisance.

(1) Putting up posts in *busti*—Whether nuisance. See ACT III OF 1899 (CALCUTTA MUNICIPAL) No. 1, 8 Ind. Cas. 17.

Obiter dictum.

Meaning and scope of. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Opium Act.

See ACT I OF 1878.

Pardon.

(1) Tender of—when, will be forfeited—Duty of Judge and jury. See CRIM. PRO. CODE, No. 135, 7 M.L.T. 121.

(2) Tender by committing Court—Retracting confession before special Bench—Powers of special Bench. See APPROVER, No. 2, 37 C. 845.

Pariah.

Causing, to stand in a public street—Pollution—Obstruction—Wrongful restraint. See PENAL CODE, No. 60, 7 M.L.T. 366.

Passenger.

Definition of. See ACT IX OF 1890 (RAILWAYS), No. 3, 31 P.W.R. 1910 (Cr.).

"Patakhas."

—or crackers, whether fire works—license, whether necessary for sale of. See ACT IV OF 1884 (EXPLOSIVES), No. 1, 8 P.R. 1910 (Cr.).

Penal Code.

(1) Ss. 3, 4—Scope and effect. See PUNJAB CHIEF COURT, No. 1, 20 P.W.R. 1910 (Cr.).

(1-a) S. 4. See No. 1. *supra*.

(2) Ss. 24, 25, 464, 471—*Forgery, interpolation of the name of a person as an attesting witness if—False document, ingredients of—Material part of document, if altered—Dishonestly and fraudulently.*

Where the accused, after the execution and registration of a document which was not required by law to be attested, added his name to the document as an attesting witness:

Held, (by Mookerjee, J., agreeing with Harington, J., Teunon, J., dissenting)—That the accused was not guilty of an offence under Sec. 471; that the accused, by the insertion of his name as an attesting witness, cannot be held to have done the act either dishonestly or fraudulently within the meaning of these words as defined in Ss. 24 and 25, Penal Code.

The word "fraudulently" defined.

The interpolation of the name of a person as an attesting witness to a document not required by law to be attested, subsequent to its execution and registration, is not an alteration of the document in a material part. **Surendra Nath Ghosh v. The Emperor**. 14 C.W.N. 1076.

MOOKERJEE, HARINGTON and TEUNON, JJ.

(2-a) S. 25—See No. 2, *supra*.

(2-b) Ss. 30, 477—Title page of account book signed by partners—Valuable security—See CRIM. PRO. CODE. No. 5-a, 7 Ind. Cas. 747.

(3) Ss. 34, 141, 142, 147, 149—*Unlawful assembly—Riot—Common object—Conduct—Presumption—Criminal Procedure Code (Act V of 1898.) Ss. 233, 235, 239—Riotous mob—Same transaction—Joint trial—Evidence of good character—Political offence—Positive evidence—Negative evidence—Weight of evidence.*

Penal Code—(Continued)'

Per Benson and Munro, JJ.—In the absence of evidence or reasons to the contrary it is permissible to presume that the common object of a riotous mob is that indicated by their conduct, and that they entertained from the beginning the common object indicated by their conduct throughout their proceedings.

The proceedings of a riotous mob, which from first to last showed a continuity of purpose and of action and were united by a close proximity in time, form one transaction within the meaning of Ss. 235 and 239, Crim. Pro. Code, so as to render all the rioters liable to be tried at the same trial for the acts done by each of them.

Per Benson, J.—The presumption from the evidence of good character, education and good family connection of an accused person cannot be pressed too far in the case of offences originating in extreme political feeling.

The negative evidence of the witnesses, who say that they did not see the accused doing anything, cannot outweigh the positive evidence of those who prove the acts done by him.

Per Sankaran Nair, J.—The essence of the offence defined in S. 141, Indian Penal Code, is the common unlawful purpose and an accused person cannot be convicted if the common object proved is different from the common object in the charge or for which he has been tried.

Persons to be tried jointly for an offence under S. 142, Indian Penal Code, must have been associated from the first in the series of acts which form the same transaction. *In re Loganathaiyar*, 11 Cr. L.J. 30=4 Ind. Cas. 700=6 M.L.T. 17.

BENSON and SANKARAN NAIR, JJ.

References:—29 B. 449 (465); 7 Bom. L.R. 527; 2 Cr.L.J. 480; 31 C. 1053; 8 C.W.N. 715; 1 Cr.L.J. 713, F.

(3-a) Ss. 35, proviso 1, 397—*Punishment—Accused convicted of several offences—Aggregate term of imprisonment.*

Held that an aggregate sentence of 20 years' rigorous imprisonment is contrary to the provisions of proviso to S. 35, Penal Code.

The provisions of S. 35 only apply to a person convicted at one trial of two or more distinct offences. The section has no application whatever when a person is convicted on two or more separate trials even though in all of them the complainant is the same and the offences are similar and they are concluded on the same date. In the case of separate trials

Penal Code—(Continued).

S. 397 applies. *Shoo Narain v. The Crown*, 105 P.L.R. 1910.

REID, C.J., and RYVES, J.

(3-b) S. 40. See No. 93, *infra*.

(4) S. 71—Crim. Pro. Code, Act V of 1888, S. 35—*Separable offences under S. 71, I, P. C., whether distinct offences within S. 35, Crim. Pro. Code—Separate sentences under S. 71—Legality—Failure of justice, not happening—Interference in revision.*

Separable offences which come within the provisions of S. 71, I.P.C., cannot be treated as distinct offences within the meaning of S. 35, Crim. Pro. Code., 1898. A Court, in awarding punishment under the provisions of S. 71, I.P. C., should pass one sentence for either of the offences in question, and not a separate one for each offence (a).

Where, however, the aggregate punishment in such a case does not exceed the punishment provided by law for the major offence, and where the irregularity has in fact occasioned no failure of justice, the High Court will not interfere in revision. *Imperator v. Baradi*, 3 St.L.R. 224=6 Ind. Cas. 880=11 Cr.L.J. 415.

KNICHT and CROUCH, A. J. C. S.

References:—(a) 23 B. 706, F.; 10 A. 58 and 17 B. 260, not F.

(5) S. 71—*Separate sentences for different offences—Powers of Magistrate.* See CRIM. PRO. CODE, No. 9, 7 A.L.J. 910.

(6) S. 76—*Act done by accused under the orders of superior officer—Evidence Act (I of 1872), S. 105—Presumption—Pleadings.*

Where an accused person has raised pleas inconsistent with the defence which would bring his case within one of the general exceptions in the Indian Penal Code, he cannot, in appeal, set up a case, upon the evidence taken at his trial, that his act came within such general exceptions; the circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record. In the absence of such evidence, the Court is not competent to assume the existence of those circumstances, more particularly when the pleas taken are inconsistent with the assumption that such circumstances might have existed, or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the

Penal Code—(Continued).

doubt. **King-Emperor v. Wajid Husain**, 7 A.L.J. 438=6 Ind. Cas. 589=11 Cr. L.J. 374=82 A. 451.

KNOX and KARAMAT HUSAIN, JJ.

(7) Ss. 77, 499, 500—. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

(7-a) Ss. 85, 86—*Voluntary drunkenness—Intention.*

Where an act done is not an offence unless done with a particular intention, it is permissible to consider voluntary drunkenness in determining whether the accused had that intention. **J. M. v. King-Emperor**, U.B.R. (1910) 2nd Cr. p. 17.

SHAW, J.C.

References:—8 W.R. 71 (Cr); W.R. (1884) 24 (Cr.); 2 L.B.R. 204; 2 S.T.L.B. 650, 16 Cox. C.C. 306, *cons.*

(7-b) S. 86. See No. 7-a, *supra*.

(8) Ss. 104, 504. S. 104 can have no application by way of defence to a charge under S. 504. See CRIM. PRO. CODE, No. 129, 11 C.L.J. 113.

(8-a) S. 109. See No. 57 and 72-a, *infra*.

(8-b) S. 114. See No. 57, *infra*.

(9) Ss. 114, 302—Charge under S. 302—Conviction under Ss. 114, 302. See CONFESSION, No. 1, 11 C.L.J. 273.

(10) Ss. 121, 121-A, 122, 123—Offences under—Sanction authorising complaint of offences under special sections and “other” offences—Commitment for offences not specified—Legality—“Waging war,” meaning of. See CRIM. PRO. CODE, No. 71, 37 C. 467.

(11) Ss. 121, 124-A—*Waging war against the King—Abetment of waging war—Incitement to wage war.*

The accused published a book of poems, where in a spirit of blood-thirstiness and murderous eagerness directed against the Government and “white” rulers ran through the poems; the urgency of taking up the sword was conveyed in unambiguous language; and an appeal of blood-thirsty incitement was made to the people to take up the sword, form secret societies, and adopt guerilla warfare for the purpose of rooting out “the demon” of foreign rule.

Held, that the poems conveyed to readers an instigation to war; and that the offence of abetting the waging of war, punishable under S. 121, Penal Code, was committed.

Per Chandavarkar, J.—Under the English Law, mere words spoken or written, however,

Penal Code—(Continued).

wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King, or the levying of a war against him, and in the contemplation of the speaker, do not amount to treason. Under the Indian Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by S. 121. That is, the abetting of the waging of war is under the Code as much an offence of treason as the waging of war itself.

According to the general law as to abetment (S. 108, Expln. 2), to constitute the offence of abetment, it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused. This applies to the abetment of the waging of war against the King, as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while, under the general law as to abetment, a distinction is made, for the purposes of punishment, between abetment which has succeeded and abetment which has failed, S. 121 does away with that distinction so far as the offence of waging war is concerned, and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever.

Per Heaton, J.—So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore of abetting the waging of war.

The term ‘instigation,’ as used in S. 107, Penal Code, may be an instigation of an unknown person.

The term ‘abet’ in S. 121 of the Code does not mean something less than that word as used in S. 107. (See S. 7 of the Code). The abetment contemplated by S. 121 need not be abetment of some war in progress; there may be, and usually is, instigation of rebellion before rebellion actually begins: instigation of this kind is abetting waging war against the King. **Emperor v. Ganesh Damodar Savarkar**, 12 Bom. L.R. 105 (Cr.).=5 Ind. Cas. 854=11 Cr. L.J. 264=34 B. 394.

CHANDAVARKAR and HEATON, JJ.

(11-a) S. 121-A. See Nos. 10 and 11, *supra*.

(11-b) S. 122. See No. 10, *supra*.

(11-c) S. 123. See No. 10, *supra*.

Penal Code—(Continued).

- (12) *S. 124-A—Sedition—Newspaper—Printer—Fair comment—Admissibility in evidence of articles other than one complained of—Evidence Act (I of 1872), S. 15—Journalist not expected to write with precision.*

In order to use other articles than that complained of as seditious for the purpose of showing the meaning of certain expressions used in the article complained of and also to show the intention of the writer, it is necessary to show who the writer was and that all the articles produced were by the same hand.

The writer may be guilty of exciting or attempting to excite feelings of "disaffection", as that term is used in S. 124-A of the Penal Code, no matter how guardedly he may attempt to conceal his real object, but the printer and publisher cannot be punished if the concealed object is not established by evidence on the record (a).

A man may comment upon any measure or act of Government, whether legislative or executive, and freely express his opinion upon it. He may express the strongest condemnation of such measures and he may do so severely, and even unreasonably, perversely, or unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred of his readers—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling on its foreign origin and character, or imputing to it base motives or accusing it of hostility or indifference to the people then he is guilty under S. 124-A and the explanation will not save him (b).

A writer in a newspaper called upon the Nationalist Party to "once more assume their legitimate place in the struggle for Indian liberties": *Held*, that the use of the word "liberties" in the plural would not *prima facie* point to liberation of the country from foreign rule, but to certain specific liberties, and that the words were not seditious.

A writer is entitled to express his opinion on the Reform Scheme, and the mere fact that he states that the scheme is not a genuine reform or not a genuine measure of constitutional progress, cannot be seditious.

A writer wrote the following in a newspaper: "We shall not break the law and, therefore, we need not fear the law. But, if a corrupt police,

Penal Code—(Continued).

unscrupulous officials or a partial judiciary make use of the honourable publicity of our political methods to harass the men who stand in front by illegal ukases, suborned and perjured evidence or unjust decision; shall we shrink from the toll that we have to pay on our march to 'freedom': *Held*, that these words did not fall within S. 124-A of the Penal Code.

There is no harm in a writer stating that, if his association, which he believes to be a lawful one, is suppressed, the proclamation suppressing it will be arbitrary.

A statement that the Reform Scheme is monstrous and misbegotten, because it is not founded upon democratic principles, is not by itself one that exceeds fair and reasonable comment.

A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expression of keeping with the general character and tendency of the articles.

A journalist wrote: "Until these demands are granted we shall use the pressure of that refusal of co-operation which is termed passive resistance. The Swadeshi—Boycott movement still moves by its own impetus. We must free our social and economic development from the incubus of the litigious resort to the ruinously expensive British Court. *Held* that the words were not seditious. **Mon Mohan v. Empreor** 8 Ind. Cas. 531.

HOLMWOOD and FLETCHER, JJ.

References:—(a) 20 A. 55 (68), *Rel.* (b) 22 B. 112, *Rel.*

(12-a) S. 124-A, essentials of—Sedition—Attempt to publish sedition—Intention in sedition is a question of fact. See CRIM. PRO. CODE, No. 147, 12 Bom. L.R. 21.

(13) S. 124-A—Declaration made under the Press Act—Effect—Publication of seditious book. See ACT XXV OF 1867 (PRESS), No. 1, 12 Bom. L.R. 675.

(13-a) *Ss. 124-A, 153—Same pamphlet—Different passages—Distinct offences under two sections—S. 71, I.P.C.—Separate conviction under each section—Legality—Crim. Pro. Code, S. 196—Order stating facts—Non-specification of sections of Penal Code—Sufficiency.*

Where separate convictions and sentences were passed upon three persons on the charge of attempting to promote feelings of hatred

Penal Code—(Continued).

between different classes of His Majesty's subjects, and where it was contended that this charge did not comprise a distinct offence but was included in the charge of attempting to excite disaffection against the Government established by law in British India, *held* that the offence of attempting to promote feelings of hatred between the different classes of His Majesty's subjects was distinct from and not a necessary ingredient in the offence of exciting disaffection against the Government established by law in India.

It is not necessary for the charges to specify distinct passages in the pamphlet which were alleged to constitute the offence of attempting to promote feelings of hatred, and the distinct passages which were alleged to constitute the offence of attempting to excite disaffection. It is sufficient to allege generally that the pamphlet constitutes an attempt to promote feelings of hatred and also to excite disaffection (a).

The two offences, though committed by means of the same pamphlet, are distinct ones and do not come within the terms of S. 71, I.P.C. (b).

So long as the matter of complaint is made sufficiently clear in the order, no specification of the particular section of the Penal Code appears to be required by S. 196, Crim. Pro. Code. **Imperator v. Virumal Begraj**, 4 S.L.R. 55.

HAYWARD, J.C. and CROUCH, A.J.C.

References :—(a) 33 B. 77 (82, 85), *F.* (b) 10 Bom. L.R. 848 (903); and 12 Bom. L.R. 105 (106, 115, 117), *F.*

(13-b) S. 141. See No. 3, *supra*.

(13-c) S. 142. See No. 3, *supra*.

(13-d) S. 143. See No. 87, *infra*.

(14) Ss. 143 and 379—Charges of theft and unlawful assembly—Points for determination—Judgment. See CRIM. PRO. CODE, No. 140, No. 37 C. 194.

(15) S. 147—Common object charged and common object proved—Variance between, when not material. See LOCAL INQUIRY, 1, 14 C.W.N. 432.

(16) S. 147—Rioting—Essentials of offence—Errors in the charge—Effect. See CRIM. PRO. CODE (MYSORE), No. 4, 15 M.C.C.R. 68.

(16-a) S. 147. See No. 3, *supra*.

(17) Ss. 147, 304 read with S. 149—Conviction upon a hypothetical state of facts, not

Penal Code—(Continued).

suggested by the prosecution, how far sustainable—Hypothetical case.

In cases of rioting, it often happens that the Court may consider that the story told by the prosecution is false in some of its details, but is nevertheless sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution and was never suggested to the accused as being the case they had to meet. **Bunga Hadua v. The King-Emperor**, 11 C.L.J. 270=5 Ind. Cas. 771.

STEPHEN and CARNDUFF, JJ.

(17-a) S. 149. See No. 3, *supra*.

(16-b) Ss. 149, 302, 436—Riot—Unlawful assembly—Common object.

In the recent Kotappakonda riots in 1909, certain persons were killed, the police station was burnt down, and a constable was burnt to death under a heap of straw piled upon him and a number of accused were convicted for various offences. *Held* that there is no evidence that the first accused himself set fire to the police station, and he can only be found guilty on this count if it is held that the police station was set on fire in prosecution of the common object of the unlawful assembly, or that the members of the assembly knew that the police station was likely to be set on fire in prosecution of the common object. **Chennappareddi v. Emperor**, 8 M.L.T. 326.

MUNRO and SANKARAN NAIR, JJ.

(17-c) S. 153. See No. 13-a *supra*.

(17-d) S. 162—Taking bribes—Motive essential to constitute offence.

Where it was simply found that a certain sum was handed to the accused to be delivered by him as bribe to the subordinate Magistrate: *Held* that this was insufficient to support a conviction under S. 162, without a finding that the money was accepted or obtained by the accused as a motive or reward for tampering with the subordinate Magistrate. **R. Chinnaswami Iyengar v. Emperor**, 8 Ind. Cas. 668.

MUNRO and SANKARAN NAIR, JJ.

(18) S. 166—Peon entrusted with service of notice—Representation that the notice was a warrant and arrest—Conviction under S. 66, I.P.C.—Legality.

Penal Code—(Continued).

Where a peon, who was entrusted with a notice for service on the complainant, and whose duty was merely to require the signature of the complainant to an acknowledgment of the service of notice, represented the notice to be a warrant and actually arrested the complainant under colour of the alleged warrant held, that the peon was rightly convicted under S. 166, I.P.C. *In re Rangasami Naidu* 7 M.L.T. 429=6 Ind. Cas. 773=11 Cr.L.J. 400=20 M.L.J. 568. "

MUNRO and SANKARAN NAIR, JJ.

(19) S. 168—Municipal member in Berar—Becoming interested in contracts contrary to the terms of S. 146 (1), Berar Municipal Law 1886—Offence under. See BERAR MUNICIPAL LAW, 1886, No. 1, 6 N.L.R. 114 (Cr.).

(20) S. 174—Land Revenue Act (III of 1901), S. 147, intentional disobedience of citation issued under—Construction of the sections of an Act—Legislative Council, admissibility of its proceedings for the purpose of construction.

Held, that, a citation, issued under S. 147 of Act III of 1901, is an order to the defaulter to appear at the time and place named therein within the meaning of S. 174, Penal Code, and intentional disobedience of it is an offence under that section.

Held, further, that debates in a Legislative Council, or reports of Committees which precede the passing of an Act, cannot be referred to as legitimate aids to the construction of a particular section of the Act. *Ram Ball Singh v. King-Emperor*, 13 O.C. 55 (Cr.)=5 Ind. Cas. 805.

CHAMIER and EVANS, JJ.

References:—6 A.L.J. notes 114; 14 A. 145 R.

(20-a) S. 174—Madras Revenue Summons Act (Mad. Act III of 1869), S. 1—Disobedience to summons issued by Tahsildar—Revenue enquiry held by Revenue Inspector under Tahsildar's orders—Offence.

Accused, a karnam, was summoned by the Tahsildar, under S. 1 of Madras Act III of 1869, to appear before him on a certain day for enquiring into the correctness of the subdivisions of fields. Accused failed to appear and was convicted under S. 174, I.P.C.

Held (1) that the accused was guilty of an offence under S. 174, I.P.C. and that his conviction was right (a).

Penal Code—(Continued).

(2) that it did not affect the offence that the enquiry for which accused was summoned was not held by the Tahsildar, but was deputed to a subordinate officer. *In re Yenkatarao*, 8 M.L.T. 378.

AYLING, J.

Reference:—(a). 7 M. 197, R.

(21) S. 175—Accused called upon to produce a book in Court—Book not necessary for decision of the case—Disobedience of Court's order—Effect. See CRIM. PRO. CODE, No. 97, 5 Ind. Cas. 17.

(22) Ss. 175 and 188—Difference between S. 136 of the old, and order XI, Rule 21 of the new Code—Disobeying order for production or inspection of documents.

Held, that a party to a suit failing to comply with an order for production or inspection of documents can be dealt with only in the manner prescribed by Order XI, Rule 21, but is not punishable under S. 175 or any other section of the Penal Code. *Ram Chand v. The Crown*, 15 P.W.R. 1910 Cr.=15 P.R. 1910=6 Ind. Cas. 623=11 Cr.L.J. 386.

SIR ARTHUR REID, C.J.

(23) S. 177—Furnishing false information—Road cess return—Road Cess and Public Work Cess Act (IX B.C. of 1880), Ss. 14 94 and 95, object of—Return admissible against person making it.

The object of S. 94 of the Road Cess and Public Work Cess Act is to secure that the person submitting a return does not therein under value his property for the purposes of the Road Cess and Public Work Cess.

Therefore, where the petitioner in such a return presented rent payable to him in respect of his subordinated holding to be in excess of that which the Magistrate found that the tenant was actually bound to pay: Held, that as under S. 95 of the Act, such a return is admissible in evidence against the petitioner and not in his favour, and as he did not under-value his property, he could not be convicted under S. 177 of the Indian Penal Code. *Mohamed Wasil v. Emperor*, 11 Cr.L.J. 11=4 Ind. Cas. 578; 13 C.W.N. 191; 5 M.L.T. 98.

BRETT and RYVES, JJ.

(24) S. 180—Refusal to sign inquest report whether an offence—Crim. Code, Ss. 174 and 175—Power of village head acting under these sections.

Penal Code—(Continued).

An inquest report is not a statement within the meaning of S. 180, Penal Code, and refusal to sign such a report is not an offence punishable under the Penal Code.

A village head acting under Ss. 174 and 175 of the Crim. Pro. Code has only the powers of a police officer specified in S. 175. *In re Andl.* 8 M.L.T. 198 Cr.

SANKARAN NAIR, J.

- (25) S. 182—*Information given to—Public officer—Petition containing information not signed by accused—Sanction to prosecute—Petition for taking action under S. 110 Crim. Pro. Code—Sanction granted without judicial investigation legality of.*

An accused may be convicted of an offence under S. 182 of the Penal Code, even if the petition containing the information given by him is not actually signed by him.

A petition was presented to a District Magistrate, praying that he would proceed under S. 110, Crim. Pro. Code, against a certain person, and certain information was given with regard to such a person. The District Magistrate without holding a judicial investigation believed the information to be false and granted sanction against the petitioner for an offence under S. 182 of the Penal Code.

Held, that the sanction to prosecute was valid (a). *Emperor v. Gokal walad Satram*, 11 Cr. L.J. 3=4 Ind. Cas. 477 ; 3 S.L.R. 132.

LUCAUS, J.C., and CROUCH, A.J.C.

References:—(a) 1 C.W.N. 452, not appl.

- (26) S. 182—*False information to the Police, prosecution for,—Opportunity to the informant to prove his case—Sanction given by the Inspector of Police—Criminal Procedure Code (Act V of 1898), S. 195—Cognizance of an offence without the complaint of public servant with whom false information lodged.*

A person, who lays information to the Police is entitled to have his case judicially determined, before he is called upon to answer the charge of giving false information under S. 192, I.P.C.

Where, on the Police reporting an information to be false, the Inspector of Police, purporting to act under S. 195, Crim. Pro. Code, granted sanction for the prosecution of the informant under [S. 182, I.P.C., and the Magistrate took cognizance of the offence :

Penal Code—(Continued).

Semble :—That, without the complaint of the public servant to whom the alleged false information was given, the Magistrate was not right in taking cognizance of the offence. *Munshi Isser v. The King-Emperor*, 14 C.W.N. 765=6 Ind. Cas. 415=11 Cr. L.J. 856.

• HARINGTON and HOLMWOOD, JJ.

- (26-a) S. 182—*Unfounded allegations against a magistrate in application for transfer—Information to public officer.*

The accused applied for transfer of his case from Tahsildar's court, and in the application made certain unfounded allegations against the Tahsildar. He was examined by the Sub-Divisional Magistrate and repeated the allegations made in the application. *Held* that the statement made under such circumstances was not information given to a public officer within the meaning of S. 182, I.P.C., and the petitioner could not be prosecuted for that statement, inasmuch as he was in the position of an accused person and made the statement in answer to questions put by the Sub-Divisional Officer. *Matau v. King-Emperor*, 7 A.L.J. 1143 Cr.

GRIFFIN and CHAMIER, JJ.

- (26-b) S. 182—*See No. 42, infra.*

(27) Ss. 182, 211—*False complaint to a District Registrar—Sanction to prosecute. See CRIM. PRO. CODE, No 96, 11 C.L.J. 111.*

(28) Ss. 182, 211—*Acquittal of offence under S. 182, whether bars subsequent trial of accused for an offence under S. 211. See CRIM. PRO. CODE, No. 143, 20 P.R. 1910, Cr.*

(29) Ss. 182, 500—*Acquittal of offence under S. 182, whether bars prosecution under S. 500, arising out of the same transaction. See CRIM. PRO. CODE, No. 117, 14 C.W.N. 839.*

- (30) S. 186—*Resistance to the execution of warrant under the Public Demands Recovery Act after the date specified in the warrant—Civ. Pro. Code (Act V of 1908) O. 21, r. 24—Extended date not specified in the warrant—Execution by person not expressly authorised—Warrant under Chowkidari Act (VI of 187, B.C.) S. 45—Delegation of authority to execute.*

A warrant issued under the Public Demands Recovery Act (I of 1895) was made returnable on the 26th July, and it was alleged by the prosecution that the warrant was extended to the 8th of August. The accused resisted the execution of the warrant on the 2nd August

Penal Code—(Continued).

and were charged with an offence under S. 186, I.P.C.

Held that, under O. 21, r. 24, Civ. Pro. Code, the day on or before which the warrant was to be executed should have been specified in the warrant. Even assuming that the warrant had been extended to the 8th August, the warrant, on the date of its execution, viz., the 2nd August, was not a good warrant, inasmuch as the extended date did not appear on the warrant, and therefore "the accused did not commit any offence under S. 186 by offering resistance to its execution on the 2nd August.

Resistance to the execution of a warrant issued under the Public Demands Recovery Act, by a person on whom the warrant on the face of it does not confer any authority to execute it, does not constitute an offence under S. 186, I.P.C.

The person against whom the warrant is sought to be executed is entitled to see the warrant not only for the purpose of satisfying himself as to the amount, but also for the purpose of satisfying himself that the person who seeks to execute the warrant is legally authorised to do so.

Where a warrant issued under S. 45 of the Chowkidari Act (VI of 1870, B.C.) was directed to the naib-nazir, who made it over to one of his subordinates for execution.

Held, that the resistance to the execution of the warrant by the latter person to whom the warrant was made over did not constitute an offence under S. 186, I.P.C.

The warrant issued under S. 45 of the Chowkidari Act must contain the name of the person who is to execute it, and only that person who is named in the warrant as charged with execution can lawfully execute it.

The words of S. 45 of the Chowkidari Act are sufficiently stringent to override any general power of delegation which the naib-nazir might have in cases of execution of warrants in which his power has not been specifically limited by statute. **Sheikh Naseer v. The Emperor**, 14 C.W.N. 282 = 37 C. 122 = 11 Cr. L.J. 128 = 5 Ind. Cas. 409.

HARINGTON and CHATTERJEE, JJ.

(30-a) Ss. 186, 225 B—Resistance or obstruction to arrest—Overt act.

Where a warrant was issued by the Civil Court for arrest of a judgment-debtor, and he resisted the officer executing the warrant in

Penal Code—(Continued)

making the arrest, he would be guilty of an offence under S. 225 (B), Penal Code. But where the judgment-debtor, on seeing the officer, ran into the house and thus avoided arrest, *held* that it did not amount to intentional resistance or obstruction to the arrest within the meaning of S. 225-B, I.P.C. There must be an overt act of resistance or obstruction which could justify a conviction under S. 186 or S. 225, I.P.C. **King Emperor v. Gajadhar**, 7 A.L.J. 1174. (Crl.).

STANLEY, C.J., and BANERJI, J.

(31) S. 188—Disobedience of order under S. 144, Crim. Pro. Code—Sanction to prosecute, essentials for granting.

A Magistrate should not sanction a prosecution under S. 188, Penal Code, unless he thinks that all the elements necessary for a conviction are present.

Where the order sanctioning a prosecution under S. 188, Penal Code, for an alleged disobedience of an order under S. 144, Crim. Pro. Code, did not show that the disobedience caused or tended to cause obstruction, annoyance or injury or a riot, the High Court set it aside in revision. **Projapat Jha v. The Emperor**, 14 C.W.N. 234 (Cr.) = 5 Ind. Cas. 154 = 11 Cr.L.J. 49.

COXE and RYVES, JJ.

(31-a) Ss. 188 and 430—Overseer of the P.W.D. not a public servant lawfully empowered to promulgate an order—Disobedience thereto—No offence under S. 188.

The accused, *ryots* of a certain village, were convicted by the Deputy Magistrate of offences under Ss. 430 and 188, Penal Code, for damaging a certain *odai* and feeding the tank in contravention of an order issued by the P.W.D. Overseer. The Sessions Judge reversed the conviction under S. 430, but confirmed the conviction under S. 188, I.P.C. It was contended on behalf of the accused that the Overseer's order did not come within S. 118.

Held, that the contention was valid. The order of the Overseer could not operate to make an act unlawful which was lawful before its promulgation. **Malina Servai v. Emperor**, 8 Ind. Cas. 302 (Cr.).

ATYLING, J.

(31-b) S. 188—See No. 22, *supra*.

(32) S. 193—Perjury—Crim. Pro. Code (Act V of 1898), S. 476, enquiry under, if judicial proceeding.

Penal Code—(Continued).

An enquiry under S. 476, Crim. Pro. Code, is a judicial proceeding, and a witness giving false evidence in the course of such an enquiry is guilty of offence under S. 193 of the Penal Code. **Abdullah Khan v. The Emperor**, 14 C.W.N. 132=5 Ind. Cas. 62=11 Cr.L.J. 45=37 C. 52.

CHATTERJEE and RYVES, JJ.

Reference:—34 C. 42, *relied on*.

(33) S. 193—*Making contradictory statements—When amounts to an offence.*

The gist of an offence under S. 193, Penal Code, in which the accused is charged with making two contradictory statements, one of which he must have known to be false, is that the two statements, taking the words of those statements in their ordinary and natural meaning in the light of the context in which they are used, must be irreconcilable.

Where the accused was charged with perjury, in that he made a statement on the first occasion that he saw one L, son of R, run away from the custody of the peon, and, on the second occasion, that he saw one man going eastward and that he was not certain whether that man was the accused:

Held, that the accused could not be charged or convicted for perjury, as, at the time of his second deposition, the accused was not asked to explain his first deposition in the light of his second statement. **K Narayanan Nair**, 6 Ind. Cas. 409.

ABDUR RAHIM, J.

(34) S. 193—*Perjury—Evidence, sufficiency of.*

A sued B for ejectment from a certain house, B pleaded that he was the owner of the house. A produced two *kirayanamas* executed by B, which showed that he was the tenant of A. B said that he had left his signature on blank papers and it was on those papers that A had subsequently filled up the contents of the *kirayanamas*; he, however, subsequently endorsed on the back of the documents "*Tahrir taslim hai*." Upon the strength of the endorsement, B was run down for perjury: *held* that the endorsement, was not alone sufficient evidence to convict B for perjury. **Chatar Singh v. Emperor**, 7 Ind. Cas. 420.

TUDHALL, J.

(34-a) S. 193—*Cr. P. O. (Act V of 1898)—Perjury—Sanction to prosecute—Judicial proceedings—Land Alienation Act (XIII of 1900)—Delegation of power.*

13 Cr.

Penal Code—(Continued).

The mortgagee having produced before the Deputy Commissioner a copy of a mortgage-deed, that officer referred it to the Tahsildar for investigation and report. The Tahsildar did not make any enquiry. Before the Naib-Tahsildar, the mortgagee stated that no payments were made by the mortgagor to him. On enquiry it was found that payments had been made which were indorsed on the back of the original mortgage-deed and the document was withheld for that reason. The Deputy Commissioner sanctioned prosecution of the mortgagee for falsification of evidence by fraudulently producing the copy and not the original of the mortgage-deed and making a false statement before the Naib-Tahsildar.

Held that the prosecution was illegal, for (1) the mere production of the copy did not amount to falsification of evidence and (2) the proceedings before the Naib-Tahsildar were *ultra vires*. **Klayan Singh v. The Crown**, 80 P.L.R. 1910.

CHEVIS and SHAH DIN, JJ.

(34-b) S. 193—*Prosecution under, when can be ordered.* See CRIM. PRO. CODE, No. 141, 8 M.L.T. 81.

(35) Ss. 193, 311—*Prosecution for perjury—Delay in applying for sanction—Effect.* See CRIM. PRO. CODE, No. 85, 7 A.L.J. 50

(36) S. 194-A—*Keeping a Lottery Office—Lottery, what is.*

Held, that, the office or place, the keeping of which is punishable under the first part of S. 194-A of Act XLV, of 1860, is the scene of the actual drawing of the lottery. But keeping a small office for doing preliminary business and correspondence, and not intended and fit for the drawing purposes, is not indictable under this part of the section.

Held, also, that a scheme for distributing prizes, etc., of the following description, is a 'lottery' within the meaning of the second part of the said section.

"Every subscriber pays Rs. 10-8 and gets a bond for Rs. 10. This sum is guaranteed by one of seven Banks, and not only is negotiable but can be cashed at the Bank at par at any time. The draws were to start when 2,000 tickets had been sold, and, at stated intervals, further drawings were to be made until every one had got a prize or had had their money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize, or decided to withdraw

Penal Code—(Continued).

their money. Thus the original ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc."

Obiter:—In case of doubt, a penal provision of a statute should always be construed in favour of the subject. **Madan Gopal v. The Crown**, 14 P.W.R. 1910 (Cr.)—17 P.R. 1910—6 Ind. Cas. 620—11 Cr.L.J. 382.

SHAH DIN and WILLIAMS, JJ.

References:—XI Q.B. Div. L.R. 207; Cox's Criminal Law Cases, 352; 1 K.B. 1907 448, F.; 1 M.H.C.R. 488; 22 M. 212, D.

(37) Ss. 199, 210—*Sale of more than what the decree allowed—Criminal intention.*

M obtained a decree for sale of half of certain property. He executed the decree thrice. First he applied for sale of the half, but, in his second application, which was infructuous, he applied for the sale of the whole property and actually got the same sold by his third application. On the judgment-debtor's objection, part of the property was exempted, and the decree-holder was put on his trial for an offence under S. 193, Penal Code, which in appeal was changed to S. 210. *Held* that the facts proved did not establish a criminal intention. **Mangatrai v. King Emperor**, 7 A.L.J. 93—5 Ind. Cas. 693—11 Cr. L.J. 202.

TUDBALL, J.

(38) S. 203—*False evidence given on questions by police during investigation.*

S. 203 does not apply to the case of a person who gives false evidence as a witness to the police in the course of their investigation, and that only in reply to questions put to him. It contemplates information volunteered by some person. **Sarju Sarun v. Emperor**, 7 Ind. Cas. 50 (Cr.).

TUDBALL, J.

(38-a) S. 210. See No 37, *supra*.

(39) S. 211—*Sanction to prosecute—Inquiry in granting sanction—Report of police—Magistrate—Criminal Procedure Code (Act V of 1898), Ss. 201—203.*

Before granting any sanction under S. 211, Penal Code, the Magistrate ought to observe all the formalities prescribed in Ss. 201—203, Crim. Pro. Code. In other words, he should examine the complainant, and then afterwards he might refer the matter to the police, and when the police report is received by him, then he may determine whether the complaint is

Penal Code—(Continued).

true or false. That gives him jurisdiction to exercise his discretion and determine the question as to the truth or otherwise of the complaint.

There is nothing in the Code of Criminal Procedure which compels a Magistrate in express terms to examine any or all witnesses whom the complainant wishes to adduce, before dismissing a complaint and granting sanction under S. 211, Penal Code. It may be contrary to justice to do that, but whether it is so or not must depend on the circumstances of each case. *In re Rachappa Tippanna*, 12 Bom. L.R. 229—5 Ind. Cas. 971—11 Cr. L. J. 339.

CHANDAVARKAR and KNIGHT, JJ.

(40) S. 211—*Instituting criminal proceedings—Statement under S. 162, Crim. Pro. Code.*

A statement made under S. 162, Crim. Pro. Code, cannot be made the basis of a prosecution for an offence under S. 211, I.P.C., when the accused made his statement, the law had already been set in motion, and the proceedings cannot be said to have been instituted by the statement made by the accused under S. 162, Crim. Pro. Code. *In re Krishna Baipadithaya*, 20 M.L.J. 132—5 Ind. Cas. 908—11 Cr. L. J. 286—8 M.L.T. 87.

MUNRO and ABDUR RAHIM, JJ.

Reference:—31 M. 506, F.

(41) S. 211—*Telegram sent—No complaint—No prosecution can be ordered—Crim. Pro. Code (Act V of 1888), S. 193—Hearsay evidence.*

A Chaprasi sent a telegram to the Collector, saying that the Tahsildar and certain others in his absence entered his house and forcibly inoculated his wife and children. The Collector sent the telegram to a Magistrate who examined the Chaprasi and certain witnesses, who stated that they had heard that the complainant's house was forcibly entered into. Finding the statement false, he directed the prosecution of the complainant and his witnesses. *Held* that the complaint was no complaint in law, and a prosecution could not be maintained against the Chaprasi under S. 211, Penal Code.

A hearsay statement should not be recorded by a Magistrate while recording the deposition of a witness. If such a statement is recorded it cannot be made subject of prosecution under

Penal Code—(Continued).

S. 193, Penal Code. **Chedi v. King-Emperor**, 7 A.L.J. 618 = 6 Ind. Cas. 890 = 11 Cr.L.J. 351.

KNOX, J.

(41-a) S. 211. See Nos. 27 and 28, *supra*.

(42) Ss. 211, 182—*Complaint, when it can form subject of charge under—Accused filing complaint under, before the disposal of original complaint against him—Conviction under—Effect.*

A complaint must be disposed of in one way or another, before it can form the subject of a charge under S. 211, or, at the least, the responsibility of instituting proceedings under S. 182 must be assumed by the police themselves.

So, it is not open to any accused person to file a complaint against his accusers under S. 211 before that pending against himself has been disposed of. And if, before final orders have been passed upon the original complaint, a Magistrate accepts a complaint against the accusers under S. 211 and convicts them thereon, the conviction is bad and ought to be set aside. **Crown v. Topan**, 3 Sind L.R. 189 = 4 Ind. Cas. 1160.

KNIGHT, J.C.*

(43) Ss. 215, 240—*Deprived of moveable property—Necessary ingredient for conviction under S. 215—Cattle disappearing—No presumption as to its being stolen—Cheating—Dishonest motives must be present at the time of taking money.*

There can be no conviction for an offence under S. 215 of the Penal Code, until it is proved that a person has been deprived of moveable property by an offence punishable under the Code.

Where a buffalo has disappeared, there is no presumption that an offence has been committed in respect of it.

In order to constitute an offence under S. 420, Penal Code, the dishonest intent must either precede or accompany the act of dishonesty. **In re Hemraj v. Emperor**, 6 Ind. Cas. 250 = 11 Cr. L.J. 295.

KNOX, J.

(44) S. 216—*Harbouring or concealing—“Order a person to be apprehended for an offence.” meaning of—“Punishable,” meaning of.*

It is an offence under S. 216, Penal Code, to harbour or conceal a person for whose apprehension an order has been passed by a public

Penal Code—(Continued).

servant, even when such apprehension is sought to be made not for the purpose of trying him for an offence that he may have committed, but for enforcing a punishment already inflicted on him for having committed the offence.

The expression “order a person to be apprehended for an offence” in S. 216, Penal Code, means only that the offence is the *causa sine quo non* of the apprehension.

The word “punishable” in the latter part of the section is used merely for the purpose of describing particular classes of offences, in relation to which the punishment indicated in the section is to be inflicted; and it does not indicate that in a particular case the offence must not have been punished. **Santaji Koer v. King-Emperor**, 11 C.L.J. 109 = 5 Ind. Cas. 311 = 11 Cr. L.J. 95.

JENKINS, C.J. and WOODROFFE, J.

(44-a) S. 216-A. See No. 73, *infra*.

(45) S. 223—*Negligently suffering a prisoner to escape—Officer in charge leaving order to head constable—Negligence.*

Before a man can be convicted under S. 223, Penal Code, of having negligently suffered a prisoner to escape, it must be shown, not only that he was guilty of negligence, but that the escape was at least the natural and probable consequence of his negligence.

Where an officer in charge of a Police Station was ordered to despatch certain prisoners, and he left the police station ordering the head constable to despatch them, and in the way the prisoners escaped. *held* that the negligence of the officer in charge was too remotely connected with the escape, and he could not be convicted under S. 223, Penal Code. **Durga Prasad v. King-Emperor**, 7 A.L.J. 907 (Cr.) = 7 Ind. Cas. 411 = 11 Cr. L.J. 478.

CHAMIER, J.

(46) S. 224—*Escape from lawful custody—Neglect or consent of custodian.*

A prisoner, who escapes after he is arrested and before he is delivered by due course of law, owing to the neglect or consent of the person having him in custody, is guilty of an offence under S. 224 of the Penal Code (a). **Government of Mysore v. Appaji**, 15 M. C. C.R. 42 (Cr.).

STANLEY ISMAY, C.J., and KRISHNA ROW, J.

Reference :—(a) (1908) 31 M. 271, F.

Penal Code—(Continued).

(4C-a) S. 224—*Escape from custody—Arrest of judgment-debtor—Judgment-debtor allowed to go by decree-holder and process-server.*

Where a person arrested in execution of a civil process was allowed to go by the decree-holder and the process-server who had arrested him :

Held that there was no offence of escape from lawful custody committed by the person who was arrested (a). **In re The Public Prosecutor**, 7 Ind. Cas. 392.

KRISHNASWAMI Aiyer, J.

References :—(a) 18 M. 401 ; 18 M.L.J. 540 ; 31 M. 271 ; 8 Cr.L.J. 200, distinguished.

(47) S. 225 B—*Escape from custody—Default. er for payment of Government revenue—Rules of Board of Revenue, 9 cl. (2)—Land Revenue Act (III of 1901), Ss. 142, 143, 149.*

The use of the word "ordinarily" in rule 9, clause 2, Rules of the Board of Revenue, relating to the recovery of arrears of revenue, shows that the intention of the Board was that in every case process should issue against the lam-bardar in the first instance, but that occasion may arise when it is found expedient to issue process in the first instance, against the defaulter. Under S. 142, Land Revenue Act, all the proprietors are jointly and severally responsible to Government for revenue, and the arrears may be realised, under S. 146, by the arrest and detention of the defaulter as defined in S. 143.

The writ of demand and the writ of arrest and detention may issue simultaneously against the defaulter, the words of S. 146, Land Revenue Act, are wide, and there is nothing to limit the order in which they should issue.

Hence, where a co-sharer had made default in the payment of Government revenue and under a writ of detention was confined in the lock-up wherefrom he escaped, *held* that he was guilty of an offence under S. 225-B, Penal Code. **King-Emperor v. Gulab Singh**, 7 A.L.J. 91=5 Ind. Cas. 449=11 Cr.L.J. 137=32 A. 116.

KNOX and KARAMAT HUSAIN, JJ.

(48) S. 228—*Insult to public servant in a stage of judicial proceeding—Procedure. See DEFAMATION, No. 2, 15 M.C.C.R. 9.*

(49) S. 296—*Knowledge that one's act is likely to disturb religious worship—Whether sufficient to constitute offence under S. 296,*

Penal Code—(Continued).

I.P.C.—Notification by District Magistrate of hours of worship—Right of procession during such hours.

It is not necessary for the purpose of S. 296, I.P.C., that the accused should have had an active intention to disturb religious worship. It is sufficient, if, knowing they were likely to disturb it by their music, they took the risk and did actually cause the disturbance.

The accused had no right to pass the mosque with music, so as to disturb religious worship going on in the mosque, during the hours which had been notified as the hours in which religious worship would be carried on (a). **The Public Prosecutor v. Sunku Seethalah**, 7 M.L.T. 430=6 Ind. Cas. 774=11 Cr. L. J. 400.

MUNRO and SANKARAN NAIR, JJ.

References :—(a) 2 M. 140 ; 6 M. 203, R.

(50) S. 297—*See CRIM. PRO. CODE, No. 56, 24 P.W.R. 1910 (Cr.).*

(50-a) S. 299. *See No. 51, supra.*

(51) Ss. 299, 300, 302—*Murder—Culpable homicide—Jury—Misdirection—Imperfect statement of elements constituting offence—Failure to direct that every man is presumed to intend the natural consequences of his act.*

Where the accused had no legal excuse to go to a certain land in the possession of the party of the deceased, armed with dangerous weapons, to enforce their right or supposed right, and a fight ensued, and the injuries inflicted, though not premeditated, resulted in the death of the deceased :

Held, per Sharfuddin and Tennon, JJ. (Chatterjee, J. diss.), that the case came under clause 4 of S. 300, Penal Code, and a charge of murder ought to have been framed against the accused, and the Judge's omission to do so vitiated the whole trial.

An imperfect statement of elements constituting an offence under clause 1 of S. 304, and the failure of the Judge to direct the jury that, in law, every man must be presumed to intend the natural and ordinary consequences of his acts, constitute very grave misdirection.

Per Sharfuddin, J.—All murder is culpable homicide, but all culpable homicide is not murder. Subject to the five exceptions to S. 300, Penal Code, every act that falls within one or more of the four clauses of that section

Penal Code—(Continued).

is murder, and also falls within the definition of culpable homicide in S. 299, Penal Code. Every act that falls within any or more of the four clauses of S. 300, Penal Code, in respect of which there co-exist one or more of the sets of circumstances described in the five exceptions to that section, is, by that fact, taken out of section 300, Penal Code, but the act notwithstanding continues to be within S. 299, and since it is not murder, it is culpable homicide not amounting to murder. Every act that falls within S. 299 and does not fall within S. 300, since it is not murder, is culpable homicide not amounting to murder. **Reazud-din Shaikh v. Emperor**, 6 Ind. Cas. 251 = 11 Cr. L.J. 295.

CHATTERJEE, TEUNON and SHARFUD-DIN, JJ.

(51-a) S. 300. See No. 51, *supra*.

(54) S. 300, *Exception 5—Applicability of*.

When a person claims the benefit of exception 5, he must show that the person whose death he caused consented to have the act, which caused death, done upon him, knowing that it would cause his death or knowing that his life would be endangered thereby. But it is not sufficient merely to satisfy the Court that the person whose life he took voluntarily took the risk of death.

So, where M voluntarily entered the compound of N's house and rushed at N, knowing that the latter had a knife in his hand, and knowing that N had threatened to stab him if he came to the house, and in the course of the struggle M was fatally stabbed, *held* that N was guilty of murder and exception 5 would not be applicable to the case. **Po Set v. King-Emperor**, 5 L.B.R. 160.

FOX, C.J. and PARLETT, J.

Reference :—18 C. 484, *R. Mayo's Criminal Law of India*, para 447 *referred to and commented on*.

(53) S. 300 (1) and (2)—*Murder—Intention to cause death or bodily injury likely to cause death—Attack of a violent and determined character—Causing severe injuries and ruptures of the spleen in a healthy condition*.

Where A and his party attacked B, a strongly built man of about 35 years of age, in a violent and determined manner, inflicting not less than 16 wounds on his body and causing severe ruptures of his spleen which was in a healthy condition, and so caused his death, *held*, these

Penal Code—(Continued).

facts leave no doubt that A and his party who attacked B either intended to cause B's death, or that they attacked him in such a brutal manner, regardless of the consequences, well-knowing that they would be likely to cause his death, and that the offence committed by A and his party therefore amounted to murder. **Elem Molla v. Emperor**, 37 C. 315 = 6 Ind. Cas. 921 = 11 Cr. L.J. 417.

BRETT and CHITTY, JJ.

(54) S. 302—*Burial of explosive substance on path—Explosion—Death of a passer-by—Murder—Presumption—Facts to be proved—Explosive Substances Act, VI of 1908, Ss. 3, 5—Gist of section 3—Essentials of S. 5—Report of Chemical Analyst—How far and when evidence*.

The accused got made for him an iron arch and also gave a false name when he got the arch made. It was also proved that a piece of paper found at the house of the accused was taken from a copy of a certain book, and the scraps found at the scene of explosion were taken from a copy of the same book. *Held*, that the facts proved were not sufficient to sustain the conviction of the accused for the offence of murder and for an offence under S. 3, Explosive Substances Act, 1908.

Held, also, that the accused was properly convicted under S. 5, Explosive Substances Act, 1908.

Per Chief Justice.—The essence of the offence under S. 3, Act VI of 1908, is the unlawfully and maliciously causing, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property.

Though the circumstances that the accused gave no explanation and adduced no evidence as to why he got the arch made and as to how the piece of paper found at his house came into his possession, tell against the accused, yet they do not relieve the prosecution from the obligation of adducing such affirmative evidence as leaves no room for any reasonable doubt as to whether the accused was guilty of the offence with which he was charged (see the observations of Abdur Rahim, J., to a similar effect).

Per Abdur Rahim, J.—Under S. 5, Explosive Substances Act, 1908, it is not necessary to come to any more definite finding than that accused had possession of the explosive substance under suspicious circumstances.

Penal Code—(Continued).

The gist of S. 3 of the same Act is the causing an explosion unlawfully and maliciously, which must be proved in the ordinary way.

The words of S. 114, Evidence Act, as is abundantly clear from the illustrations appended to it, indicate that the existence of only such facts may be presumed as are likely to have happened, having regard to the common course of natural events in their relation to the facts of the particular case.

A conviction for murder cannot be based solely on presumptive evidence (a).

The law makes the contents of a report of a Chemical Analyst to the Government evidence, and dispenses with the necessity of examining the expert as a witness in the case. But such report can be of no use, unless there is proof of identity of the articles found during investigation and sent to the chemical examiner with the articles examined by him.

Per Benson, J.—The facts proved in this case lead one clearly to the belief that the first accused either himself made the bomb and buried it in the path where it exploded, or caused it to be made and buried there by some other person, and in either case he is equally guilty on the principle *quasi facit per altum facit per se*. If a person buries a bomb in a frequented path where it is almost certain to be trodden on, and to explode and cause the death of any one treading on it, and if it does, in fact, explode and cause death, that person is guilty of murder, unless he can explain his action in such a way as to negative the inference as to his intention which the nature and circumstances of the act suggest. **Chukkapalli Ramayya v. Emperor**, 7 M.L.T. 314 = 6 Ind. Cas. 51 = 11 Cr. L.J. 322 = 20 M.L.J. 657.

SIR ARNOLD WHITE, C.J., and BANSON and ABDUR RAHIM, JJ.

Reference :—(a) 13 M. 426, Cons. and Expl.

(54-a) S. 302—Murder—Retracted confession, Corroboration—Sulphate of copper poisoning.

Where one of two women (R and S daughter and mother.) R, gave birth to a female child, and S alone attended her, and the infant, while in their custody, died of sulphate of copper poisoning soon after its birth, the presumption is that they (R and S) have administered the poison, and they are guilty of murder even in the absence of clear motive for committing the crime. The fact of their taking no step towards saving the infant's life is the evidence

Penal Code—(Continued).

of intentional, and negatives the defence of, accidental poisoning. Such a circumstance is sufficient to corroborate their confession of guilt retracted by them at the time of trial.

Held, also, that in such a case capital sentence is not justifiable. **Saidan v. The Crown**, 43 P.W.R. 1910 (Cr.).

JOHNSTONE and SCOTT-SMITH, JJ.

(54-b) S. 302. See Nos. 9, 17 B and 51, *supra*.

(54-c) S. 304. See No. 17, *supra*.

(55) S. 307—Attempt to murder—Firing two shots—Statement of victim how far and when credible—Impropriety of prosecuting a witness during trial—Prejudice—Examination of accused—Personal inspection of a spot by a Magistrate—S. 342 of Crim. Pro. Code, 1898.

Held, that :—

(1) A person's firing two shots successively at another person clearly shows murderous intent.

(2) Where a victim in agony makes a statement as to what has happened with him shortly after the occurrence, the connection of a false story becomes highly, improbable though not quite impossible.

(3) While a case is pending, it is undesirable and improper to start prosecution of a witness for perjury or other offence, which the witness appears to have committed in connection with the case in the opinion of the presiding officer. To adopt such a course very often prejudices the party producing the witness.

(4) It is against the provisions of S. 342, Crim. Pro. Code, 1898, to subject an accused person to a lengthy examination, before whole of the prosecution evidence is over; particularly to cross-examine him regarding the line of defence which the accused is to adopt is hardly justifiable.

(5) A Magistrate does not make himself a witness in the case by incorporating into it the results of his inspection of a spot, where something connected with the commission of the crime is alleged to have happened. Having visited the spot expressly for the purposes of the trial, he is fully justified in noting what he sees and in drawing reasonable inferences therefrom. **Malik Ahmad Yar Khan v. The Crown**, 1 P.W.R. 1910 (Cr.) = 11 Cr. L.J. 171 = 5 Ind. Cas. 102.

JOHNSTONE, J.

References :—13 P.R. 1901, F.; 19 M. 268, not F.

Penal Code—(Continued).

(56) Ss. 307, 323—*Intention to kill—Presumption.*

The accused, in the course of a quarrel with her sister-in-law and in a fit of anger, flung her child, three years old, into a pond four feet deep, on the edge of which her house was situated, and at the same time gave expression to a wish that the death of the child should rest as a curse on the woman with whom she was quarrelling: *Held*, that the circumstances gave raise to a presumption that the intention of the accused was to cause death of the child, and that she was, therefore, guilty of an offence under S. 307, although the child was picked up by a stander-by without loss of time. **Emperor v. Musammat Nannhi Bahu**, 5 Ind. Cas. 138=11 Cr. L. J. 48.

KNOX and PIGGOT, JJ.

(56-a) S. 311. See No. 35, *supra*.

(56-b) S. 323. See No. 56, *supra*.

(57) Ss. 323, 325, 109, 114—Setting aside conviction on compounding the offence—Revision. See CRIM. PRO. CODE, No. 157, 13 O.C. 161.

(57-a) S. 325. See No. 57, *supra*.

(57) S. 332—*Assault on Constable on duty—Duty need not be imposed by law.*

Where a Constable was employed to watch the accused, and the accused knew of it when he assaulted him.

Held that the Constable was not doing anything in excess of his authority at the time of the assault, and the accused was rightly convicted under S. 332, I.P.C.

Held also that the duty need not be a particular duty imposed expressly by the law on the particular occasion. **In re Mahomed Yakoo**, 7 M.L.T. 386=6 Ind. Cas. 12=11 Cr. L.J. 221.

MILLER, J.

Reference :—18 A. 246, *Expl.*

(59) S. 332—Police officer arresting without warrant in case of burglary under S. 54, Crim. Pro. Code.—Assaulting police officer—Offence under S. 332, I.P.C. See CRIM. PRO. CODE, No. 3, 18 P.R. 1910 (Cr.).

(60) S. 339—*Wrongful restraint—Causing Pariahs to stand in a public street or preventing complainant from conducting a procession, whether amounts to obstruction.*

A person will not be justified in complaining of wrongful restraint against a pariah, who, being lawfully in the public street on his own

Penal Code—(Continued).

business, refused to move when directed to remove himself to a distance, knowing that, if he remained, the complainant would be deterred, by fear of pollution, from passing near him.

So, where A caused certain pariahs to stand in the public street in the vicinity of a temple, with the object of preventing B from conducting a procession from the temple through the street, *held*, the act of A did not amount to an obstruction within the meaning of S. 339, and it was B's disinclination to go near the pariahs, and not the presence of the pariahs, which prevented him from going where he would, and that A did not therefore commit the offence of wrongful restraint. **In re Venkata Subba Reddy**, 7 M.L.T. 366=5 Ind. Cas. 851=11 Cr. L.J. 263.

MILLER and MUNRO, JJ.

(61) Ss. 339, 341—*What amounts to wrongful restraint.*

The complainants in this case charged six accused persons with the offence of wrongful restraint, inasmuch as they had restrained the complainants from passing through certain fields on their way to their well.

Held that the accused cannot be convicted of an offence under S. 341, I.P.C., because—

(1) complainants' right of way is not sufficiently established; and

(2) it is not shown that accused acted otherwise than *bona fide* in obstructing them. **Natha Singh v. The Crown**, 22 P.R. 1910 (Cr.)=7 Ind. Cas. 493=11 Cr. L.J. 495.

SMITH, J.

Reference :—25 P.R. 1886 (Cr.), *F.*

(61-a) S. 341. See No. 61, *supra*.

(62) S. 351—*Assault on constable by one accused—Other accused surrounding constable in a threatening attitude—Effect.*

Where one of the accused hit a constable on the face, and the other accused surrounded the constable in a threatening attitude, this finding is not sufficient to convict the other accused of assault within the meaning of S. 351, I.P.C. **Munisami v. Emperor**, 8 M.L.T. 118=7 Ind. Cas. 416=11 Cr. L.J. 489.

MILLER, J.

(63) S. 352—Resisting attempt by railway servant to put more passengers into the carriage—Assault. See ACT IX OF 1890 (RAILWAYS), No. 3, 31 P.W.R. 1910 (Cr.).

Penal Code—(Continued).

(64) Ss. 352, 379, 447—Charge—Conviction under Ss. 352 and 447—Conviction by appellate Magistrate under S. 379—Legality. See CHARGE, No. 1, 7 M.L.T. 202.

(64-a) Ss. 354, 376, 511—Rape—Difference between attempts to rape and assault to outrage modesty—First report to the police. *

Held that, where, in the first report to the police, the girl merely stated that the accused seized her by the arm and asked her to have connection with him, the conviction of having committed rape cannot be maintained.

But where evidence proves that he stripped her nearly naked and was lying upon her, when her cries attracted people to the spot, he commits an offence under Ss. 376, 511, and not merely under S. 354, Penal Code. **Khadam v. Crown**, 42 P.W.R. 1910 (Cr.).

REID, C.J.

(65) S. 361, *Expl.*—Kidnapping married minor girl—"Lawful guardianship"—"Father entrusted with care of custody of the minor"—Judge to adhere to words of section and not to substitute phraseology of his own—Misdirection—Failure to place evidence fairly before jury—Sentence suffered under conviction set aside.

In case of kidnapping from lawful guardianship under section 363, Indian Penal Code, the Judge dealt with the question of guardianship, in his charge to the jury, as follows:—

"Now, the lawful guardian of a married woman is no doubt her husband. But there is the evidence before you that she came with the consent of the husband into the house of her father, if you believe such evidence. Therefore, the father of the girl was her *de facto* lawful guardian for the time that the girl was residing in her father's house."

Held, that in matters of this kind a Judge should adhere to the words of the particular section of the Penal Code with which he has to deal, and, not substitute phraseology of his own, and what should have been left to the jury was whether or not the father had been lawfully entrusted with the care or custody of the girl, instead of the form adopted by the Judge.

Held, further, that where the Judge failed to place before the jury a fair and proper statement of the evidence that the girl came with the consent of her husband to the house of her father, his charge in this respect amounted to a misdirection.

Penal Code—(Continued).

The Court in estimating what should be the proper sentence ought to have regard to the detention already suffered by the accused under a conviction which had been previously set aside. **Emperor v. Nakul Kabiraj**, 11 Cr.L.J. 9=4 Ind. Cas. 543=13 C.W.N. 754.

JENKINS, C.J., and MOOKERJEE, J.

(65-a) S. 361—*Defacto* guardianship of children—Right to sustain prosecution under. See CRIM. PRO. CODE, No. 166-a, 8 M.L.T. 300.

(66) S. 363—Kidnapping from British India—Consent of person kidnapped obtained by false representations.

Where the accused induced certain women (the complainants) to leave British India for Ceylon, on the misrepresentation that they were to be married to his sons, and after arriving at Ceylon made them work as coolies on ten estate:

Held, that the women must be held to have been taken without their consent, and that the accused was guilty of an offence under S. 363, Penal Code. **In re Periasawmi Kangani**, 6 Ind. Cas. 503 (Cr.)=8 M.L.T. 91=11 Cr. L.J. 368.

MILLER and MUNRO, JJ.

(66-a) S. 376. See No. 64-a, *supra*.

(67) S. 379—Theft—Claim of title by the accused—Conviction for theft illegal, unless the Court finds the claim to be a pretence.

In a case of alleged theft of fish from a tank which the accused claimed to have been in their possession and not in the complainant's.

Held that, if the accused asserts a claim to the thing alleged to have been stolen by him, he should not be convicted, unless the Court is in a position to say that the claim is a mere pretence. **Dhirendra Mohan Gossain v. The Emperor**, 14 C.W.N. 408=5 Ind. Cas. 794.

JENKINS, C.J. and WOODROFFE, J.

(68) S. 379—Theft—Dishonest intention—Retaining passenger's umbrella to make him pay fare.

The accused, an employee under a Steamer Company, whose business it was to check the tickets of passengers, asked to see the complainant's ticket, but, the complainant not having got one, the accused took possession of his umbrella as security that he might be compelled to pay his fare,

Penal Code—(Continued).

held—That, there being no suggestion that the accused intended either to get any wrongful gain to himself by compelling payment of the fare, or to cause any wrongful loss to the complainant who was bound to pay his fare, a conviction for theft was wrong. **Matabar Sheikh v. King-Emperor**, 14 C.W.N. 936 = 7 Ind. Cas. 257 = 11 Cr. L.J. 441.

HARINGTON and HOLMWOOD, JJ.

(69) *S. 379—Question of title or right to possession of property stolen not determined—Legality of conviction.*

In this case, the accused was charged with having dishonestly carried away the produce of a tamarind tree, which was in the possession of the complainant, but which the accused contended was sold to him. The question whether the accused was or was not the owner of the produce was not decided, nor was it found whether the complainant had or had not a right to possession. *Held* that, in the absence of findings on either of those questions, the conviction was bad. **Chinna Garata Reddi v. Emperor**, 8 M.L.T. 119 = 7 Ind. Cas. 416 = 11 Cr. L.J. 484.

MILLER, J.

(69-a) *S. 329—See Nos. 14 and 61, supra.*

(70) *Ss. 379, 429—Conviction under—Appeal—Setting aside conviction in one but confirming the sentences in both—Effect—Enhancement of sentence.*

The Appellate Court should reduce the sentence when setting aside the conviction for one of the offences in respect of which the sentence was imposed by the lower Court. Otherwise the upholding of the sentence would amount to an enhancement of the sentence, which is illegal. **Emperor v. Varadan**, 8 M.L.T. 177 = 7 Ind. Cas. 415 = 11 Cr. L.J. 483.

MILLER, J.

References :—30 M. 48 and 22 B. 760, R.

(70-a) *S. 380—See No. 82, infra.*

(71) *Ss. 391, 392—Six persons charged—Three acquitted—Conviction for dacoity—Nothing more than robbery disclosed in evidence—Alteration of conviction into one under S. 392, I.P.C.*

Where there were six robbers, of whom three were acquitted, and the rest were convicted of dacoity under S. 391, I.P.C., and where the Sessions Judge nowhere, in his charge to the jury, directed their attention to the evidence as to the number of the robbers so as to show that there were five or more offenders and that the offence amounted to dacoity,

14 Cr.

Penal Code—(Continued).

held, that the conviction under S. 391 was not sustainable, and the same was altered into one for robbery under S. 392, I.P.C. **Pidda Enumandugaru alias Arula Ramudu v. Emperor**, 7 M.L.T. 340 = 5 Ind. Cas. 797 = 11 Cr. L.J. 249.

* BENSON and SANKARAN NAIR, JJ.

(71-a) *S. 392—See No. 71, supra.*

(72) *S. 395—Dacoity—Proof—Identification of accused—Tracker—Evidence of—Benefit of doubt.*

The accused were convicted of the offence of dacoity on the statements of the complainants as to their identification and of the trackers as to the identification of their tracks. The dacoits had issued from the roadside jungle, made a sudden attack on the complainants and put dust into their mouths. The night was a dark one and each complainant was separately assaulted and overpowered, so that he did not and could not see what the dacoits did with the other. Two trackers were originally mentioned in the *chalan*, but only one was examined by the prosecution, the other was examined by the defence. Their evidence was found to be extremely suspicious.

Held that, though there were suspicious circumstances against the accused, they could not be convicted of the offence charged, as the evidence was not shown to be reliable.

The Court observed that the tracker examined by the defence must be regarded for all practical purposes as a witness for the prosecution. **Jahana v. The Crown**, 71 P.L.R. 1910.

SHAH DIN, J.

(72-a) *Ss. 395, 109—See MISDIRECTION TO JURY, No. 1, 7 M.L.T. 191.*

(73) *Ss. 395, 400, 216 A, Penal Code—Gang of dacoits, belonging to—Meaning of—Approver evidence of—Corroboration of an approver evidence necessary for.*

A person cannot be said to belong to a gang of dacoits within the meaning of S. 400, Penal Code, in respect of whom the Court is satisfied that his connection with the gang was limited and always intended to be limited to a series of acts, none of which amounted either to dacoity or to abetment of dacoity, though they might be punishable under S. 216-A, Penal Code.

It is not necessary for a conviction under S. 400, Penal Code, that the person convicted must have taken part in any one dacoity.

Penal Code—(Continued).

Evidence, showing the actual participation by an accused in any given dacoity, is evidence both of his association with the gang and of his object in such association.

Evidence though not believed for the purpose of a conviction under S. 395, Penal Code, may yet be relied upon for the purpose of a conviction under S. 400, Penal Code.

A conviction under S. 400, Penal Code, cannot be considered bad in law, merely because the evidence on the record would also have justified a conviction of a specific offence under S. 395, Penal Code.

No conviction can be based on the evidence of an approver without clear and independent corroboration.

Evidence in corroboration of the statement of an approver must be evidence tending to prove that the particular person to whom it relates was guilty of the offence charged; it is not sufficient that it should merely corroborate the general accuracy of the story told by the approver.

Evidence dealing with facts outside the knowledge of the approver would amount to a corroboration of the approver's statement, if it tended to prove the guilt of the particular accused with reference to the offence charged. **Gaya Deen and Raghunandan v. King-Emperor**, 13 O.C. 235.

EVANS and PIGGOTT, J.C.S.

(73-a) Ss. 395, 411, 412—Charges under—Misjoinder. See MISJOINDER OF CHARGES, No. 1, 11 C.L.J. 182.

(73-b) S. 397—See No. 3 a, *supra*.

(74) S. 400—Dacoity—Belonging to a gang of dacoits—Proof—Evidence Act (I of 1872), S. 30—Confession—Accomplice—Corroboration.

To sustain a conviction on a charge under S. 400 (1), I.P.C., for having belonged to a gang of persons associated for the purpose of habitually committing dacoity, there must be (1) proof of association and (2) proof that the association was for purpose of habitually committing dacoity, and the habit must be proved by an aggregate of acts (a).

Previous convictions of the accused for dacoity along with other dacoits is relevant against him, under explanation 2 of S. 14 of the Evidence Act. But the propriety of the accused's conviction must be judged exclusively by reference to the evidence adduced by the prosecution at the trial.

Penal Code—(Continued).

The confessions made by the accomplices at previous trials for dacoity cannot be taken into consideration against the accused under S. 30 of the Evidence Act. Such confessions do not stand on a better footing than the sworn testimony of an accomplice, and cannot be treated as good evidence against the accused, without being corroborated *aliunde* by independent evidence in material particulars, and specially in respect of the identity of the accused. **Walia v. Crown**, 18 P.L.R. 1910 (Cr.). = 6 Ind. Cas. 492 = 11 Cr.L.J. 364.

SHAH DIN and WILLIAMS, JJ.

References:—(a) 9 P.R. 1880 Cr. and (b) 1 C.W.N. 146, R.

(74-a) S. 400—Approver's evidence, corroboration necessary for—Accomplice—Confession of accused—Gang of dacoits, belonging to—Evidence Act, S. 30.

The evidence of an approver cannot by itself be accepted as sufficient proof of the guilt of an accused. It must be corroborated by evidence independent of accomplices.

A confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under S. 30 of the Evidence Act, but the value of such a confession as evidence is very small and does not constitute legally sufficient corroboration of the testimony of an approver either as to the *corpus delicti* or the identity of the person affected.

The term "belong" in S. 400, Penal Code, implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity. **Hira Lal v. King-Emperor**, 13 O.C. 243.

EVANS and LINDSAY, J.C.S.

(74-b) S. 400—See No. 73, *supra*.

(75) Ss. 403, 409—Offence under—Jurisdiction. See JURISDICTION (GENERAL). No. 1, 7 P.R. 1910 (Cr.).

(76) S. 406—Criminal breach of trust—Failure to account for money entrusted—Dishonest misappropriation may be inferred from circumstances.

Penal Code—(Continued).

Failure to account for money entrusted to the accused for a particular purpose constitutes criminal breach of trust (a).

Dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence (b). **H.A.L. Grisham v. Mutusamy**, 11 Cr. L.J. 44=4 Ind. Cas. 762; U.B.R. 1909, 1 I.P.C., p. 21.

SHAW, J.C.

References :—(a) 9 A. 666, *doubted*. (b) U.B.R. 1904-06, Indian Penal Code, p. 12, *relied upon*.

(77) S. 406—*Deceased, property of—Heir not justified in taking forcible possession of such property*.

A person, who claims to be an heir to a deceased person, is not justified in taking possession of the property left by him, by force, from the person who is actually in possession of it. **Crown v. Ram Ditta**, 11 P.L.R. (Cr.) 1910=6 Ind. Cas. 490=11 Cr. L.J. 364=41 P.W.R. 1910 (Cr.).

RATTIGAN, J.

(78) S. 408—*Jurisdiction*. See CRIM. PRO. CODE, No. 77, 7 A.L.J. 319.

(79) Ss. 403, 467—*Misjoinder of charges under—Retrial*. See CRIM. PRO. CODE, No. 113, 7 A.L.J. 225.

(80) S. 409—*Breach of trust—Crim. Pro. Code, S. 234—Joinder of charge*.

As a general rule, no case should be committed to the Court of Session which can be adequately dealt with by a Magistrate.

When an accused is charged with criminal breach of trust in respect of a lump sum of money, the mere fact that the items composing that sum are specified and are more than three in number, does not render the charge obnoxious to S. 234 of the Crim. Pro. Code. **Lakshmi Narasimhaia v. Government of Mysore**, 15 M.C.C.R. 271.

ISMAY, C.J., and CHANDRASEKHARA AIYAR, OFFG. J.

(80-a) S. 409—*Cheating—Directors of a Loan and Deposit Society—Issue of false balance sheets—Balance-sheet containing incorrect entries—Presumption of guilty knowledge—Wrong classification of bad debts—Failure to include Director's loans as a separate item—Position of auditors—Auditor's certificate about the existence of securities—Criminal liability*.

The mere fact that the Directors of a Deposit and Loan Society passed an incorrect balance-sheet is not sufficient to justify the framing of

Penal Code—(Continued).

a charge of cheating against them and placing them on their defence. The guilty knowledge of each Director cannot be presumed from the mere fact that he authorised the issue of a balance-sheet containing false entries, but must be decided in view of all the circumstances of the case, i.e., the nature of the false statements, the ease or difficulty with which their truth or falsity could be ascertained, the course of business of the society, the position, experience and attainments of individual Directors, etc (a).

Mistakes and omissions in the classification of debts as "doubtful" or "bad" cannot, in the absence of positive evidence of guilty knowledge, be taken to afford any presumption of cheating on the part of the Directors of a limited Company. Nor does the omission by Directors to show their debts as a separate item afford any presumption of guilt.

The above acts and omissions, though by themselves would entail strong civil liability on the part of the Directors, will not make them criminally liable.

Where an Auditor, who does not happen to be a trained Accountant, certifies to the existence of securities, and states that the balance-sheet is correct and according to law, he cannot be held liable criminally for failure to detect mistakes which would have revealed the financial unsoundness of the Company (b). **Giles Seddon v. S.J. Loane**, 8 Ind Cas. 325 (Cr.).

AIYLING, J.

References :—(a) 16 A. 88, D. (b) (1895), 2 Ch. App. 673; 64 L.J. Ch. 866, It.

(80-a-i) S. 409—*Misappropriation—Burden of proof—Mode of misappropriation of money, prosecution not bound to prove*.

A peon was charged with misappropriation of money. The prosecution proved that he had not returned the money when it was his duty to return it:

Held, that the prosecution had proved its case; and it lay on the accused to prove his defence. The prosecution is not bound to prove the actual mode of misappropriation of the money. **Emperor v. Kadir Baksh**, 8 Ind. Cas 687 (Cr.).

RICHARDS and TUDBALL, JJ.

(80-b) S. 409—*Trial of accused—Joinder of charges—Previous acquittal—Bar to trial*. See CRIM. PRO. CODE, No. 110, 12 Bom. L.R. 226.

(80-c) S. 409—See No. 75, *supra*.

Penal Code—(Continued).

(81) *S. 411—Stolen property belonging to several owners—Separate trial and conviction for each item, when illegal.*

Where a person is found in possession of stolen property identified as belonging to different owners, but there is nothing to show that he has received such property at different times, he cannot be tried and convicted under S. 411 of the Penal Code separately in respect of the property identified by each owner. **Ponnappachari v. Government of Mysore**, 15 M. C.C.R. 40 (Cr.).

STANLEY ISMAÏ, C.J., and KRISHNA RAO, J.

(81-a) *S. 411—Joinder of charges. See CRIM. PRO. CODE, No. 112-a, 36 P.L.R. 1910.*

(81-a-i) *S. 411—Burden of proof. See CRIM. PRO. CODE, No. 145-d, 8 M.L.T. 418.*

(81-b) *S. 411. See No. 73-a, supra.*

(81-c) *S. 412. See No. 73-a, supra.*

(82) *Ss. 414, 380—Property stolen by son—Restoration by father to owner—Denial of knowledge of restoration when required to explain—Conviction of father under Ss. 414, 380, legality—The words disposing of in S. 414—Meaning and interpretation of—Dealing with property after theft—Whether amounts to theft or abetment thereof.*

Where the accused restored to the owners property stolen by his son, and, subsequently, with a view to save his son from punishment, denied all knowledge of the restoration when required to explain it, and where the accused was, on these facts, convicted under S. 414 I. P. C.

Held, that the accused committed no offence, and the conviction was set aside.

The words 'disposing of' in S. 414, I.P.C., must be interpreted by the light of the words they are associated with, viz., 'concealing' and 'making away with,' and they cannot be taken to include 'restoring to the owners.'

Dealing with the property after the theft was committed would not amount either to theft or to abetment of theft and S. 380 could not apply. **Nga Yan E v. King-Emperor**, U.B.R. 1910 (1st quarter), 8 (Cr.).

SHAW, J.C.

(83) *S. 420—Cheating—Evidence of the previous and subsequent conduct of accused when and in what cases relevant—Principle of Civil Law when applies to a Criminal case—Indian Evidence (Act I of 1872) Ss. 14, 15 and 54.*

Penal Code—(Continued).

Held, that G, by falsely, representing to L, that (i, had been instructed by a competent authority to recruit unskilled labour for service in Africa, and that G, would, on payment of a certain sum of money as a fee for registering L's name, would be able to engage L for service in that country, induces L, to pay him G the said fee; G commits an offence punishable under S. 420, I.P.C.

Held, also, that, in a case of the above description, it is open to the prosecution, under Ss. 14 and 15 of the Indian Evidence Act (I of 1872) to show that the act charged against the accused, was a part or a series of similar acts committed by him, or in which he was concerned at or about or before or after the doing of the said act in question, and that evidence of such other acts is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. But the evidence merely to prove that the accused person's character is such that he is likely to commit the act of cheating with which he is charged is not admissible. The distinction between those two propositions is quite apparent and has been well brought out in *Reg v. Fisher* (26 L.T.R. 122) (a).

Held, further, that evidence of previous and subsequent conduct on other similar occasions, of a person accused of any of the following offences, is admissible:—

(1) Arson—*Reg. v. Gray* (4 Foster and Finlason, N.P. 1102).

(2) Embezzlement.—*Reg. v. Richardson* (2 Foster and Finlason, N.P. 343=8 Cox's Criminal Cases 448).

(3) False pretences—*Reg. v. Francis* (Law Journal Magistrates' Cases, page 97=2 Law Reports Criminal Cases 128 and *Reg. v. Rhodes* 1 Q.B. 77).

(4) False coining.—*Reg. v. Fuller* (Russel and Rayan, page 308 and *Reg. v. Wauls*).

(5) Forgery.—*Reg. v. Whiely* (Russel and Rayan, p. 90) and *Reg. v. Colebrough*.

(6) Obtaining credit by fraud.—*Reg. v. Wyall* (1 K.B. 188).

Held, further, that a principle of Civil Law can equally apply to a criminal case, provided it is not in any way against any of the principles of Criminal Law.

Held, further, that *per se* a promise to do something in the future may not amount to a

Penal Code—(Continued).

false pretence or to cheating. **Girdhari Lal v. The Crown**, 26 P.W.R. 1910 (Cr.) = 6 Ind. Cas. 964 = 11 Cr.L.J. 428.

RATTIGAN, J.

References :—(a) 36 C. 573; 14 Bom. 414; 4 Law Reports Common Pleas Division, p. 106; 95 Law Times Reports 304; 2 Q.B. 758, F.; 19 Bom. 51, D.

(88-a) S. 420—*Cheating—Mortgagor not disclosing his defective title.*

Held, that mere suppression of some facts at the time of borrowing money does not amount to cheating, where there is no evidence of either active deception or dishonest or fraudulent action. So where a person mortgaged to another for Rs. 1,000, a mortgage executed in his favour of a house for Rs. 2,000, and also agreed that, in case of his mortgagee not being able to recover his money from the mortgage rights, he would make good the money from his other property, there is no element of cheating in that person's act, even if he knew at the time of borrowing money that his mortgagor's title to the house was defective, and did not disclose this defect to his creditor (a).

A mortgage of a mortgage of a house is not a re-mortgage of the house (b). **Hari Kishan v. The Crown**, 40 P.W.R. 1910 (Cr.).

REID, C.J.

References :—(a) 19 B. 715; 27 A. 302, R. (b) 27 A. 302, R.

(83-b) S. 420—See No. 43, *supra*.

(84) S. 421—*Insolvent—Fraudulent transfer—Magistrate's jurisdiction to try the offence.* See ACT III OF 1909 (PRESY. TOWNS INSOLVENCY) No. 1, 12 Bom. L.R. 750.

(84-a) S. 425—*Mischief—Blocking up a channel—Civil rights—Tort.*

Where the accused blocked up a channel, the result of which was that the surplus water flowed direct on to the complainant's land and damaged his crop, and the site of the channel was the common property of all the accused;

Held, that the act of the accused did not constitute the offence of mischief and that complainant's remedy for any damage he had sustained lay in an action in the Civil Courts. **In re Kondi Chetty**, 8 M.L.T. 385 (Cr.).

AYLING, J.

(85) Ss. 425, 430—*Mischief—Necessary elements of the offence—Knowledge of causing wrongful loss to others—Insufficiency of evidence—Conviction.*

Penal Code—(Continued).

In order to convict a person of criminal mischief, it must be proved that the accused did the particular acts in question with the knowledge that they were likely to cause wrongful loss or damage to other persons. Where the intention was not to cause loss to any body, but to protect the accused's own property which was in danger of injury, the mere fact that the accused, by cutting through a bund and permitting a portion of the water of a tal to escape, caused thereby a diminution in the supply of water for agricultural purposes, is not sufficient to base a conviction, under S. 430, Penal Code, unless it be proved that wrongful loss or damage resulted to some person from such diminution in the supply of water (a).

The mere diminution in water supply does not lead to the presumption that loss or damage was thereby caused to some person. **Mohammad v. Emperor**, 11 Cr. L.J. 164 = 5 Ind. Cas. 560.

PIGGOTT, J.

Reference :—8 C.W.N. 370, R.

(85-a) Ss. 425, 430—*Conviction under S. 430—Condition precedent for—Crim. Pro. Code, Act V of 1898 S. 417—Object.*

A condition precedent to a conviction under S. 430, I.P.C., is that the accused has committed mischief, as defined in S. 425, and it must be proved that he caused destruction of some property or some such change in any property or in any situation thereof, as destroyed or diminished its value or utility, or affected it injuriously.

The mere fact that he has dealt with water does not constitute an offence punishable under S. 430, I.P.C.

The object of S. 417, Crim. Pro. Code, is not to enable the Local Government to obtain from the Chief Court opinions on abstract points which do not arise on the facts established. The object of the section is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a retrial. **The King v. Fateh Din, Baland Khan, Amir Khan and Buta**, 14 P.R. 1909 (Cr.) = 25 P.L.R. 1910.

REID, C.J., and WILLIAMS, J.

(86) S. 426—*Ploughing bona fide on widowed daughter's husband's land—Whether an offence.*

The accused was the father of the sonless widow of the deceased brother of the complainant and was charged with criminal trespass

Penal Code—(Continued).

on the lands of the complainant by ploughing them without right. He admitted that he entered the lands as they belonged to his daughter. He was convicted on the presumption of criminal intent. *Held* that, as there was no evidence that the entry on the land was with intent to commit an offence or to intimidate, insult or annoy any person, the conviction must be set aside. **Manikka Yeera Raghava Charlar v. Emperor**, 8 M.L.J. 246.

MILLER, J.

(86-a) S. 426—Cognizance of an offence of mischief by cutting trees—Order of attachment—Legality. See CRIM. PRO. CODE, No. 81, 37 C. 221.

(87) Ss. 426, 443, 447—Accused entering for the purpose of building the wall of one of them—Trespass—Unlawful assembly—Conviction—Legality.

Where the accused were convicted under Ss. 426, 443 and 447, I.P.C., for having entered into a vacant *manai* forming themselves into no unlawful assembly, broken down a wall and rebuilt it, and where it appeared from the evidence that one of the accused continued to remain in possession of the wall on his own right, and that the accused went to the place neither to commit any offence, intimidate, insult nor annoy the complainant,

held, that the accused did not form themselves into an unlawful assembly and that their conviction was wrong. **In re Sarvana Pillai**. 8 M.L.T. 222.

SANKARAN NAIR, J.

(87-a) S. 429. See No. 70, *supra*.

(87-b) S. 430. See Nos. 85 & 85a, *supra*.

(87-c) S. 436. See No. 17-b, *supra*.

(87-c-1) S. 447 *Trespass—Criminal force not an essential element—Crim. Pro. Code, S. 422—Dispossession must be accompanied by Criminal force.*

No action can be taken under S. 522 of the Crim. Pro. Code, unless the dispossession of the property was attended with Criminal force (a).

In criminal trespass, criminal force may be used as a matter of fact, but the use of criminal force is not an essential of the offence. **Ibrahim Khan v. Emperor**, 8 Ind. Cas. 219 (Cr.).

KARAMAT HUSEIN, J.

References:—(a) 25 A. 341; A.W.N. (1903) 41, F.

Penal Code—(Continued).

(87-d) S. 447. See Nos. 64 & 87, *supra*.

(87-e) Ss. 447, 442—*Criminal trespass—Mischief—Damage of one's own property by himself—Intention.*

The accused, a *petadah*, acting solely in the interest of his master R, removed or damaged certain bamboos belonging to R, which were in the possession of the Court of Wards. He was convicted of criminal trespass and mischief.

Held, that the conviction of criminal trespass was wrong, as the accused entered upon property in the possession of his master without intending to commit an offence or to intimidate, insult or annoy the Court of Wards.

Held, also, that the conviction of the accused of mischief was unsustainable. Although a man may commit mischief by damaging his own property provided he does so in order to cause wrongful loss, it can hardly be said that a man, who damages his own estate—though he has at present a qualified interest—damages the trustees in possession, whose only object is to preserve the estate for the benefit of the owner. **Parmeshwar Singh v. Emperor** 7 Ind. Cas. 312.

HOLMWOOD and DOSS, JJ.

(88) S. 457—See CRIM. PRO. CODE, No. 177 19 P.W.R. 1910 (Cr.).

(89) Ss. 463, 467—*Forgery—Want of sanction for prosecution—Effect.* See CRIM. PRO CODE, No. 92, 14 C.W.N. 479.

(90) S. 464—*Making a false document what is—Persons signing bail bond with names not their own, whether guilty of offence under.*

A person makes a false document, who dishonestly or fraudulently signs a document with the intention of causing it to be believed that the document was signed by a person by whom he knows it was not signed. So, where two persons signed a bail bond with names not their own and before signing the bail bond said to the Magistrate that their names were the names they afterwards signed to the bail bond.

Held, that, since there was no intention on the part of the accused to cause the Magistrate to believe that the bail bond was signed by any person real or fictitious other than the accused, the accused were not guilty of an offence under S. 464. **Yenkaraju Yenkatasami v. The Emperor**. 8 M.L.T. 125 (Cr.).=11 Cr.L.J. 440=7 Ind. Cas. 176.

MUNRO and SANKARAN NAIR, JJ.

Penal Code—(Continued).

(90-a) S. 464—See No 2, *supra*.

(91) Ss. 465, 477-A—*Falsification of a register to conceal a fraud—Intention at time of offence.*

The accused, a postal clerk, retained the proceeds of a V.P.P. for 3 months, and only then remitted it to the vendor. Meanwhile he made a false entry in the Register of V.P.P. articles, to the effect that the parcel in question had been refused by the addressee and returned to the vendor.

Held, that, if the accused committed any offence at all, it was one falling under S. 477-A and was triable only by the Court of Sessions. The Magistrate could not give himself jurisdiction by charging and convicting under S. 465 (a).

Held, also that the falsification of books with the object of concealing a fraud previously committed would be an offence (b).

Held further in the present case that, as the accused was merely withholding the money with the apparent intention of misappropriating it, the offence of criminal breach of trust was incomplete. In such circumstances the falsification of the books would not be done to conceal an offence previously committed but to assist in the completion of the offence; it would be part of the scheme.

Held also that, if the accused subsequently thought better of it and remitted the money, that would not alter the character of the falsification, which must be judged by the accused's intention at the time he made it. **King-Emperor v. W. C. Das**, U. B. R. (1909) 11th Qr. Penal Code. 29.

SHAW, J.

References :—(a) U.B.R. (1897 1901) I, 328, *Appl.* (b) 11 M. 411; 1 Weir 554, 22 C. 313; 35 C. 450, *F.*; 6 N.W.P. 56; 2 N.W.P. 11; 5 A. 533; 8 A. 653; 4 B. 657, *N.F.*, U.B.R. (1892—96) I 279, *R.*

(91-a) S. 467—See Nos. 79 & 89, *supra*.

(91-b) Ss. 467, 468, 420—*Jurisdiction—Ordinary First Class Magistrate—Offence exclusively triable by Sessions but including minor offences triable by Magistrate—No power to try—Power to discharge or to commit to Session—Conviction by himself illegal.*

Forgery of a *hundi* is an offence under S. 467, I.P.C., which is exclusively triable by a Court of Session.

A First Class Magistrate, not holding powers under S. 30, Crim. Pro. Code, could not dispose

Penal Code—(Continued).

of the case himself, even though the offence charged includes minor offences under Ss. 420 & 468, I.P.C., triable by him.

The Magistrate can only dispose of the case either by a committal to Sessions or by an order of discharge. **Lekhraj v. The Crown**, 31 P.R. 1910 (Cr.).

CHEVIS, J.

(92) S. 471—*Copy of false document—Whether false document—Conviction—Legality.*

A copy of a document alleged to be false does not come within the definition of a "false document" and a conviction under S. 471, I.P.C., upon such copy, cannot stand. **In re Gopalakrishna Heggade**, 7 M.L.T. 428=20 M.L.J. 534—6 Ind. Cas. 776=11 Cr.L.J. 401.

MUNRO and SANKARAN NAIR, JJ.

(92-a) S. 471—See No. 2, *supra*.

(93) Ss. 476, 40—*Offence—Interpretation.* See CRIM. PRO. CODE, No. 90, 12 Bom.L.R. 393.

(93-a) S. 477-A—See No. 91, *supra*.

(94) Ss. 482, 486—*Existence of differences not likely to mislead—Conviction under Ss. 482 486—Maintainability—Use of the word 'copyright'—False description—Conviction under Ss. 6, 7, Act IV of 1889.*

Where the title page of the alleged piracy and the title page of the complainant's book are so different that no one is likely to have been misled, a conviction under Ss. 482, 486 Penal Code, cannot be sustained: where, in the title-page of his book, the accused has put the word 'copy-right' which is proved to be a false trade description, he is guilty under Ss. 6 and 7 of Act IV of 1889. **In re Kanchi Doraisawmy Mudaliar**, 7 M.L.T. 309. =6 Ind. Cas. 683=11 Cr.L.J. 393.

MUNRO and SANKARAN NAIR, JJ.

(94-a) S. 486. See No. 94, *supra*.

(95) S. 494—*Bigamy—Person aggrieved—Code of Criminal Procedure (Act V of 1898), S. 198—Procedure—Commitment.*

In a case of bigamy, the person aggrieved is either the first husband or the second husband, and not the father. Hence, where, in such a case, a complaint was preferred by the father of the husband, under S. 494, Indian Penal Code, but not by either of the husband, *held*, there was no valid complaint before the Court and the commitment was bad, **King Emperor v. Lala**, 7 A.L.J. 10=32 A. 78.

TUDHALL, J.

Penal Code—(Continued).

(95-a) *S. 494 Re-marriage of Hindu when Christian wife alive—Whether bigamy.*

The accused, a Hindu convert to Christianity, married a Christian woman according to the rites of the Roman Catholic religion. Subsequently he reverted to Hinduism, and during the life-time of his Christian wife, married a Hindu woman in accordance with Hindu rites. *Held*, the offence of bigamy was not committed. **Emperor v. Antony**, 33 M. 371.

ABDUR RAHIM, J.*

References:—3 M.H.C.R. App. VII, 4 M.H. C. R. App III, F. .

(96) *S. 498—Enticing away a married woman—Jhanjara marriages valid in the Kangra District—Divorcing and selling a wife illegal—No offence in the absence of lawful marriage.*

Held, that a complainant is incompetent to prosecute another man under S. 498, Penal Code, for enticing away a woman, unless he establishes that he is her lawful husband.

Jhanjara (Chadar Andazi) marriage with a widow is no doubt valid according to the custom prevailing generally in the Kangra District, but there is no custom (and even if there be any, it cannot be enforced) allowing a husband to divorce and sell his wife to another on receipt of pecuniary compensation. Such a connection between the woman and the purchaser does not create any legal relationship of husband and wife which can be recognised by any Civil or Criminal Court. **Nihala and Khazana v. The Crown through Kharku**, 22 P.W.R. 1909 (Cr.)=4 Ind. Cas. 1042=11 Cr. L.J. 155.

WILLIAMS, J.

Reference:—99 P.R. 1890, F.

(97) *S. 498—Enticing away a married woman—Crim. Pro. Code (Act V of 1498) S. 345—Compounding of offence before Police.*

The complainant, a man of some 50 years of age, had a wife of some 16 years of age. On 2nd September, 1907, he brought a case against one K and his mother, under S. 498, I. P. C. On the 18th January he compounded the case.

On the 18th December, 1908 he instituted a case against the present petitioner under Ss. 497, 498 and 363, I.P.C., asserting that, on 1st February, 1909, the petitioner had taken away his wife and child after removing the hinges of her door. In the proceedings that ensued, he stated that his wife had left him in his absence,

Penal Code—(Continued).

and simply mentioned his suspicions that petitioner had got hold of the woman through the agency of the third person.

On the 18th March, 1909 a compromise was effected before the Inspector of Police, when the case was under investigation by the police, and the same was withdrawn.

On 7th May, 1909 the complainant asserted that he had been forced into the compromise and wished to go on with his case against the petitioner. The Magistrate ordered a warrant to be issued against the petitioner for an offence under S. 498, I.P.C.

Held, that, as the offence had been compounded, the proceedings before the Magistrate were *ultra vires*.

That, as to the charge of kidnapping, it was impossible under the circumstances of the case to prove it. **Crown v. Harman Singh**, 22 P.L. R. 1910 (Cr.)=6 Ind. Cas. 497=11 Cr.L.J. 366.

JOHNSTONE, J.

(97a) *S. 494—Adultery—Woman going to accused of her own accord—Sentence.*

When the accused is convicted of an offence under S. 498 of the I.P.C., and it appears that the woman, being not on good terms with her husband, went to accused of her own accord, a sentence of one year's rigorous imprisonment is too severe. **Rasul Khan v. The King-Emperor of India**, 33 P.L.R. 10.

SHAH DIN, J.

(98) *S. 499—Defamation—Calling a Parsutia Kaisth "Kori Chamar."*

The accused referred to the complainant, who was a *Parsutia Kaisth*, as a "*Kori Chamar*" with the result that none of the priests attended the religious ceremony which had to be performed at the complainant's house:

Held, that the accused were guilty of an offence under S. 499, Penal Code. **Bachcha Paragwal v. Emperor**, 6 Ind. Cas. 876 (Cr.)=11 Cr. L.J. 413.

RICHARDS, J.

(98-a) *S. 499—Defamation.*

When an accused person is charged with the offence of defamation, his guilt or innocence is to be determined solely with reference to the provisions of the Indian Penal Code. **Labbe Emam Sab v. Khaji Mahomed Ummaji**, 15 M.C.C.R. 275.

ISMAY, C.J., KRISHNA RAO and CHANDRASEKHARA AIYAR, JJ.

Penal Code—(Continued).

(98-a-i) S. 499—See No. 7, *supra*.

(98-b) S. 499, *Exceptions 1 and 9—English Law—Defamation—Justification—Qualified privilege—Good faith, necessity of—Due care and caution.*

Where the accused, in response to a letter from the committee of the Panjibhai Jamayat calling upon him to show cause why he should not thenceforth be regarded as no longer a member of the Jamayat and be debarred from its privileges, forwarded and published in two newspapers a letter which contained the following among other allegations, *viz.*, (1) that the Panjibhai Jamayat is a "dangerous society giving every encouragement to murder and assassination and (2) that the real object of the notice is 'to incite' and arouse the intolerance and murderous feelings of the 'ignorant, deluded and fanatic members of your society to the necessary pitch for, and for the express object of, taking my life'":

Held that these imputations were highly defamatory and were not only wholly unjustifiable either for the protection or for public good, but were also calculated greatly to enhance the fanatical resentment of the Panjibhai community against the senders therefrom.

Exceptions 1 and 9 of S. 499, I.P.C., codify those portions of the law of libel and slander treated in English text books under the heads of justification and qualified privilege.

Under exception 1, it is a good defence in criminal cases that the words complained of are in fact true, and that it was for the public benefit that the matters charged should be published, even though the actual motive of publication was malevolence.

The defence of qualified privilege extends to communications made by a person who has a legal, moral or social duty to some particular person or persons, who have a corresponding interest or privilege to receive it, and such communications might be not only allegations of fact that could be proved to be true but also expressions of opinion and personal inferences. The use of the expression "imputation on the character" in exception 9 cannot be taken to imply that allegations of definite acts are excluded. Exception 9 for all practical purposes covers exception 1.

In order to be entitled to the benefit of the exceptions, the accused must show that he in good faith made the imputation in self-defence or for public good. He must have acted with due care and caution, and the actual words

Penal Code—(Continued).

used, the manner in which the words are published, the persons to whom they are communicated, must all be limited to the reasonable requirements of the occasion. **Jaffar Fadu v. The Crown**, 4 S.L.R. 67.

CROUCH, A.J.C.

•(98-c) Ss. 499, *Ex. (9)*, 500—*Defamation—Party to suit—Party to suit—Privilege—Good faith. Crim. Pro. Code, S. 198—Person aggrieved—Master cannot sue for defamation of servant.* *

Plaintiff to a suit is not privileged under exception 9 to S. 499, Penal Code, unless the allegations made in the plaint were made in good faith (a).

A plaintiff in a rent suit made the following allegation in his plaint:—"In 1310 F. the plaintiff gave evidence in defence of Sub-Inspector, G. In consequence of this, defendant M became exceedingly annoyed with the plaintiff and the servants of the defendant began to oppress the plaintiff in all manner of ways.....and by threats of confining him and of having him disgraced by beating, realized this amount from him."

On the basis of the above allegation M made a complaint under S. 500, Penal Code:

Held, that the allegation defamed not M but his servants, and action for defamation could not be sustained at the instance of M. **Til Kanchan v. Emperor**, 8 Ind. Cas. 220.

KARAMAT HUSAIN, J.

References:—26 M. 43; 12 M.L.J. 413, R.

(99) Ss. 499, 500—*Defamation—Letter addressed to a legal practitioner in reply to the notice of a claim on behalf of his client, which contains imputations concerning the client—Publication—Privileged communication—Imputation addressed to the person himself—Defaming husband in wife's presence and vice versa—Crim. Pro. Code, S. 139.*

Held that:—

(1) Where a person, to whom a claim is presented by a legal practitioner on behalf of his client, in replying exceeds the privilege by sending to the legal practitioner a letter containing defamatory statements concerning the client, the publication is complete when the letter is received and read by the legal practitioner.

Any one in the transaction of business with another has a right to use language *bona fide*, which is relevant to that business and which a

Penal Code—(Continued).

due regard to his own interest makes necessary even if it should, directly or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing, do not fall within this rule. *

(2) In the present case it was enough for the respondent to deny the truth of the petitioner's claim on the ground of enmity, but to go the length of attacking his character and writing the letter, the material portions of which are given below, is *prima facie* defamatory and does not fall within any of the exceptions to S. 499, Penal Code.

"Dear Sir,—In reply to the notice, dated the 9th February, 1908, I state as follows:—

"I inspected the account of Kalka Municipal Office as Senior Auditor. In the course of the audit, embezzlements to the extent of about Rs. 1,000 were committed by Dr. J., the Sanitary Officer at Kalka.... All these statements showed dishonesty on the part of the Doctor. I stated in my report that during the last year, he must have embezzled about Rs. 6,000. On my report the Doctor was transferred from Kalka.... My report was subsequently printed and sent to the local officers. I discharged my official duties honestly, and this is the reason why Dr. J. is inimically disposed towards me. I owe him no money nor did I borrow any money from him..... The local authorities taking pity on the Doctor on account of his old age were content with his transfer only. In fact, I, in my report, and also the Examiner, recommended that he (Doctor) should be criminally prosecuted (a)...."—

(3) *Obiters*:—Defaming husband in wife's presence and *vice versa* is sufficient publication within the meaning of S. 499 and is punishable under S. 500, I.P.C. (b).

But the uttering of a libel by a husband to his wife is no publication and consequently is not an offence under S. 500, I.P.C. (c).

(4) It is settled law that the communication of defamatory matter concerning a particular person to that person only is not publication within the purview of S. 499, Penal Code (d). **Dr. J. v. Sher Singh**, 6 P.W.R. 1910 (Cr.) = 10 P.R. 1910 (Cr.).

ROBERTSON and SHAH DIN, JJ.

References:—(a) 12 Adolphus and Ellis, Q. B. 793; 6 C.B.N.S. 514; (1887) 4 Times L.R.

Penal Code—(Concluded).

159 & 30 American State Reports, 528, F.; 1 Q.B. 524 & 1 K.B. 371, R.; 1 Q.B. 842, D. & Expt. (b) 22 L.J.C.P. 120, F. (c) 22 Q.B.D. 635, F. (d) 7 A.205 (F.B.); 18 B. 205; 7 C.W.N. 74, F.

(100) S. 500—See Nos. 7, 29 and 99, *supra*.

(100-a)*See DEFAMATION.

(101) S. 504—See No. 8, *supra*.

(102) S. 511—See No. 64-a, *supra*.

Perjury.

(1) *Contempt, summary proceeding for, against witness who has perjured—Criminal offence—Opportunity to explain should be given—Formulation of specific allegations of perjury if essential, when the whole evidence on a particular issue alleged to be at issue of falsehoods.*

Ordinance, No. 3 of 1873 of Hong Kong, which empowers the Court to commit a witness, who has given false evidence in Court, as for contempt, as an alternative to formal proceedings for perjury, contemplates summary proceedings on the spot, not involving a statement or trial of specially formulated issues. But this does not do away with the necessity, before passing sentence, of giving the witness an opportunity for explanation and possibly the correction of misapprehension as to what had been in fact said or meant, contempt of Court being a criminal offence (a).

Where, in such a proceeding, the Court stated that the whole evidence of the witnesses convinced him of a conspiracy on their part to make it appear that a certain person was on a certain date a partner of a firm, and that all they had said material to that issue was a tissue of deliberate falsehoods.

Held, that, having regard to the nature of the charge the Judge was making against the witnesses, it did not admit of being formulated in a series of specific allegations of perjury, and that the gist of the accusation ought to have been sufficiently clear to them from the language employed. **Chan Hang Kiu v. In the matter of Lai Hing Firm**, 13 C.W.N. 635 (P.C.) = 11 Cr.L.J. 277.

LORDS MACNAGHTEN, ATKINSON and COLLINS and SIR ARTHUR WILSON.

References:—(a) 5 Moore N.S. 111; L.R. 2 P.C. 106 (1868), F.

(2) Deposition irregularly recorded—Witness acknowledging correctness of deposition—Conviction for—Validity. See CRIM. PRO. CODE, No. 189, 8 M.L.T. 117.

Perjury—(Concluded).

(3) Essentials of. See PENAL CODE, No. 83, 6 Ind. Cas. 409.

Pleader.

(1) *Pleader—Setting up a false plea of alibi—Professional misconduct.*

In a case where a pleader was alleged to be guilty of professional misconduct in setting up a false plea of *alibi* in a case of defamation brought against him, their Lordships were of opinion that they were not called upon to make any order under the Legal Practitioners' Act. *In re a Second Grade Pleader*, 20 M.L.J. 498 = 7 Ind. Cas. 356 = 11 Cr. L.J. 452.

SIR ARNOLD WHITE, C.J., MILLER and KRISHNASWAMI AIYAR, JJ.

(2) —, *right of representation by—*

There is no general rule of law that entitles every person to be represented by a pleader before public officers. The claim must, in each and every case, be referred to some express provision of law.

The right of a person, ordered to furnish security under S. 118, Crim. Pro. Code, to be represented by a pleader in the subsequent proceedings relating to the fitness of sureties offered under S. 122, is entirely within the discretion of the Court. *Imperator v. Tawakali*, 4 S.L.R. 49.

HAYWARD and CROUCH, J.C.S.

(3) Prohibiting uncertificated pleaders from practising—Procedure for aggrieved party. See CRIM. PRO. CODE, No. 151, 4 Ind. Cas. 876.

(4) Unprofessional conduct of—What amounts to. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

(5) Letter to pleader containing imputations concerning the client—Defamation. See PENAL CODE, No. 99, 6 P.W.R. 1910 (Cr.).

Police.

(1) Value of initial report of an offence to the—Powers of police under S. 550, Crim. Pro. Code. See CRIM. PRO. CODE, No. 175, 14 P.W.R. 1909 (Cr.).

(2) Malicious report by a police officer—His liability. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

(3) Failure by police to send report under S. 157, Crim. Pro. Code—Serious neglect of duty See CRIM. PRO. CODE, No. 64, 4 S.L.R. 38.

(4) Police officer—When is an Excise officer. See ACT XII OF 1896 (EXCISE), No. 1, 13 P.R. 1910 (Cr.).

Police—(Concluded).

(5) Power to arrest without warrant in cases of burglary—Assaulting police officer—Offence under S. 332, Penal Code. See CRIM. PRO. CODE, No. 3, 18 P.R. 1910 (Cr.).

(6) Effect of order based on Police report—Police report if evidence. See CRIM. PRO. CODE, No. 31, 4 S.L.R. 18.

(7) Statements of accused and of witnesses made to Police officer—Entry in special diary—Value. See EVIDENCE ACT, No. 11, 8 Ind. Cas. 259.

Police Act.

See ACT V OF 1861.

Possession.

(1) Conflicting claims to—Duty of Magistrate. See CRIM. PRO. CODE, No. 57-a, 8 Ind. Cas. 63.

Post-Mortem reports.

Value of. See EVIDENCE ACT (MYSORE), No. 1, 15 M.C.C.R. 1.

Post Office Act.

See ACT VI OF 1898.

Practice.

Practice—Procedure—(Order of Sessions Judge addressed to Magistrate—Refusal of the District Magistrate to forward order.

The District Magistrates should forward orders of Sessions Judges to the Magistrates to whom they are addressed, and they cannot withhold them on the ground of their being illegal.

A revision of such orders can, however, be obtained by moving the High Court through the Law Officers of the Crown. *Gangadhara Padayachi v. Velayuda Pillai*, 6 Ind. Cas. 350 = 8 M.L.T. 87 = 11 Cr. L.J. 327.

MILLER and MUNRO, JJ.

*References:—*9 A. 362; 18 C. 186, R.

Presidency Small Cause Courts Act.

See ACT XV OF 1882.

Presidency Towns Insolvency Act.

See ACT III OF 1909.

Press Act.

See ACT XXV OF 1867.

Previous conviction.

(1) —intended to effect punishment—Form of charge—Omission to set out in due form—Effect. See CRIM. PRO. CODE, No. 109, 7 M.L.T. 77.

Previous conviction—(Concluded).

(2) Mention of, in charge. See CRIM. PRO. CODE (MYSORE), No. 3, 15 M.C.C.R. 107.

Private defence.

Using abusive language—Right of. See CRIM. PRO. CODE, No. 129, 11 C.L.J. 113.

Private Prosecutor.

Acquittal on an erroneous view of the law—Interference of High Court at the instance of a. See CRIM. PRO. CODE, No. 129, 11 C.L.J. 113.

Privileged communications.

(1) How far Magistrate bound to enquire. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

(2) Principle of. See PENAL CODE, No. 99, 6 P.W.R. 1910 (Cr.).

Procession.

(1) *Procession, Right to go in—Public street—Magisterial order prohibiting procession, whether gives a cause of action.*

Where the orders of the Magistrate prohibited procession in a public street,

Held, that the Magisterial orders furnished a good cause of action for a suit by a member of the public for a declaration and injunction regarding his right to go in procession. **Mutheyya Reddi v. Sudalaimuthu Nadar**, 20 M.L.J. 119=8 M.L.T. 114 -5 Ind. Cas. 902.

BENSON, O.C.J., and MILLER, J.

Reference :—19 M.L.J. 617.

(2) Order of Magistrate as to carrying emblem—Effect. See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), No. 1, 12 Bom.L.R. 1029.

Profession Tax.

Liability to pay—Trader buying goods through servant at M—Shop in T—Whether carries on business at M. See ACT III OF 1904 (MADRAS CITY MUNICIPALITY), No. 2, 7 M.L.T. 80.

Proof.

Contradictory statements, mode of proving.

A witness before a Court of Sessions made a statement different from the one made by him before the Magistrate or the Police. *Held* that the proper procedure to prove the contradiction in the statement is for the Sessions Court to bring on record the deposition of the witness before the Magistrate or obtain from the Police proof of the statements made to them. The Sessions Judge's note that the witness did

Proof—(Concluded).

make a particular statement to the Magistrate or the Police is no evidence and is not proof that such a statement was made. **The Crown v. Balochkhan wd. Kadero**, 4 S.L.R. 38.

HAYWARD and LEGGATT, J.C.S.

Prosecution.

(1) —when fails. See EVIDENCE ACT, No. 12-a, 36 P.W.R. 1910 (Cr.).

(2) Offence under Companies Act—Competency to prosecute. See ACT VI OF 1882 (COMPANIES), No. 1, 35 P.W.R. 1910 (Cr.).

(3) —in conformity with an *ultra vires* order—Effect. See CRIM. PRO. CODE, No. 79-a, 87 P.L.R. 1910.

Public Demands Recovery Act.

See ACT I OF 1895 (BENGAL).

Public Works Department.

(1) Order of Overseer of—Disobedience—Offence. See PENAL CODE, No. 31-a, 8 Ind. Cas. 302.

Punjab Chief Court.

(1) *Jurisdiction of the Chief Court—Convict incompetent to appeal from the order of a District Magistrate in the Punjab acting under special powers given by the Local Government—Local Government's statement—Native Indian subject committing an offence in a Native State—Penal Code, Ss. 3 and 4.*

Held, that—(1) The Chief Court, Punjab, has no jurisdiction to entertain and hear an appeal from the order of a District Magistrate in the Punjab, specially appointed by the Local Government to try Criminal cases in a Native State outside British India.

(2) The Chief Court has also no power to question the validity of such an appointment, but is bound to accept as conclusive the statement of the Local Government with regard to the capacity in which that officer has acted.

Obiter.—(3) Native Indian subjects of His Majesty committing offences in a Native State are amenable to the jurisdiction of the Courts of that State. All that sections 3 and 4 of the Indian Penal Code provide is, that such a subject is also liable to be prosecuted in British India for any offence committed under this Code, in a foreign territory (if not already tried there). **Bishen Das v. The Crown**, 20 P.W.R. 1910 (Cr.).=14 P.R. 1910=6 Ind. Cas. 640=11 Cr.L.J. 390.

SIR ARTHUR REID, C.J., and RATTIGAN, J.

Punjab Chief Court Circulars.

Circular No. 849 G., dated 15th February 1900—whether *ultra vires*. See DEFAMATION, No. 1, 4 P.W.R. 1910 (Cr.).

Railway.

(1) Railway Company—Concession tickets—Cheating by false personation. See CHEATING, No. 1, 7 M.L.T. 201.

(2) Rules made by Railway authorities—Validity and effect. See ACT IX OF 1890 (RAILWAYS), No. 1-a, 12 Bom. L.R. 930.

Railways Act.

See ACT IX OF 1890.

Rape.

—on a child—Complaint of robbery—Report of Chemical Examiner. See CONFESSION, No. 4, 93 P.L.R. 1910.

Receiver.

(1)—appointed under S. 146, Crim. Pro. Code, rights of. See CRIM. PRO. CODE, No. 53, 14 C.W.N. 631.

Registrar.

False complaint to a District Registrar—Enquiry held departmentally—Sanction to prosecute. See CRIM. PRO. CODE, No. 96, 11 C.L.J. 111.

Reg. XI of 1816 (Madras).

S. 10—Kallans—Whether “lower castes of people” within the meaning of—Power of village Magistrate to sentence Kallan to confinement in stocks.

The Kallans do not come under the phrase “the lower castes of the people” in the Regulation (a). A village Magistrate has no power to sentence a Kallan to confinement in stocks. *In re Koila Thevan*, 7 M.L.T. 305 = 5 Ind. Cas. 797 = 11 Cr. L.J. 249.

MILLER, J.

References :—(a) 6 M. 247 and 24 M. 271, F.

Regulation VI of 1825 (Bengal).

(1) S. 2—Fine imposed by Joint Magistrate—Legality of—Crim. Pro. Code (Act V of 1898), S. 435—Power of Sessions Judge to make reference.

It is only the Collector who can take action and impose a fine under the Bengal Regulation VI of 1825. Where the District Magistrate made over a proceeding under the Bengal Regulation to the Court of the Joint Magistrate, held that the Joint Magistrate had no jurisdiction to proceed under S. 2 of the Regulation.

Regulation VI of 1825 (Bengal)—(Concluded).

Where, under such circumstances, the Joint Magistrate proceeded with the proceedings under S. 2 of the Regulation, which he had no jurisdiction to do, held that, as he dealt with the case as a Magistrate, the Sessions Judge could take action under S. 435, Crim. Pro. Code. *Muhammad Alam v. King-Emperor*, 7 A. L. J. 983 (Cr.).

CHAMBER, J.

Regulation (VI of 1890, Mysore Arms).

(1) S. 14 (a)—Manufacturing.

The making of stocks to be affixed to old guns amounts to manufacturing within the meaning of S. 14 (a) of the Mysore Arms Regulation, 1890. *Yenkatappa v. The Government of Mysore*, 15 M.C.C.R. 301.

ISMAY, C.J. and KRISHNA RAO, J.

Reference :—5 M.C.C.R. 164, Diss.

Regulation III of 1901 (Frontier crimes).

S. 59—Trial of person under the Regulation—Course of appeal. See APPEAL, No. 3, 19 P. R. 1910 (Cr.).

Restitution of conjugal rights.

(1) Effect of decree for—Wife's right to maintenance. See MAINTENANCE, No. 1, U.B.R. (1910), 2nd Qr. 34.

Retrial.

(1)—refused when evidence untrustworthy and discrepant. See CRIM. PRO. CODE, No. 112, 20 P.W.R. 1909 (Cr.).

(2) When different Magistrate should retry. See JOINDER OF CHARGES, No. 1, 7 A.L.J. 19.

(3) Improper admission of evidence—Retrial. See EVIDENCE ACT, NO. 7, 11 C.L.J. 301.

(4)—when may or may not be ordered. See CRIM. PRO. CODE, No. 145-a, 8 Ind. Cas. 594.

Revenue officer.

Nature of proceedings by a -. See CRIM. PRO. CODE, No. 160, 13 O.C. 198.

Review.

(1) Power of Judge to review Criminal judgment to expunge damaging remark against a witness. See WITNESS, NO. 1, 2 P.W.R. 1910 (Cr.).

(2) Power of Court to review and modify order once passed. See CRIM. PRO. CODE, No. 107, 12 Bom. L.R. 521.

Revision.

(1) Power of Chief Court to revise order inflicting fine under S. 283 of Cantonment

Revision—(Continued).

Code—Several persons tried together and fined on similar facts—Chief Court's power to deal with all the fines on the application of one person—Cantonment Code, 1899, S. 283—Fine cannot be imposed for breach of conditions of license—Practice—Right of convicted person to copy of proceedings.

An order inflicting a fine, under S. 282 of the Cantonment Code, for breach of the conditions of a license is a judicial order and, therefore, open to revision by the Chief Court.

A fine cannot be inflicted under section 283 for breach of the conditions of a license, where the license only provides for suspension or for cancellation in case of such breach. S. 283 cannot be applied to such a case.

Where the several offenders are tried together and found guilty on exactly similar facts and fined, the Chief Court has the power, on the application of one of the persons fined, to deal with all the fines.

A convicted person is entitled to a copy of the proceeding in the Magistrate's summary Register. **Mangl Ram v. Emperor**, 11 Cr. L. J. 17 = 4 Ind. Cas. 611 = 9 P.R. 1909 (Cr.) = 30 P.W.R. 1909 (Cr.).

JOHNSTONE, J.

(2) *Revision—Circumstantial evidence—High Court's power to go into evidence on revision side—Indian Evidence Act, I of 1872, S. 8, Crim. Pro. Code, 1898, S. 139*

Held, that it is not legal to convict only on circumstantial evidence connecting the accused with commission of the crime, specially when it can be explained otherwise.

Held, also, that the fact that the complainant at first said that a certain person was the real culprit is relevant under section 8, Evidence Act.

In this case, the Chief Court discussed the evidence, reversed concurrent findings on facts of both the Courts below, and acquitted the accused. **Abdul Ghafur v. The Crown**, 25 P. W.R. (Cr.) 1910 = 6 Ind. Cas. 957 = 11 Cr. L. J. 425.

WILLIAMS, J.

(3) Discretion of Chief Court to hear pleader in—See ACT III OF 1867 (GAMBLING), No. 2, 5 P.W.R. 1910 (Cr.).

(4) Conviction for theft and release upon probation of good conduct under S. 562, Crim. Pro. Code—Whether can be revised under S. 439 (5), Crim. Pro. Code. See CRIM. PRO. CODE, No. 144, 5 L.B.R. 129.

Revision—(Concluded).

(5) Extent of Chief Court's power of—. See CRIM. PRO. CODE, No. 19, 17 P.W.R. (1910) (Cr.).

(6) Order of Sessions Judge addressed to Magistrate—Illegal order—Revision. See PRACTICE, No. 1, 6 Ind. Cas. 358.

(7)—of order passed under S. 203, Crim. Pro. Code—Notice to opposite party. See CRIM. PRO. CODE, No. 104-a, 13 O.C. 289.

Revival of prosecution.

—when will not be allowed. See CRIM. PRO. CODE, No. 105, 11 P.W.R. 1910.

Sanction to prosecute.

(1) Presy. S.C. Court—Full Court's powers. See CRIM. PRO. CODE, No. 86, 12 Bom. L.R. 130.

(2) Inquiry in granting—Duty of Magistrate. See PENAL CODE, No. 39 = 12 Bom. L. R. 229.

(3) Sanction vague—Effect. See CRIM. PRO. CODE, No. 99, 7 Ind. Cas. 51.

Sanyasi.

Rights of sanyasi over his children—Right to resume his former status—Effect of invalidity of initiation. See CRIM. PRO. CODE, No. 166-a, 8 M.L.T. 300.

Search list.

(1)—Evidence of contents of. See CRIM. PRO. CODE, No. 7, 11 Cr. L. J. 136.

(2) Search list—whether evidence of matter recorded therein—Oral evidence. See CONFESION, No. 6, 33 M. 413.

Search warrant.

Essentials of—. See ACT III OF 1867 (GAMBLING), No. 3, 23 P.R. 1910 (Cr.).

Security for good behaviour.

(1) Appeal—Procedure—Jurisdiction. See CRIM. PRO. CODE, No. 32-a, 13 O.C. 354.

Security proceedings.

Breach of surety bond—Fresh proceedings necessary for fresh bond. See CRIM. PRO. CODE, No. 13, 7 M.L.T. 90.

Sentence.

(1) *Revision—Interference by Chief Court—Sessions Judge passing heavier sentence than the verdict of the jury.*

The Chief Court will not interfere in revision, in a case where the Sessions Judge passes on the accused a heavier sentence than he would have passed, had he agreed with the verdict of the jury. **Emperor v. Chit Maung**, 8 Ind. Cas. 455.

HARTNOLL, J.

Sentence—(Concluded).

(2) Provocation caused by unjustifiable act—Offence—Severity of sentence—Enhancement of, when not permissible. See CRIM. PRO. CODE, No. 175, 14 P.W.R. (1909) (Cr.).

(3) Sentence, reduction of, where conviction for one of the offences is set aside. See CRIM. PRO. CODE, No. 149, 7 M.L.T. 81.

(4) —for defamation—Nature of—Effect of delay in the proceedings. See CRIM. PRO. CODE, No. 156-2, 4 S.L.R. 86.

(5) Conviction for two offences—Appeal—Setting aside conviction for one but confirming the sentences for both—Effect—Enhancement of—Duty of Court. See PENAL CODE, No. 70, 8 M.L.T. 117.

Sessions Court.

(1) Power of, to direct investigation by police under S. 156, Crim. Pro. Code. See CRIM. PRO. CODE, No. 63, 11 P.R. 1910 (Cr.).

(2) —superior to District Magistrate—Duty of District Magistrate to send records to, when called for. See Act XIV OF 1908 (CRIMINAL LAW AMENDMENT), No. 2, 14 C.W.N. 516.

(3) Order of Sessions Judge addressed to Magistrate—Duty of District Magistrate—Revision. See PRACTICE, No. 1, 6 Ind. Cas. 358.

Signature.

Award—Parties signing otherwise than as witnesses—Effect. See STAMP ACT (1899), No. 1, 7 A.L.J. 180.

Small Cause Court.

Sanction to prosecute—Presy. S. C. Court, Bombay—Powers of Full Court. See CRIM. PRO. CODE, No. 86, 12 Bom. L.R. 130.

Spy.

(1) Position of—Value of his evidence. See ACCOMPLICE, No. 1, 8 Ind. Cas. 119.

Stamp Act (1899).

(1) S. 62—*Arbitration award—Parties signing otherwise than as witnesses—Meaning of—Construction of Statute in favour of subject.*

A Penal Act must be read as favourably as possible for the subject.

A dispute was referred to arbitration and an award was passed. The parties to the proceedings signed the award and acted upon it. The award not being stamped, the parties had to pay the duty and penalty. They were then criminally prosecuted. *Held* that the only

Stamp Act (1899)—(Concluded).

person liable to sign the award was the arbitrator, and the other parties who signed it could not be said to have signed it otherwise than as witnesses within the meaning of S. 62 of Act II of 1899. *Birj Pal Saran v. King-Emperor*, 7 A.L.J. 180 = 5 Ind. Cas. 180 = 11 Cr.L.J. 52 = 32 A. 198.

RICHARDS, J.

(2) S. 64 (a)—*Non-disclosure of certain facts, liability for.*

R purchased certain property for Rs. 20,000 paying Rs. 1,000 in cash and leaving Rs. 19,000 with the vendors to be drawn upon whenever necessary but which was never paid. Subsequently R re-transferred the property to the vendors by a deed for Rs. 1,000, making no mention of the Rs. 19,000. The Sub-Registrar impounded the document. *Held* that the real consideration was Rs. 1,000 plus an oral agreement cancelling the liability of the vendors for payment of Rs. 19,000, and that the omission in the sale deed to make any reference whatever to the unpaid consideration could only have been intended to avoid the question of stamp duty being raised. The vendor therefore committed an offence under section 64 (a) of the Stamp Act. *Rameshar Das v. King-Emperor*, 7 A.L.J. 110 = 5 Ind. Cas. 697 = 11 Cr.L.J. 204 = 32 A. 171.

KNOX and PIGGOTT, JJ.

Statute 24 & 25, Vic. 67 (Indian Councils).

S. 22, proviso—Right of trial by jury—Effect of S. 454, Crim. Pro. Code. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Stay of prosecution.

(1) *Prosecution, stay of—Pendency of civil proceedings.*

Case in which the High Court directed the stay of a prosecution on the charge of forgery during the pendency of a civil suit in which the genuineness of the document would be a material issue. *Sasibhusan Seal v. Manik Lal Nundy*, 12 C.L.J. 270 (Cr.).

HARINGTON and TEUNON, JJ.

(2) Pendency of civil suit—Stay of criminal proceedings. See CRIMINAL PROCEEDINGS, No. 1, 6 Ind. Cas. 181.

Stolen property.

—belonging to several owners—Separate trial. See PENAL CODE, No. 81, 15 M.C.C. R. 40.

Summons.

Substituting, for warrant. See CRIM. PRO. CODE, No. 106, 3 Sind. L.R. 167.

Summons case.

—tried as warrant case—Effect of discharge of accused—Acquittal. See CRIM. PRO. CODE, No. 122, 6 Ind. Cas. 385.

Survey Act.

See ACT V OF 1875 (BENGAL).

Telegram.

—sent—No complaint—No prosecution can be ordered. See PENAL CODE, No. 41, 7 A.L.J. 618.

Tout.

(1) *Tout—Evidence—Power of Chief Court to interfere—Ss. 3 and 36 of Act XVIII of 1879, as amended by Act XI of 1896 and S. 13 of the Punjab Courts Act, XVIII of 1884.*

Held, that, the evidence of an ordinary witness to the effect that a Barrister pays a person commission on any case brought to him while the Barrister himself denies, is not sufficient to declare that person a habitual tout. **Baisakhi Ram v. The Crown**, 27 P.W.R. 1909 (Cr.)—4 Ind. Cas. 1022—11 Cr. L.J. 148.

HARRIS, J.

(2) *Tout—Evidence—Interference by the Chief Court—Ss. 3 and 36 of Act XVIII of 1879, as amended by Act XI of 1896, and S. 13 of the Punjab Courts Act, XVIII of 1884.*

Held, that, a person cannot be declared a habitual tout when evidence of his being so is vague and general, while there is the testimony of apparently respectable witnesses to the contrary. **Nizam Din v. The Crown**, 26 P.W.R. 1909 (Cr.)—4 Ind. Cas. 1021—11 Cr. L.J. 147.

FRIZELLE, J.

(3)—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 5, 31 P.W.R. 1909 (Cr.).

Tracker.

Evidence of. See PENAL CODE, No. 72, 71 P.L.R. 1910.

Transfer of case.

(1) *Magistrate refusing to grant time under S. 526, cl. 8, Crim. Pro. Code—Where application was made after commencement of proceedings—Convenience of parties and witnesses—Grounds of transfer.*

Refusal to grant postponement of case under S. 526, cl. 8, where the application had been

Transfer of case—(Concluded).

delayed for nearly two months after the hearing had commenced, is no ground for a transfer of the case from the Magistrate.

The accused cannot plead convenience of parties and witnesses as a valid ground of transfer of the proceedings, where the accused are themselves under custody and have not disclosed the names of their witnesses. **Imperator v. Azizdin Ahmed**, 4 S.L.R. 42.

HAYWARD, J.C.

Reference :—S.L.R. 8, R.

(2) Nature of provisions as to—Notico. See CRIM. PRO. CODE, No. 4, 35 P.W.R. 1909 (Cr.).

(3) Notice to accused when necessary—Effect of non-recording of reasons for transfer. See CRIM. PRO. CODE, No. 83, 3 P.R. 1910 (Cr.).

(4)—Personal interest of Magistrate—Ground of—. See CRIM. PRO. CODE, No. 174, 7 A.L.J. 813.

(5) Prejudging a counter case—Sufficient ground for—. See CRIM. PRO. CODE, No. 173-a, 8 Ind. Cas. 721.

Treason.

Whether S. 191, I.P.C., same as English Law of. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Trespass.

Property in dispute—Order prohibiting complainant from taking possession—Trespass on the property. See CRIM. PRO. CODE, No. 49-a, 8 M.L.T. 289.

Victim.

Statement of, how far and when credible—. See PENAL CODE, No. 55, 1 P.W.R. 1910 (Cr.).

Waging war.

Meaning of—Essentials of offence. See CRIM. PRO. CODE, No. 71, 37 C. 467.

Whipping.

(1) Sentence of—Order for notifying address of previously convicted offender—Legality. See CRIM. PRO. CODE, No. 179, 12 Bom. L.R. 901.

Witness.

(1) *Power of a Judge to review a criminal judgment to expunge damaging remark against a witness.*

Held that, a Judge has power to reconsider and expunge damaging observations regarding a witness in a criminal case, who had at the trial no chance of defending himself. This

Witness—(Continued).

does not amount to review of a criminal judgment, and there is no question of reconsidering the guilt of the accused. *In re Malik Umar Hayat Khan*, 2 P.W.R. 1910 (Cr.)—5 Ind. Cas 611=11 Cr. L. J. 178.

JOHNSTONE, J.

(2) Impropriety of prosecuting a—, during trial. See PENAL CODE, No. 55, 1 P.W.R. 1910 (Cr.).

(3) Discrepancies between statements of witnesses before the police and Court—Effect. See EVIDENCE ACT, No. 12-a, 36 P.W.R. 1910 (Cr.).

Witness—(Concluded).

(4) Duty of prosecutor and Court—When witnesses may be dispensed with. See COMMITMENT, No. 1, 15 M.C.C.R. 265.

(5) Criminal trial—Close of prosecution evidence—Petition of accused to tender letter by prosecution witnesses—Right to recall witnesses. See CRIM. PRO. CODE, No. 128-a, 8 M. L.T. 367.

Workman's Breach of Contract Act.

See ACT XIII OF 1859.

SUPPLEMENT.

SECTION I—CRIMINAL.

Imperial Acts.

Act III of 1867 (Gambling).

- (1) *Ss. 5, 6—Search under S. 5—Irregularity—Presumptions under S. 6—Conviction on the strength of such presumptions—When sustainable.*

Irregularity in a warrant issued under S. 5 of the Act will not *per se* vitiate a conviction following on a search made under it, if there is evidence on which such conviction can be supported without invoking the presumptions proscribed by S. 6 of the Act. But those presumptions only arise when a search has been duly made under S. 5, and a conviction cannot be sustained, merely on the strength of such presumptions, in a case where the search was not duly made (*a*). **Emperor v. Umerkhan**, 6 N.L.R. 168.

SKINNER, A.J.C.

References :—(1884) A.W.N. 286 ; 4 C. 710 & 4 C. 659, *F.* ; (1884) A.W.N. 291, *D.*

Act VIII of 1897 (Reformatory Schools).

- (1) *Ss. 8, 9, 16—Youthful offender—Absence of sentence of imprisonment—Order sending him to Reformatory—Illegality—Order under the Act—No bar to appeal against conviction—Effect of S. 16.*

No order sending a youthful offender to the Reformatory School can be passed under Act VIII of 1897, unless a definite sentence of imprisonment has been passed on him.

There is nothing in Act VIII of 1897 which deprives a convict of his right of appeal against his conviction. All that is provided by S. 16 of that Act is that, where proceedings on trial are complete up to and including the stage of a sentence of imprisonment, there can be no interference with a subsequent order directing him to be sent to a reformatory (*a*). **Crown v. Bakhtawar**, 34 P.R. 1910 (Cr.).

KENSINGTON, J.

Reference :—(*a*) 18 P.R. 1907 (Cr.).

Complaint.

(1) Report of police officer—Whether a— See PENAL CODE, No. 2, 32 P.R. 1910 (Cr.).

17 Cr.

Crim. Pro. Code.

(1) *Ss. 4 (1) and 199—Police officers report—Whether complaint.* See PENAL CODE, No. 2, 32 P.R. 1910 (Cr.).

- (2) *S. 439—Revision—Power to interfere with non-appealable orders—Order framing charge against accused—Revisability—Findings by Civil Court—Conviction upon different findings on same facts—Propriety—Duty of Criminal Courts.*

The Chief Court has power, under S. 439, Cr. P.C., to interfere with orders, in respect of which no appeal would lie under the Code, and may, therefore, set aside, if it so thinks fit, the order of a Magistrate charging an accused person with an offence (*a*).

It would be anomalous to hold that it is open to Criminal Courts to go behind the findings of the Civil Courts and to convict of cheating and fraud a person who, upon the very same facts, had succeeded in satisfying the Civil Court upon the merits of the case of the legality of his claim. **Crown v. Bishen Das**, 33 P.R. 1910 (Cr.).

ROBERTSON and RATTIGAN, JJ.

References :—(*a*) 27 C. 126, *Diss. from* ; 45 P. R. 1885 (Cr.), *D* ; 42 P.R. 1885 (Cr.) ; 25 C. 233 ; 26 C. 786 ; 22 C. 131 ; 2 A. 398 ; 19 A.W.N. 212 ; 20 B. 543 and 18 P.R. 1904 (Cr.), *R*.

- (3) *Ss. 476, 195—Delivery of possession—Obstruction—Jurisdiction of executing Court to make order under S. 476 of the Cr. P. C.—Enforcement of process of Court—Offence committed—Cr. P. C., S. 195.*

An execution proceeding is a judicial proceeding within the meaning of S. 476 of the Cr. P. C., and consequently, the Court, while engaged in such a proceeding, is competent to make an order under that section, if the fact is brought to his notice that offences have been committed while the process of the Court was attempted to be enforced. **Khondkar Abdul Basir v. Panchkowri**, 12 C.L.J. 618.

MOOKERJEE and CARNDUFF, JJ.

References :—10 C.W.N. 55 ; 3 Cr. L.J. 142 ; 10 C.L.J. 450.

Execution proceedings.

(1) Nature of—Offence committed in—Jurisdiction. See CRIM. PRO. CODE, No. 3, 12 C.L.J. 618.

Jurisdiction of Civil and Criminal Courts.

(1) *Criminal Court, duty of—Prior findings by Civil Court—Conviction upon different findings on same facts—Propriety.* See CRIM. PRO. CODE, No. 2, 33 P.R. 1910 (Cr.).

Penal Code.

(1) *Ss. 300, Excep. 2, 302, 304—Causing death and grievous hurt by stabbing—Right of private defence—Absence of plea of—Facts sufficient to establish such defence, proved—Court's duty.*

Where the deceased and some of the prosecution witnesses had trespassed by night into the house of the accused and were dragging him outside the house, the accused was entitled to defend himself against them. But where the accused, while so being dragged, stabbed the deceased, and the first accused inflicted mortal wounds on the former and caused grievous hurt to the latter, when his assailants were unarmed and when there was nothing to suggest that he had any reason to believe that he was in danger of death or grievous hurt at their hands.

Held, that the accused exceeded his right of private defence, but was within the 2nd

Penal Code—(Concluded).

exception of S. 300, I.P.C., and that he was consequently guilty not of murder but of culpable homicide not amounting to murder.

Where the accused failed to set up the plea of right of private defence, but the facts proved were sufficient to establish such a right, the Court is not only entitled but also bound to decide the case on a consideration of the facts proved by the evidence, in favour of the accused. *In re Garuga Ramayya*, 8 M.L.T. 462.

MILLER and KRISHNASAWMY IYER, JJ.

(2) *S. 498—Absence of complaint—Conviction under S. 498—Non-maintainability—Report of police officer—Whether complaint—Cr. P. C., Ss. 4 (h) and 199.*

Where there has been no complaint to the Magistrate by the husband or guardian, a conviction under S. 498, I.P.C., is not maintainable.

The report of a Police Officer is not a complaint within the terms of Ss. 4 (h) and 199, Cr. P.C. (a). *Bhana v. The Crown*, 32 P.R. 1910 (Cr.).

REID, C.J.

References:—(a) 4 P.R. 1888 (Cr.); 30 C. 910 (F.B.); 31 B. 218, F.

Private defence.

(1) Right of—Absence of plea of—Facts establishing such right proved—Court's duty. See PENAL CODE, No. 1, 8 M.L.T. 462.

1910. FINAL PART (Section II—Civil).

6TH YEAR OF ISSUE.

The "Current Index" is published Monthly, the Sixth Part incorporating and superseding the First Five Parts, and the Final Part incorporating and superseding all the Parts issued during the year.

THE CURRENT INDEX

OF

INDIAN CASES, 1910

(FINAL PART—SECTION II—CIVIL).

COMPILED AT

THE LAWYER'S COMPANION OFFICE, TRICHINOPOLY

AND PUBLISHED BY

T. A. VENKASAWMY ROW,

PROPRIETOR,
THE LAWYER'S COMPANION OFFICES,
TRICHINOPOLY AND MADRAS.

The Cases digested in this Part have been taken from the following Reports:—

I.L.R. Allahabad Series, Vol. XXXI.

" Bombay " " XXXIV.

" Calcutta " " XXXVII.

" Madras " " XXXII.

Allahabad Law Journal " VII.

Bombay Law Reporter " XII.

Calcutta Law Journal " XI & XII.

" Weekly Notes " XIV, Nos. 7 to end.

Madras Law Journal " XIX, Parts 16 to

24 and Vol. XX.

Madras Law Times, Vols. VII & VIII.

" Nos. 1 to 28.

Punjab Record, 1910.

Law Reporter, 1910.

PUBLISHING OFFICE:

"MADHWA VILAS,"

Teppakulam, Trichinopoly.

Punjab Weekly Reporter, 1910.

Nagpur Law Reports, Vol. VI, Parts 1 to 11.

The Oudh Cases, Vol. XIII.

Lower Burma Rulings, 4th Qr., 1909 and 1910,

1st, 2nd and 3rd Qr.

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Indian Cases, Vol. IV, Part 6 and Vol. V to VII, complete and VIII, Parts 1 to 4.

Sind Law Reporter, Vol. III, Nos. 9 and 10 and Vol. IV, Nos. 1 to 5

Criminal Law Journal of India, Vol. XI.

Mysore Chief Court Reports, Vol. XV, Parts 1 to 11.

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IN CONNECTION WITH THIS COMPILATION

THE COMPILER DESIRES VERY GRATEFULLY TO ACKNOWLEDGE

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A. L. J.	...	...	...	Allahabad Law Journal.*
A. W. N.	...	...	...	Allahabad Weekly Notes.
B.	...	...	...	Indian Law Reports, Bombay Series.*
B. H. C.	...	...	...	Bombay High Court Reports.
B. L. R.	...	...	...	Bengal Law Reports.
Bom. L. R.	...	...	...	Bombay Law Reporter.*
Bur. L. R.	...	...	...	Burma Law Reports
C.	...	...	...	Indian Law Reports, Calcutta Series.*
C. L. J.	...	...	...	Calcutta Law Journal.*
C. L. R.	...	...	...	Calcutta Law Reports.
C. W. N.	...	...	...	Calcutta Weekly Notes.*
C. P. L. R.	...	...	...	Central Provinces Law Reports.
Cr. L. J.	...	...	...	Criminal Law Journal of India.*
I. A.	...	...	...	Law Reports, Indian Appeals.*
Ind. Cas.	...	...	...	Indian Cases.*
L. B. R.	...	...	...	Lower Burma Rulings.*
M.	...	...	...	Indian Law Reports, Madras Series.*
M. H. C.	...	...	...	Madras High Court Reports.
M. L. J.	...	...	...	Madras Law Journal.*
M. L. T.	...	...	...	Madras Law Times.*
M. I. A.	...	...	...	Moore's Indian Appeals.
N. L. R.	...	...	...	Nagpur Law Reports.*
N. W. P. H. C. ...	...	...	...	North-West Provinces High Court Reports.
O. C.	...	...	...	Oudh Cases.*
P. R.	...	...	...	Punjab Record.*
P. L. R.	...	...	...	Punjab Law Reporter *
P. W. R.	...	...	...	Punjab Weekly Reporter.*
S. L. R.	...	...	...	Sind Law Reporter.*
T. L. R.	...	...	...	Travancore Law Reports.*
U. B. R.	...	...	...	Upper Burma Rulings.*
W. R.	...	...	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	...	...	Applied
Appr.	...	...	...	Approved.
D. or. Distd.	...	...	...	Distinguished.
Disc.	...	...	...	Discussed.
Dis.	...	...	...	Dissented from.
Exp.	...	...	...	Explained.
F.	...	...	...	Followed.
(F. B.)	...	...	...	Full Bench.
Obs.	...	...	...	Observed on.
(P. C.)	...	...	...	Privy Council.
R. or Refd. to.	...	...	...	Referred to.
(S. B.)	...	...	...	Special Bench.

(N. B.)—(1) This publication embodies Cases (Civil and Criminal) from the Reports marked above with asterisks.

(2) In the Punjab Record and the Punjab Law Reporter, the Cases are known by their numbers and not by the pages where they are printed; (*e.g.*) 4 P. R. 1910 would mean Case No. 4, in the Punjab Record of 1910. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the volumes and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

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653	1042	980	684	1060	74
655	469	984	989	1062	1010
658	175	995	1115	1102	1229
660	1042	998	958	1117	871
664	569	1001	850	1122	691
667	646	1011	968	1130	580
675	306	1019	1233	1137	53
682	178	1022	1045	1143	133
704	700	1025	875	1167	187
709	188	1040	1046	1172	636
715	888	1064	743	1176	61
720	490	1066	1049	1198	264
724	893	1070	402	1197	80
729	469	1078	501	1200	374
732	1057	1087	975	1205	1249
735	171	1091	348		
738	298	1098	1254		
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558	346	254	126	612	84
570	787	266	125	623	1114
626	1033	275	647	632	878
		281	21	636	786
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29	1261	364	102	8	9
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50	748	397	185	53	807
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60	1097	400	96	62	508
61	439	401	786	65	988
68	752	406	420	70	1022
69	339	408	6	74	888
78	335	417	91	86	1161
81	312	420	418	91	1064
83	590	426	414	104	751
86	342	431	424	107	107
87	117	433	109	110	550
91	589	435	75	115	998
95	996	438	1018	126	789
98	118	443	723	130	992
106	551	449	302	137	931
116	991	474	734	146	893
124	876	461	1113	153	85
131	366	477	92	169	936
136	973	478	287	173	894
138	584	484	818	183	558
141	119	489	1078	185	905
147	108	501	286	192	122
148	1095	503	912	195	111
150	79	512	431	205	870
155	555	513	29	211	401
158	504	516	556	216	262
159	555	521	9	225	666
161	443	524	95	231	280
164	25	528	867	233	168
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197	623	548	788	256	1215
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207	498	557	863	267	1105
209	543	560	556	272	942
216	110	563	240	303	184
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218	891	580	1000	322	56
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378	457	920	688, 696	389	98
385	700	983	680	396	339
391	1252	994	703	403	1152
400	76	1013	247	410	612
407	89	1025	118	414	1056
410	76	1038	1188	420	228
419	353	1073	186	433	598
423	831	1080	346	437	96
428	253	1082	625	439	842
434	1259	1110	986	443	657
439	581	1117	649	446	756
442	582	1149	113	451	447
443	804	1221	748	458	1243
445	77			463	31
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468	925	15	564	484	925
470	1071	59	880	486	854
476	127	65	1150	487	548
480	544	71	493	497	835
483	1153	75	244	507	1171
486	1120	121	832	521	1018
489	67	122	833	527	275
497	1099	125	922	532	1090
506	66	146	329	535	885
519	407	170	309	545	734
525	59	182	409	552	643
537	417	183	436	556	498
545	70	186	420 1199	558	1170
549	427	191	696	560	1078
551	762	214	972	569	723
553	25	221	661	573	345
556	215	226	690	576	1157
561	557	229	755	579	968
566	474	231	110	584	410
574	963	237	991	586	75
579	1245	244	376	594	302
584	874	248	435	601	1074
586	91	252	435	606	201
589	792	256	29	607	125
591	78	261	1147	617	925
593	792	268	261	626	88
595	791	275	28	629	267
596	947	285	204	632	127
602	1066	295	1033	639	934
625	1020	297	94	641	185
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739	548	346	12	686	145
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746	1225	1073	25	728	729 Final 1909
752	595	1089	941	732	844
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857	95	228	1085	41	829
861	1164	459	615	49	674
865	870	467	1246	66	511
872	230	470	715	71	498
878	1161	485	763	74	206
892	508	487	489	78	365
884	107	489	478	79	678
888	58	502	584	86	896
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897	111	513	14	91	165
905	85	517	680	94	165
914	104	530	549	97	338
918	892	548	636	98	506
924	305	567	247	99	1251
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985	666	631	625	141	1027
990	1008	640	1249	142	159
994	47	645	60	144	466
995	275	648	604	146	48
1001	967	650	815	151	1101
1005	647	651	328	153	979
1010	184	656	1201	164	31
1019	339	666	675	171	1147
1024	68	669	1077	182	904
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283	812	591	363	977	150
288	839	596	158	979	1200
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377	619	760	355	155	815
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383	476	766	154	161	783
386	947	771	150	164	478
387	632	781	840	176	367
393	939	785	1182	177	148
394	891	791	504	197	592
396	954	794	150	198	149
398	430	798	250	199	328
400	575	803	716	234	300
407	272	805	374	237	33
412	702	808	817	239	823
415	756	814	14	244	715
417	164	821	761	242	316
421	449	823	154	215	506
423	248	849	981	261	300
423	723	852	570	262	1201
429	794	855	676	263	900
447	1018	869	1245	266	699
453	185	878	368	269	840
470	302	879	634	269	356
479	1132	885	162	271	356
494	1019	890	942	273	317
498	1019	900	666	275	649
500	24	907	1002	279	625
512	458	917	184	285	1246
524	308	927	896	286	508
526	768	930	790	290	560
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306	552	107	373	211	664
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311	505	112	702	223	851
313	784	113	691	223	759
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		151	424	247	564
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		155	847	253	701
		157	341	258	971
		159	272	262	588
		160	19	263	685
		161	670	264	164
		164	552	266	286
		164	981	266	735
		165	642	270	592
		167	1189	270	1156
		173	756	271	983
		174	438	273	902
		175	1109	278	892
		176	163	282	829
		177	504	285	23
		177	756	298	565
		178	1069	289	844
		180	784	290	719
		181	165	292	632
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352	716	55	572	173	149
358	314	56	236	180	297
354	280	57	1028	181	165 464
355	74	57	556	186	148
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363	643	60	281	188	269
364	919	67	46	189	1080
365	567	69	95	193	666
366	567	71	644	194	1059
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378	296	77	736	200	655
376	1193	79	700	200	1223
379	619	80	250	201	150
379	1035	82	1123	201	162
380	1243	83	720	202	718
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383	643	85	1126	204	570
384	651	87	226	205	1220
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392	476	98	1253	221	319
394	460	99	760	223	1199
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405	932	105	557	230	1210
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429	761	122	565	240	976
431	899	124	607	241	1132
432	1008	130	812	242	905
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		134	449	245	166
		136	165	247	34
		137	387	247	1025
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290	655	412	832	8	294
290	39	417	336	9	748
292	360	118	169	10	399
296	767	420	976	11	81
297	656	421	4	12	79
298	685	427	976	13	190
299	739	429	1093	14	429
809	209	430	770	15	1164
810	116	432	450	16	890
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814	1123	435	1222	18	532
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841	162	447	428	27	756
841	857	448	983	28	825
844	1013	449	1072	29	1027
845	769	450	302	30	584
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64	536	5	810	83	528
65	525	6	852	84	422
66	23	7	311	86	1060
67	525	9	743	88	629
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69	526	13	520	94	1145
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82	413	30	77	110	597
88	739	31	298	111	195
84	1048	32	538	112	524
85	529	34	437	113	536
86	877	35	766	114	23
87	199	39	915	115	525
88	646	40	1025	116	515
89	199	41	616	117	531
90	529	42	259	118	442
91	568	43	218	119	723
92	47	44	385	120	525
93	579	46	619	122	889
94	770	47	609	123	32
95	79	48	494	124	4
96	1053	49	1035	125	526
97	1013	50	515	127	1127
98	541	51	354	128	969
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101	441	54	1049	131	880
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4	351	61	1027	138	528
5	399	62	330	139	749
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		64	429	142	526
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159	531	139	517	51	960
160	197	142	197	52	1088
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163	91	145	492	54	881
165	294	148	809	55	218
166	532	150	344	56	780
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186	579	6	294	69	515
187	47	7	743	70	442
188	770	8	518	71	521
189	563	9	191	72	1126
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207	519	20	190	83	79
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211	593	24	91	87	586
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165	415	209	701	815	343
190	615	254	871	816	295
195	680	261	891	818	198
316	783	262	53	820	332
324	595	264	133	821	651
330	993	301	812	822	567
338	300	301	1188	828	161
353	885	302	891	829	281
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408	1100	304	224	833	915
419	885	306	856	833	88
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436	94	376	373	835	291
438	325	386	636	836	32
449	113	392	678	837	672
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459	506	406	324	842	9
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Abwabs.

(1) *Abicab — Zemindary salami — Mokarai lease — Rent — Additional sum — Whether recoverable.*

In a *mokarari* lease, there was an agreement to pay a certain sum as rent and a certain additional sum as *Zemindar salami* expenses, which were arbitrary and extra charges imposed on the tenants on account of work done in the *Zemindary sherista* and for other purposes :

Abwabs—(Concluded).

Held that they were *Abwabs* and could not be recovered by the *Zemindar* from the tenant. **Bipin Behary Mitter v. Sarat Chandra Sirkar**, 7 Ind. Cas. 760.

BRETT and VINCENT, JJ.

References:—10 C.W.N. 527; 4 C.L.J. 527, *Rel.*; 31 C. 834, *D.*; 17 C. 726 (F.B.), *F.*

(2) Right to recover *salami*, *wasil baki selami* and *teherir*. See STAMP ACT, No. 6, 7 Ind. Cas. 582.

Accounts.

(1) *Account, suit for, limitation—Demand—Breach—Limitation Act (XV of 1877), Sch. II, Arts. 89, 115, 116.*

When there is a contract to render accounts year by year, Art. 116 of the Limitation Act applies if the contract is registered, and Art. 115 if it is unregistered (*a*).

Neglect to comply with the remand to render accounts is tantamount to a refusal within the meaning of Art. 89 (*b*).

Where the contract was to render accounts year by year and there had been successive demands and breaches at the end of every year, and plaintiff brought a suit for accounts within three years of the last breach:

Held, whether Art. 89 or Art. 115 applied, he was entitled to accounts for one year only. **Easin Sarkar v. Baroda Kishore Acharyya Chowdhry**, 11 C.L.J. 43=5 Ind. Cas. 186.

HOLMWOOD and SHARFUDDIN, JJ.

References:—(*a*) 1 C.L.J. 211, *F.* (*b*) 3 C.L. R. 446, *Relied on*.

(2) *Account settled—Suit on—Account not signed—Limitation.*

An account settled must be signed by the debtor, and the creditor has three years from its date for the institution of the suit. **Chinnasawmi Naidu v. Venkatasami Naidu**, 7 M.L.T. 372=6 Ind. Cas. 719.

BENSON and KRISHNASWAMI IYER, JJ.

(3) *Babi account—Proof and corroboration of.*

Where there are entries in plaintiff's *babi* account book, which, according to the report of the Commissioner, is correct and regular according to village custom in the part of the country to which the parties belong, and there is also the plaintiff's own statement on solemn affirmation that the account is correct, *held* that certain disputed items interspersed in the

Accounts—(Continued).

account should not be disallowed simply because they were not admitted by defendants and no specific evidence was adduced in regard to them, as there is no reason why such fictitious items should have been interspersed in an otherwise true account. **Hanwanta v. Akbar Khan**, 80 P.R. 1910=147 P.L.R. 1910=117 P.W.R. 1910.

REID, C.J., and SCOTT-SMITH, J.

(4) *What is an open and current account—With reciprocal demands—Indian Limitation Act, IX of 1908, Art. 85.*

Held, that it is an open, mutual and current account with the reciprocal demands where one party supplies the other with capital by *Hundies*, and the latter in turn supplies the former with goods, and there is sometimes a balance against the one and sometimes against the other; and the formal balance struck within three years from the close of the account between them is a balance contemplated under Art. 85 of Limitation Act. The fact that the parties used to ascertain every year a balance in order to see how the account stood between them is immaterial and does not alter the nature of the account (*a*). **Imrat Lal v. Lal Chand**, 99 P.W.R. 1910=75 P.R. 1910=7 Ind. Cas. 715=124 P.L.R. 1910.

SCOTT-SMITH, J.

Reference:—(*a*) (1887) I.L.R. Bom. 134, *F.*

(5) *Accounts settled—Omission of plaintiff to pray for re-opening of accounts on the basis of fraud—Plea of defendants that no accounts were rendered—Finding that plaintiff accepted payments after hearing accounts read—Whether amounts to a finding that accounts were settled.*

A finding, in a suit for settlement of accounts, that plaintiff accepted payments after hearing accounts read, is not finding that accounts were settled between the parties.

Where the defendant, in such a suit, admits that he had not rendered any accounts to the plaintiff and was not liable to do so, the Court should presume that there was no settlement of accounts, and plaintiff's suit is not liable to dismissal on the ground that he did not pray in his plaint for re-opening of accounts on the ground of error or fraud. **Pattath Manakkal Narayanan v. Manakkal Narayanan**, 8 M.L.T. 424=7 Ind. Cas. 853.

MILLER and KRISHNASWAMI IYER, JJ.

Accounts—(Concluded).

(6) Whether balancing of an account is account stated. See **PRINCIPAL AND AGENT**, No. 7, 7 Ind. Cas. 270.

(7) Non-production of account books—Presumption. See **ADOPTION**, No. 1, 7 M.L.T. 57 (P.C.).

(8) Suit for—Addition and substitution of parties. See **CIV. PRO. CODE**, (1908), No. 99, 12 C.L.J. 537.

(9) Signature of debtors below the balance struck on a settlement of—Acknowledgment—Stamp duty. See **STAMP ACT (MYSORE)**, No. 1, 15 M.C.C.R. 32.

(10) Mutual, open and current accounts—Tests—Sum due on—Limitation. See **LIMITATION ACT**, (1877), No. 54-a, 8 M.L.T. 412.

(11) Account books and entries how to be proved. See **EVIDENCE ACT**, No. 6, 8 Ind. Cas. 81.

Accretion.

(1) *Receiver, accretions to property, if vest in—Accretion, title to, prevails against all persons not claiming under prior title—Bona fide tenants under a de facto proprietor, if acquires raiyati rights—Non-occupancy raiyat, if entitled to possession of accretions—Crim. Pro. Code, (Act V of 1898), Ss. 145, 146—Receiver appointed under S. 146, rights of.*

As a general rule, a receiver takes no title in property acquired by the person formerly in possession.

But a receiver is entitled to any accretion to the property vested in him, upon general principles and the policy of the law by which a proprietor acquires a title to accessions to his property.

Where a receiver has been appointed under S. 146 of the **Crim. Pro. Code**, in respect of any property in dispute, the receiver is entitled, unless some special circumstances is established, not only to the subject-matter of the proceedings under S. 145, but also to the accreted land, and gives good title to a tenant under him.

Such title will prevail against a trespasser, but not against a person who establishes a title to the accreted land acquired prior to the vesting of the lands in the receiver (a).

Semble.—Whether a tenant, who enters upon a land held under a *de facto* proprietor, can acquire a raiyati interest therein, even though the *de facto* possessor ultimately turns out to be no real owner, in case the tenant should have entered on the land in good faith (b).

Accretion—(Concluded).

Where a tenant has acquired the status of a non-occupancy raiyat in respect of any land, he is entitled to possession of land which has accreted to his holding (c). **Madhu v. Sabar Ali**, 14 C.W.N. 681=6 Ind. Cas. 177.

MOOKERJEE and TEUNON, JJ.

References :—(a) 10 C.L.J. 55, R. (b) 20 C. 708; 8 C.W.N. 315=5 C.L.J. 9, R. (c) 21 C. 233; 4 C.L.J. 63=33 C. 444; 13 C.W.N. 269=8 C.L.J. 537; 13 C.W.N. 267=8 C.L.J. 538; 8 C.L.J. 541, R.

Accumulation.

(1) Direction for—Validity—Hindu law—See **MORTGAGE (GENERAL)**, No. 49, 7 Ind. Cas. 921.

Acknowledgment.

(1) *Acknowledgment of a debt—Signature in account books, whether is an—*

The fact that the defendant signed the account kept by the plaintiff does not necessarily show that he thereby acknowledged there was a debt due. The entry must show that the defendant by his signature acknowledged the debt, otherwise it would only be an acknowledgment of the correctness of the figures entered therein. **Muthia Nadar v. David Nadar**, 7 M.L.T. 84=5 Ind. Cas. 756.

SANKARAN NAIR, J.

(2) See **LIMITATION ACT**, S. 19.

Acquiescence.

(1) What amounts to—effect of, by reversioner. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 4, 9 P.W.R. 1910.

(2) In action for 9 years—Effect. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 7, 39 P.W.R. 1910.

Acquisition of land.

(1) *Land acquisition—Valuation—Lands within a Municipality.*

In valuing lands within a Municipality, one-sixth of the Municipal assessment for the whole area should be deducted for road cess and other costs: taxes and ground rents should also be deducted, and the balance estimated at twenty years' purchase. **Tulshi Makhania v. Secretary of State for India in Council**, 11 C.L.J. 408=6 Ind. Cas. 543.

HOLMWOOD and CHATTERJEE, JJ.

(2) *Land acquisition—Ferry—Disturbance—Bridge—Railway Company—Compensation.*

Acquisition of land—(Concluded).

The taking of property that merely injures a franchise, but does not interfere with the exercise of it, is not such a taking of property from the owners of the franchise as to require compensation.

Where a Railway Company constructed, across a river, a bridge, near an ancient ferry, and the traffic across the ferry fell off : *Held*, that, so far as loss of the income of the ferry resulted from the use, and not the execution of the works of the Railway, no compensation can be claimed.

Held, in this case, that the compensation ought to be assessed upon one-half of the annual loss, which may be assumed as the loss of income of the owner of the ferry, due to the acquisition of the lands for the construction of the Railway bridge.

In a case where the owner has been deprived of his property by arbitrary proceedings not taken in accordance with the Land Acquisition Act, he may legitimately claim some addition to the compensation assessed on the basis of the loss of annual profits; and the additional compensation was assessed in the case at one-eighth of the original sum. **Maharaja Sir Rameswar Singh Bahadoor v. The Secretary of State for India in Council**, 6 Ind. Cas. 343 = 12 C.L.J. 56.

MOOKERJEE and CARNDUFF, JJ.

(3) Claim withdrawn—Costs. See COSTS, No. 3, 11 C.L.J. 217.

(4) See ACT I OF 1894 (LAND ACQUISITION).

Actionable claim.

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Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—BURMA ACTS.
- 5.—CENTRAL PROVINCES ACTS.
- 6.—MADRAS ACTS.
- 7.—N. W. P. ACTS.
- 8.—OUDH ACTS.
- 9.—PUNJAB ACTS.

I.—Imperial Acts.**Act XXXII of 1839 (Interest).**

- (1) *Express agreement not to pay interest—Court's discretion to award interest—Waiver by a party of an advantage conferred by law for his benefit.*

A mortgage deed provided: "I agree and covenant in writing that I shall repay in full the said loan without interest in three years' and "if I, the executant, fail to pay the principal amount on the date promised, the creditors shall be at liberty to realise the principal amount due to them without interest from the property" hypothecated: *Held*, that, as there was an express agreement that no interest shall be charged on the mortgage debt, no interest could be allowed to the mortgagee prior to the date of institution of the suit.

There is nothing to prevent a party from waiving or agreeing to waive the benefit or advantage of a law or rule made solely for the benefit or protection of the individual in his private capacity, and which may be dispensed with without infringing any public right or public policy. **Lachmi Narain Sahu v. Sheik Abdul Sattar**, 5 Ind. Cas. 285.

STANLEY, C.J., and BANERJI, J.

- (2) *Arbitration—Award directing payment to plaintiff within two months by assignment of debts—Failure to make payment—Interest.*

An award by arbitrators directed defendants to pay certain amounts to plaintiff by effecting a division within two months, if there were no obstruction, and assigning to plaintiff the debts which fell to the share of each of the defendants.

Held, that, on the defendants' failure to pay to plaintiff as aforesaid, the plaintiff was not entitled to interest under the interest Act after the said period of two months, as the time of payment was not certain. **Rangasamy Mudaliar v. Srinivasa Mudaliar**, 8 M.L.T. 405.

MUNRO and ABDUR RAHIM, JJ.

- (3) Right to interest over arrears of rent payable in kind. See MULGENI LEASE, No. 1, 12 Bom. L.R. 831.

Act XIX of 1841 (Succession Property Protection).

- (1) *Preamble and S. 3—Enquiry, scope of—Interpretation of statute.*

The preamble of Act XIX of 1841 must be read by the light of S. 3 and the following sections of the Act. S. 3 contemplates an

1.—Imperial Acts—(Continued).**Act XIX of 1841 (Succession Property Protection)—(Continued).**

enquiry upon two points, *first*, whether the opposite party has lawful title, and *secondly*, whether the applicant is really entitled, whether his application is *bona fide*, and whether he is likely to be materially prejudiced if left to a regular suit

Where an order under the Act has been made, but the procedure has not been followed, it is competent to the High Court to interfere. **Phul Chand Lal v. Kishmish Koer**, 11 C.L.J. 521.

GHOSE and HARRINGTON, JJ.

- (2) S. 3—*Scope of the Act—Joint possession of property left by deceased—Applicability of Act—Preamble of Statute—Interpretation—Enacting clause—Discretion of Judge—Affidavit of applicant.*

The Succession (Property Protection) Act is not limited in its application to cases where dispute arises between persons, each of whom claims title by succession to the entire estate, and it covers a case in which the claim relates to the undivided share of the estate left by the deceased.

Therefore, an application may be maintained when it is alleged by a person, who claims a share in the estate left by the deceased, that that share has been seized by other persons in assertion of a pretended claim of right by gift or succession.

The preamble to a statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit; but if the language of the body of the Act is obscure or ambiguous, the preamble may be consulted as an aid in determining the reasons of the law and the object of the Legislature.

In the exercise of his judicial discretion, the Judge is entitled to act upon the affidavit of the applicant, under S. 3 of the Succession (Property Protection) Act. **Gopi Krishna Rai v. Raj Krishna Rai**, 6 Ind. Cas. 259.

MOOKERJEE and TEUNON, JJ.

- (3) Ss. 3 14—*Limitation for the application—Solemn declaration—Statements on solemn affirmation.*

K, a representative Vataudar of a Deshgat Vatan, having died in 1892, his widow B's name was entered on the register as a representative Vataudar, and she held the property until her death, which took place in 1907.

1.—Imperial Acts—(Continued).**Act XIX of 1841 (Succession Property Protection)—(Concluded).**

Within six months of B's death, the applicant, claiming to be the nearest heir of K, applied for possession of the property under the Succession (Property Protection) Act, 1841. It was contended that the application could not be entertained by the Court under S. 14 of the Act, for K died more than six months before the date of the application.

Held, overruling the contention, that the decease of the proprietor, whose property is claimed by right "in succession" referred to in S. 14, would include the decease of B in this case, for B was, between the death of K and her own decease, the proprietor of the property which was claimed, and it was claimed in succession to her, that is to say, the claimant claimed to succeed her in the possession of the property.

The words "by right in succession" in S. 14 of the Succession (Property Protection) Act, 1841, are chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is, who should be put into possession of the property in succession to the last deceased holder.

Statements made upon solemn affirmation must having regard to the provisions of Act V of 1840, be taken to be statements upon solemn declaration, within the meaning of S. 3 of the Succession (Property Protection) Act, 1841. **Bhimappa Tamappa v. Khanappa Yen-kappa**, 11 Bom. L.R. 1308 = 34 B. 115 = 4 Ind. Cas. 594.

SCOTT, C. J., and BATCHELOR, J.

- (4) S. 14. See No. 3, *supra*.

Act XX of 1847 (Copyright).

- (1) Ss. 7, 12—*Infringement at Lahore—Defendant a resident of Lahore—Demand for surrender at Aligarh—Jurisdiction of the Court at Aligarh to entertain suit.*

A suit for infringement of copyright can be brought only in the Court, within the local limits of whose jurisdiction the cause of action arises, or the Court within whose limits the defendant resides.

The defendant, a resident of Lahore, printed a book in which the plaintiff alleged he had a copyright. The plaintiff resided at Aligarh where he instituted a suit for damages. *Held*

I.—Imperial Acts—(Continued).**Act XX of 1847 (Copyright) —(Concluded).**

that the cause of action arose at Lahore, and the Court at Aligarh had no jurisdiction to entertain the suit.

S. 12 of the Indian Copyright Act, 1847, does not require a person in possession of pirated copies of a book to deliver them to the proprietor of the copyright at any place selected by the latter. The place of residence of the person making the demand is besides the question.

Semble.—S. 12 of the Copyright Act applies as much to the innocent possessor of a pirated copy as to the printer and publisher in possession of a whole edition of pirated copies of a book, and the same duty is cast upon both. **Ram Kishun v. Piarey Lal**, 7 A.L.J. 923—7 Ind. Cas. 101.

TUDBALL and CHAMIER, JJ.

(2) S. 12. See No. 1, *supra*.

Act XXVIII of 1855 (Usury Laws Repeal).

(1) S. 1. See TRANSFER OF PROPERTY ACT, No. 54, 7 A.L.J. 787.

Act XV of 1856 (Hindu widow re-marriage).

(1) *Widow re-marrying according to custom whether forfeits husband's estate—Mortgage suit—Whether the mortgagor's widow after re-marriage could represent the mortgagor's estate—Mortgage-decree, effect of, when obtained against person wrongly sued as legal representative of mortgagor—Civ. Pro. Code, Act XIV of 1882, Ss. 332 and 335—Order under, made without investigation—Effect.*

One P executed a mortgage in favour of the plaintiff. On P's death leaving him surviving his mother (S) and widow (C), the plaintiff brought a suit on the mortgage against the widow (C) after she had remarried according to custom, and he got a decree in execution of which the plaintiff purchased the mortgaged property and got symbolical possession. The plaintiff subsequently brought an ejectment suit against the mother (S).

Held that as, at the time when the suit was instituted to enforce the mortgage, the widow had ceased to be the widow of the deceased mortgagor, she did not represent the estate of the mortgagor, and the decree and sale in execution were not binding upon the mother of the deceased mortgagor, who was his legal representative at that time (a).

I.—Imperial Acts—(Continued).**Act XV of 1856 (Hindu widow re-marriage) —(Concluded).**

A Hindu widow after re-marriage forfeits her deceased husband's estate, even though there is a custom of re-marriage in her caste (b).

The only order under S. 335, C.P.C. (Act XIV of 1882), upon which the character of finality is impressed, is an order upon enquiry, and by parity of reasoning, the same effect can attach to an order under S. 332 only when an investigation has been made (c). **Gouri Churn Patni v. Sita Patni**, 14 C.W.N. 346—5 Ind. Cas. 710.

CASPERSZ and DOSS, JJ.

References :—(a) 9 C.W.N. 201=32 I.A. 23; 5 C.W.N. 10—27 I.A. 216, R. (b) 22 C. 589; 22 C. 321, R. (c) 6 C.L.J. 362, *relied on*.

(2) *Application of—Marriage of a widow among Taga Brahmans.*

A Taga Brahman widow contracted a second marriage which was sanctioned by custom. The reversioners sued for possession of property which was her husband's. *Held* that the Hindu Widow's Remarriage Act did not apply, and she did not lose her right in her husband's property, inasmuch as the marriage was valid according to the custom of her caste, independent of the provisions of the Act. **Mula v. Pratab**, 7 A.L.J. 417=6 Ind. Cas. 116.

STANLEY, C.J., and BANERJI, J.

(3) S. 2—Rights of widow and mother on re-marriage. See HINDU LAW (WIDOW), No. 13, 6 N.L.R. 103.

(4) S. 2—Alienation by widow—Effect of remarriage of widow on alienee's rights. See HINDU LAW (WIDOW), No. 14-a, 8 Ind. Cas. 269.

Act XXXV of 1858 (Lunatics).

(1) S. 14—*Manager of lunatic's estate—Lease for period exceeding five years—Ordinary cultivating lease for uncertain term—Power of manager.*

An ordinary cultivating lease for an uncertain term is not a lease for any period exceeding five years within the meaning of S. 14 of the Lunatics Act, and a manager of the estate of a Lunatic has power to grant such a lease without the permission of the Civil Court. **Trilochan Neogi v. Ibrahim Dunan**, 6 Ind. Cas. 158.

CASPERSZ and DOSS, JJ.

1.—Imperial Acts—(Continued).**Act XL of 1868 (Minors).**

(1) Ss. 10, 18. See **GUARDIAN AND MINOR**, No. 7, 86 P.W.R. 1910.

(2) S. 18. See No. 1, *supra*.

Act V of 1861 (Police).

S. 42—Illegal search and seizure by the Police—Suit for damages—Limitation. See **DAMAGES**, No. 1, 15 M.C.C.R. 47.

Act XX of 1863 (Rel. Endowment).

(1) S. 4. See No. 1-a, *infra*.

(1-a) Ss. 5 and 4—*District Court if may appoint a trustee pending decision of Civil Court, in all cases.*

District Courts have no power, upon a vacancy occurring in the office of the trustee of a religious endowment, to appoint a trustee under S. 5 of the Religious Endowment Act, unless the endowed property has been actually transferred to the former trustee under S. 4 of the Act by the Board of Revenue or Government (a). S. 5 of the Act contemplates the temporary appointment of a manager by the Court, pending the decision by a Civil Court of the title of any other applicant to the office. **Mohunt Sheonandan Gie v. Dhupan Upadhye**, 14 C.W.N. 1104.

BRETT and VINCENT, JJ.

References :—(a) 3 Mad. 401 (1881); 8 Cal. 32 (1881), *relied on*; 7 Cal. 767 (1181); 18 All. 227 (1896); 19 All. 104 (1896), *D*.

(2) Ss. 7, 10—*Constitution of Committee—Powers of two members of a Committee.*

The effect of Ss. 7 and 10 of the Act is that the surviving members must act so that the date of the election shall be fixed not later than three months from the date of the vacancy. If they do not so act, their powers of election are gone, and then, unless the Civil Court takes proceedings on the application of somebody and appoints a person, there is no power to fill up the vacancy.

In construing the two sections of the Act together, they must be read as imperative or obligatory.

The fact that the remaining members of the committee are required to act with promptitude, while it shows that the Legislature was alive to the possibility of inconvenience arising in the interval, also indicates the intention of the Legislature to be that the committee shall not

1.—Imperial Acts—(Continued).**Act XX of 1863 (Rel. Endowment)—(Ctd.).**

consist of less than the number originally appointed. **Santhalya v. Manjanna Shetty**, 8 M.L.T. 213 = 7 Ind. Cas. 751.

ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

Reference :—22 M. 481, *expl. and D*.

(2-a) S. 10. See No. 2, *supra*.

(3) Ss. 13, 14, 18—*Whether a trustee can sue a co trustee for breach of trust without sanction under S. 18—How far action of the majority of trustees binds the minority—Temple Committee, powers of control of, over trustees.*

A trustee of a religious endowment, constituted under Act XX of 1863, can sue his co-trustee for a breach of trust, without getting sanction under S. 18 of the Act. Such right of suit is given by the general law, and is independent of the provisions of Act XX of 1863.

Though the decision of the majority of the trustees of a public trust binds the minority in matters connected with the management of the trust property, it does not bind them in regard to matters which are *ultra vires* and beyond the proper sphere of the trust. **Samaram Singarachariar v. Krishnaswami Iyengar**, 1 Ind. Cas. 874 = 19 M.L.J. 513.

BENSON, BHASHYAM IYENGAR and RUSSELL, JJ.

(4) S. 14—*Suit under—Jurisdiction of Civil Courts—Question of fact—Whether can be taken for the first time in second appeal.*

A Civil Court has jurisdiction to try, when proceedings are instituted under S. 14, Act XX of 1863.

The appellant cannot be allowed to take, for the first time in second appeal, a point which was neither raised in the written statement nor in the issues nor in the Courts below. **Yenkata Reddiar v. Krishna Iyengar**, 7 M.L.T. 311 = 6 Ind. Cas. 684.

WHITE, C.J., and ABDUR RAHIM, J.

References :—(a) 50 M. 158, *D*.; 23 M. 298 and 16 M.L.J. 15, *Appl*.

(4-a) S. 14. See No. 3, *supra*.

(5) S. 18—*Jurisdiction of Court to pass orders under section after making some enquiry and receiving affidavit from manager—Whether the order is open to revision under S. 622 (of the old C.P.C.).*

I.—Imperial Acts—(Continued).**Act XX of 1863 (Rel. Endowment)—(Cld.).**

A District Judge would not be acting illegally in the exercise of his discretion, if he passes an order under S. 18 of Act XX of 1863 after making some enquiry and receiving an affidavit from the Manager in reply to the allegations in the petition presented under the section (a). There is no authority to support the view that he ought to pass an order under this section on a bare perusal of the application for leave to sue.

An order under S. 18 (Act XX of 1863) is not open to revision under S. 622, C.P.C. (old Code) (b). **Ramanathan Chettiar v. Ananthanarayana Iyer**, 7 M.L.T. 126=5 Ind. Cas. 291.

BENSON and ABDUR RAHIM, JJ.

References :—(a) C.R.P. 20 of 1908, F. (b) 10 M. 98, F.

(6) S. 18—See No. 3, *supra*.

Act X of 1865 (Succession).

(1) *Ss. 2, 231—Succession—“Hindu”—Conversion to Christianity—Dying as Christian—Acquisition of title by adverse possession—Pleading.*

The Indian Succession Act is of universal application in this country, unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions.

A Hindu, who has embraced the Christian faith and continues to be a Christian up to the time of his death, is not a “Hindu” within the meaning of S. 331, Succession Act, and all questions of succession to his estate upon intestacy are to be determined by the Succession Act.

The test to be applied in determining whether the plea of title by adverse possession should be allowed to be urged, though not explicitly raised in the plaint, is, how far is the defendant likely to be prejudiced if the point is permitted to be taken. **Nepen Bala Debi v. Sitikanta Banerjee**, 12 C.L.J. 459.

MOOKERJEE and TEUNON, JJ.

(2) S. 3. See WILL, No. 1, 5 Ind. Cas. 149.

(3) S. 46—Competency of minor to make will. See WILL, No. 10, 6 Ind. Cas. 6.

(4) S. 46, Expl. 1—Hindu widow's power to dispose of property by will. See HINDU LAW (WILL), No. 2, 6 N.L.R. 46.

I.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Continued).**

(5) *S. 48—Application to set aside will—Undue influence—Burden of proof—Law applicable to wills.*

(1) The *onus probandi* lies, in every case, on the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

(2) If a person writes or prepares a will under which he takes a benefit, that is a circumstance, which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. **Mr. Cecilia King v. Arthur Abreu**, 5 L.B.R. 141.

FOX, C.J., and PARLETT, J.

References :—**Barry v. Butlin**, (1838), 2 Moore P.C. 480; and **Funny v. Govett**, (1908) 25 Times Law Reports, 186, R.

(6) *S. 50, cl. 3—Will, proof of execution of.*

When a document which on the face of it purports to have been executed as a will and attested, is proved to have been duly executed in the presence of witnesses in the assembly, the presumption, in the absence of evidence to the contrary, is that the requirements of attestation under S. 50 of the Act were satisfied.

To raise this presumption, it is not necessary that there should be a regular attestation clause. **Nital Chand Saha Banikiya v. Naganj Dassya**, 10 C.L.J. 499=3 Ind. Cas. 427.

MOOKERJEE and VINCENT, JJ.

Reference :—4 C.W.N. 204, F.

(7) *Ss. 62, 164—Will—Construction—Extrinsic evidence.*

A clause in a will ran as follows :—“My trustees shall give to my brother Pestonji Framji Mistry Rs. 1,500, namely, fifteen hundred, without interest, and they shall get him to vacate the place in my house which he now occupies.” The testator was indebted to the legatee in a sum of Rs. 1,500 which did not bear any interest; and in lieu of interest the legatee was residing in the house at a reduced rent. In a suit by the legatee to recover Rs. 1,500 given to him by the will, the trustee contended that it appeared from the will that that was

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Continued).**

not an ordinary bequest, but was intended to be no more than the satisfaction of the debt owed by the testator. This fact was sought to be proved by conclusive evidence of three facts : (1) that the testator owed the legatee Rs. 1,500 ; (2) that that sum was not carrying interest ; and (3) that in lieu of interest the legatee was residing in the house, referred to in the clause at a rent reduced in proportion to what would otherwise have been interest on Rs. 1,500 :—

Held that no extrinsic evidence, under S. 62 of the Indian Succession Act, could be let in to construe the clause, which, though in an unusual form, had no uncertainty or ambiguity about it. There was no possibility of any ambiguity about the person to be benefited ; for the testator had directed his trustees to give to the plaintiff, naming him, a definite sum of money. Nor was there any ambiguity about the property to be given, which was Rs. 1,500.

S. 62, Succession Act, empowers Courts to avail themselves of extrinsic evidence for the purpose of determining questions as to what person or what property is denoted by any words used in a will.

Where there is an ambiguity in the language used by the testator, the Judge is entitled by the use of extrinsic evidence to put himself in the testator's shoes or seat himself in the testator's chair. But where the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred, the Judge is precluded from going outside the actual words used by the testator.

Where the language of the will presents no ambiguity, the Judge ought not to imagine ambiguity in its application to different sets of existing facts, and so to initiate an inquiry into those facts. **Pestonji Framji Mistri v. Framji Bejanji Billimoria**, 12 Bom. L. R. 963.

BEAMAN, J.

(8) S. 93—Presumption in favour of joint tenancy. See *GIFT*, No. 1, 7 M.L.T. 379.

(8-a) S. 164. See No. 7, *supra*.

(9) S. 187—Will made in Bombay—Property less than Rs. 1,000—Probate—Administrator General's certificate. See *ACT XXI OF 1870 (HINDU WILLS)*, No. 2, 12 Bom. L.R. 471.

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Continued).**

(10) S. 191—Application of section to the vesting of the property of deceased in the Administrator. See *LETTERS OF ADMINISTRATION*, No. 1, 8 M.L.T. 77.

(10-a) S. 231. See No. 1, *supra*.

(11) S. 250—*Probate and Administration Act (V of 1881)*, S. 81—*Caveator—Interest of the caveator*.

The provisions of S. 250, Succession Act, 1865, and S. 81, Probate and Administration Act, 1881, are that the interest, which entitles a person to put in a caveat, must be an interest in the estate of the deceased person, that is, there should be no dispute whatever to the title of the deceased to the estate, but that the person, who wishes to come in as caveator, must show some interest in that estate, derived from the deceased by inheritance or otherwise. **Pirojahah Bhikaji v. Pestonji Merwanji**, 12 Bom. L.R. 366 6 Ind. Cas. 523 = 34 B. 459.

CHANDAVARKAR and KNIGHT, JJ.

Reference :—17 C. 48, *P*.

(12) S. 256—*Administration bond—Discharge of surety Refusal High Court Original Side Rules, Rule 470—Practice*.

Where sureties were appointed under S. 256 of the Succession Act, and their bond provided that, on the fulfilment of the conditions specified in the bond, the bond shall be void and of no effect :

Held, on application by the sureties for cancelling the bond on the ground that the administration was complete.

Per C.J. There is no provision of law to make an order to vacate an administration bond. Rule 470 of the Original Side Rules applied to an application to vacate a bond during the pendency of the administration, with a view to having another surety appointed in the place of the surety whose bond is vacated. The English practice with regard to the substitution of sureties appears to be that the Court will not discharge an original surety to the administration bond and allow another to be substituted for him (a), and this practice has been followed in this Court. Nor was there any provision in the English Probate Rules.

Per Krishnaswami Iyer, J.—The principle of law is that, as the bond becomes void on the

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Concluded).**

happening of a condition, it is allowed to work itself out on the happening of that condition, and if, as a matter of fact, the administration has become complete, the bond becomes void. If it is not, the bond is in force. There is no need for the Court being invited to make a declaration on the subject. *In re Arthur Gerald Norton Knight*, 7 M.L.T. 160=5 Ind. Cas. 311.

SIR ARNOLD WHITE, C.J., and KRISHNASWAMI IYER, J.

Reference :—(a) L.R. 1 P. and D. 76, R.

(13) S. 277—*Executor or administrator—Failure to file an inventory—Jurisdiction of Court to take action suo motu.*

Following the settled practice of the Calcutta High Court, it was held that the Court (of Judicial Commissioner of Sind), as a Court of Probate, will not ordinarily act *suo motu* (or as a matter of course and routine), under S. 277, and cite an executor or administrator to account for the property that has come into his possession in pursuance of the authority granted to him, but will await the disclosure of special reason for such action. *Re petition by Jehangirji and Byramji*, 3 Sind. L.R. 197=4 Ind. Cas. 1163.

KNIGHT, J.C.

Reference :—Williams Law of Executors, Vol. II, p. 1901.

Act XXVIII of 1866 (Trustees and Mortgagees Powers).

(1) S. 48—*Trustees—Trust-deed—Form of charity—Trustees considering the form of charity not beneficial—Directions of the Court for diversion of charity—Cypres.*

The surviving trustees of a certain trust fund, the income of which was to be utilised in distributing on every Friday morning roasted gram, parched rice and pop corn to the poor without regard to the nation, caste or creed, applied to the Court under S. 43 of the Trustees and Mortgagees Powers Act to divert the trust fund to other purposes, on the ground that the charity directed by the donor was of a useless nature as it tended to pauperise the recipients and encouraged thriftlessness, laziness and vagrancy.

Held, (1) that S. 43 of the Act did not apply to trustees, because the word "trustees" had been deleted in that section by the Trusts Act of 1882 wherever the latter Act came into force :

1.—Imperial Acts—(Continued).**Act XXVIII of 1866 (Trustees and Mortgagees Powers)—(Concluded).**

(2) That, even if the Trustees and Mortgagees Powers Act applied, the Court could not under S. 43 do more than give advice or directions, and could not pass any order which would in any way alter the duties of the trustees under the trust-deed.

Held, further, that the duty of the Court is to give effect to the charitable directions of the founder when they are not open to objection on the ground of public policy, and that the Court ought not to consider whether those directions are wise or whether a mere beneficial application of the testator's property might not be found. *In re Sir Currimbhai Ebrahim, Bart.*, 12 Bom. L.R. 1040.

SCOTT, C.J.

Reference :—(1910) 2 Ch. 124, R.

Act IV of 1869 (Divorce).

(1) *Jurisdiction—Residence—Meaning of—Duty of Court.*

Mere casual residence in a place for temporary purpose, with no intention of remaining there, is not "dwelling" within the meaning of the Divorce Act. Where the petitioner came to Meerut from Hyderabad (Sinde) for a temporary purpose and adultery was committed there, *held* that the Meerut Court had no jurisdiction to entertain the application for divorce.

Per Curiam.—In all cases of this kind, a District Judge ought to enquire into and set out in his judgment the facts relied on as giving jurisdiction to the Court to pronounce a decree for dissolution of marriage. *Arthur Flowers v. Minnie Flowers*, 7 A.L.J. 193=32 A. 203=5 Ind. Cas. 371.

STANLEY, C.J., RICHARDS and TUDBALL, JJ.

(2) Ss. 7. 45—Divorce proceedings—Attachment before judgment. See DIVORCE, No. 1, 37 C. 613

(3) S. 45. See No. 2, *supra*.

Act VII of 1870.

See COURT FEES ACT.

Act XXI of 1870 (Hindu Wills).

(1) S. 2—Competency of minor to make will. See WILLS, No. 10, 6 Ind. Cas. 6.

(2) Ss. 2 and 5—*Indian Succession Act (X of 1865)*, S. 187—*Administrator-General's*

1.—Imperial Acts—(Continued).**Act XXI of 1870 (Hindu Wills)—(Concluded).**

Act (II of 1874), S. 16—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.

A will made in Bombay is subject to the provisions of the Hindu Wills Act, and a person claiming as a legatee under the will is not entitled to sue without taking out probate, as he would be bound by S. 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act.

But where the property comprised in the will is worth less than Rs. 1,000, and the legatee has obtained a certificate under S. 36 of the Administrator-General's Act to administer the effects of the deceased, such certificate entitles the legatee to receive the property. The provision of the Administrator-General's Act is not affected by the incorporation in the Hindu Wills Act of S. 187 of the Indian Succession Act. S. 5 of the Hindu Wills Act provides that nothing contained in that Act will affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay respectively. **Narayan Shridar Date v. Pandurang Bapuji Date**, 12 Bom. L.R. 471 = 6 Ind. Cas. 905 = 34 B. 506.

SCOTT, C.J. and BATCHELOR, J.

(3) S. 3, proviso 2—Hindu widow's power to dispose of property by will. See HINDU LAW (WILL), No. 2, 6 N.L.R. 46.

(4) S. 5. See No. 3, *supra*.

Act XXIII of 1871 (Pensions).

(1) S. 6—*Applicability of the Act—Grant of the soil of village and not of land revenue—Certificate not produced at the institution of suit—Defect cured by subsequent production.*

Where a grant is not a grant of land revenue but of the soil of the village itself, the Pensions Act does not apply.

If a certificate is not obtained under S. 6 before the institution of a suit, a party may be allowed to obtain the same even subsequent to the institution of the suit, and cure the defect that might have existed before. **Sardar Ganapat Rao v. Sardar Anand Rao**, 7 M.L.T. 53 (P.C.) = 14 C.W.N. 310 = 7 A.L.J. 165 = 11 C.L.J. 281 = 12 Bom. L.R. 267 = 20 M.L.J. 164 = 32 A. 148 = 5 Ind. Cas. 689.

LORD MACNAGHTEN, LORD COLLINS
and SIR ARTHUR WILSON, JJ.

1.—Imperial Acts—(Continued).**Act XXIII of 1871 (Pensions)—(Concluded).**

(2) Ss. 6, 8, 11—*Toda Giras Hak—The Hak entered in the name of a person—Arrears of the Hak falling due in the person's life-time—Application to receive payment of the arrears by the person's heirs after his death—Collector—Certificate.*

In execution of a decree which made the Toda Giras allowance payable to him, the decree-holder applied to have his name entered in the Collector's books as the person entitled to receive the payments and to recover the arrears due. The name was accordingly entered under the Pensions Act and the arrears paid. The decree-holder having died, his heir filed a darkhast to recover further arrears that had become due in the life-time of the decree-holder. The Court overruled the Collector's objection that the darkhast could not lie in the absence of a certificate under the Pensions Act, and directed payment of the arrears into Court:

Held, (1) that the powers of the Collector under the rules framed under the Pensions Act had been exhausted, and there was no discretion left for that officer to exercise either under the Act or the rules, so far as applicant's right to receive the allowance which had accrued due in the life time of the last holder was concerned:

(2) That if the amounts remained unpaid, the Collector held them for and on the decree-holder's behalf as moneys due to him. They were, therefore, recoverable on his death by his heirs, independent of any question arising under the Pensions Act or the rules under it. **Chhaganlal Bhagvandas v. Pranjivan Shivalal**, 11 Bom. L.R. 1369 = 34 B. 154 = 4 Ind. Cas. 842

CHANDAVARKAR and HEATON, JJ.

(3) S. 8. See No. 2, *supra*.

(4) S. 11. See No. 2, *supra*.

Act I of 1872.

See EVIDENCE ACT.

Act IX of 1872.

See CONTRACT ACT.

Act X of 1873 (Oaths).

(1) S. 8—*Form of oath—Oath affecting third person—Consent to abide by statement on oath—Effect—Oath repugnant to decency—Competency of Court.*

In this case, the oath administered to defendant was: "If I lie in saying that I did not

I. — Imperial Acts — (Continued).**Act X of 1873 (Oaths) — (Concluded).**

strike the balance and had paid the debt, may my wife be considered to have been divorced from me " *Held* that the oath was repugnant to decency and purported to affect a third person. The acceptance by the defendant and his taking the oath did not validate the oath. The oath was in contravention of S. 4 of the Oaths Act, and the Court was not competent to tender the oath, and was consequently barred from accepting the evidence of the defendant. **Nabi Baksh v. Ram Jawaya**, 66 I.R. 1910 = 7 Ind. Cas. 479.

REID, C.J., and RYVES, J.

References :—36 P.R. 1873, F.; 18 A. 46, Diss.

- (2) S. 10—Administration of oath—Oath proposed by one party—Prior agreement necessary.

The procedure prescribed in the Act must be strictly followed; and it is only when an agreement is arrived at that the Court is empowered, by S. 10 of the Act, to administer the oath proposed. The necessary procedure preliminary to the agreement must be adopted. **Krishna Rao v. Srinivasa Rao**, 7 M.L.T. 286.

MILLER and SANKARAN NAIR, JJ.

- (3) S. 10—Commission to administer oath—Discretionary power of Courts.

Where a party to a suit offers to be bound by any form of oath taken by the opposite party, and the latter first accepts to take it, but subsequently withdraws from it on some excuse, there is nothing illegal in the Court accepting as sufficient the excuse given and proceeding with the case (a). **Ibrahim Sab v. Hakim Abdul Gaffur Sab**, 15 M.C.C.R. 141.

KRISHNA RAO and SETLUR, JJ.

References :—(a) (1879) 11 M. 356; (1896) 22 Bom. 281; (1899) 22 Mad. 231 and (1895) 18 All. 46, F.

Act II of 1874 (Administrator-General's).

S. 86—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate. See ACT XXI OF 1970 (HINDU WILLS), No. 2, 12 Bom. L.R. 471.

Act IX of 1875 (Majority).

S. 3—Competency of minor to make will. See WILL, No. 10, 6 Ind. Cas. 6.

I. — Imperial Acts — (Continued).**Act I of 1877.**

See SPECIFIC RELIEF ACT.

Act III of 1877.

See REGISTRATION ACT.

Act XV of 1877.

See LIMITATION ACT.

Act XVIII of 1879 (Legal Practitioners).

(1) Ss. 3, 36. See TOUT, Nos. 1 and 2, 26 and 27 P.W.R. 1909 (Cr.).

(1-a) S. 12. See No. 6, *infra*.

(2) Ss. 12, 13 and 14—Pleader—Unprofessional conduct—Meaning of "any other reasonable cause"—*Letters Patent*, S. 10—*Ejusdem generis*, principle of—*Interpretation of statute*—*Marginal notes*, value of.

Where two pleaders became Directors of a Provident Society, which was in no sense an undertaking for the purposes of life insurance in the ordinary acceptance of the term, but was a means of furnishing profit to the directors, by enabling those who so desired to gamble to become applicants to the society: *held*, that they were guilty of unprofessional conduct under S. 13, cl. (f) of the Legal Practitioners Act.

Per Miller, J.—"Any other reasonable cause" must be given a wide meaning, and must not be construed in a limited way on the principle of *ejusdem generis*.

Per Kirshnaswami Iyer, J.—Dishonourable or dishonest conduct, not in the discharge of professional duty, would fall within the purview of "reasonable cause" in S. 13. (The application of the doctrine of *ejusdem generis* considered.) When a vakil does that which involves dishonesty, it is for the interest of suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as a vakil of the Court.

Value of marginal notes considered. *In the matter of two Second Grade Pleaders*, 6 Ind. Cas. 313 = 8 M.L.T. 22 = 11 Cr.L.J. 310 = 20 M.L.J. 500.

WHITE, C.J., MILLER and KRISHNA-SWAMI AIER, JJ.

- (3) Ss. 12, 13, (f), 14—Subordinate Court, jurisdiction of—High Court, powers of.

When a muktair has been convicted of any criminal offence implying a defect of character, it is the High Court alone which can take proceedings under S. 12 of the Legal

1.—Imperial Acts—(Continued).

Act XVIII 1879 (Legal Practitioners)—(Ctd.).
Practitioners Act. A subordinate Court has no jurisdiction to initiate proceedings in such a case.

Quære, whether S. 13, cl. (f), applies to such a case, and whether S. 14 applies to a case under S. 13, cl. (f). **In the matter of Kali Prasanna Chowdhury and Kali Kumar Chowdhury Muktears**, 11 C.L.J. 164=5 Ind. Cas. 727.

MOOKERJEE and TEUNON, JJ.

- (4) *Ss. 12, 14—Mukhtear—Conviction of rioting—Liability to suspension from practice—Conviction if conclusive.*

Two muktears, who were parties to a proceeding under S. 145, Cr. P.C., in the course of which a *chur*, the subject of the proceeding, was attached under S. 146 and placed in charge of a receiver, collected a number of armed men who formed an unlawful assembly with a view to take forcible possession of the *chur* :

Held that, having regard to the character of the offence, an order under S. 12 of the Legal Practitioners Act could properly be passed against them ;

That, in such a proceeding, it was not open to them to go behind their conviction by the Criminal Court and invite the Court to examine the facts with a view to showing that the conviction was erroneous (a).

But the Court in such a case will look into all the facts as found to determine the position of the persons concerned. **In re Kali Prasanna Bosu Chowdhury**, 14 C.W.N. 1073 11 Cr. L.J. 503=7 Ind. Cas. 622.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 26 I.A. 212 ; s. c. 22 All. 49 ; 3 C.W.N. 736 (1899), *F*.

(4-a) S. 13—See No. 2, *supra*.

- (5) *S. 13 (c) (d)—Payment by pleader out of his Munshi's fee to a person who brings a case to him—Misconduct.*

Held by the Full Bench that :—

(1) That *Munshiana* (Clerk's fee) does not mean the fee paid or payable to a pleader for his services within the terms of S. 13 (c) of Act XVIII of 1879 as amended.

(2) Paying wholly or in part *Munshiana* to a person, who introduces a client to a pleader, is not objectionable under the said S. 13 (c),

1.—Imperial Acts—(Continued).

Act XVIII 1879 (Legal Practitioners)—(Ctd.).
provided it is not done in pursuance of any previous arrangement between that person and the pleader, for the procuring by the former of clients for the latter.

Obiter :—(3) The *Munshiana* system is very similar to that in force in England where a Counsel's clerk is paid by his employer and receives fees as well from that employer's clients.

On receiving back the case from the Full Bench, the Division Bench (*Johnstone and Williams, JJ.*) after remarking as follows :—

Held, that a pleader, who himself pays a sum of money to a procurer of clients or allows him to take his clerk's *Munshiana* in whole or in part as a gratification for having procured him a client, is as liable to be dealt with under S. 13 (c) of Act XVIII of 1879 as if he has paid out of his own fee.

Remark —

In referring the aforesaid question regarding it [S. 13 (c)], to the Full Bench, we rather assumed that the words "out of any fee..... service;" qualified "tenders" or "gives" as well as "consents to the retention of;" but examination of the structure of the clauses shows that this assumption was hardly correctthe real meaning of the clause is this.

"Who tenders or gives any gratification for procuring or having procured the employment, etc., or consents to the retention out of any fee paid or payable to him for his services, or any gratification for procuring, etc." **In the case of Amolak Ram, Pleader**, 22 P.W.R. 1918 (Cr.).

REID, C.J., RATTIGAN and CHEVIS, JJ.

- (5-a) S. 13 (b)—See No. 3, *supra*.

- (6) *Ss. 13, 12—Scope of—"Any other reasonable cause" in S. 13, cl. (f)—Construction ejusdem generis, applicability of—Object of legislature—Conviction under S. 124-A, I.P.C., Prima facie defect of character—Conviction, final as regards guilt—Punishment—High Court's discretion.*

The words "any other reasonable cause" in S. 13, cl. (f) of the Legal Practitioners Act, 1879, were not confined to misconduct of which a practitioner is guilty in his professional capacity, but embrace all causes which, in the

1.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners)-(Ctd.).

opinion of the High Court, may afford reasonable ground for suspension or dismissal.

The significance of cl. (f) of S. 13 is not limited by the principle of *ejusdem generis* (a).

Ss. 12 and 13 deal, respectively, with legal practitioners convicted of crime, and legal practitioners not so convicted. In the one case, the High Court proceeds upon the character indicated by the crime: in the other it has to deal with a particular act of misconduct.

The Legislature makes an effort, for the purpose of codification, to crystallise matter which is otherwise in a nebulous state of unwritten law—The unwritten law of professional etiquette.

The conviction of an enrolled pleader for sedition, under S. 124-A, I.P.C., *prima facie* implies a defect of character which unfits him to be a pleader, and renders him liable to be dealt with under S. 12, Legal Practitioners Act.

The suspension or dismissal of a pleader, under the Act, does not amount to a second punishment for the same offence (b).

For the purposes of every case under S. 12, Legal Practitioners Act, where a legal practitioner has been convicted by a Criminal Court of competent jurisdiction whose decision has become final, such conviction must be taken to have made *res judicata* the fact that the practitioner concerned has been guilty of the offence whereof he was convicted (c).

Nevertheless, despite the conviction, the language of S. 12 makes it clear that a discretion remains in the High Court to decide whether or not the convicted prisoner should be suspended or dismissed (d). *In re Kolhatkar*, 6 N.L.R. 129.

BATTEN, OFFG. C.J. and STANYON, A.C.J.

References:—(a) 27 C. 1023; 29 A. 95; 29 C. 890; 26 M. 448 & 19 M.L.J. 504. (b) *Ex parte Brounsall*, 2 Coup. R. 829. (c) 22 A. 49 (P.C.), *Rel.* (d) 29 A. 98 (105), R.

(7) Ss. 13, 14—Reference—Jurisdiction—Constitution of Bench—Division Court if empowered to hear references under S. 14.

According to a long and undeviating course of practice in the High Court, the constitution of a Bench for hearing civil appeals and

1.—Imperial Acts—(Continued).

Act XVIII of 1879 (Legal Practitioners)-(Ctd.).

references from a particular group has been treated as conferring on that Bench a jurisdiction to hear references under S. 14 of the Legal Practitioners Act coming from districts within that group.

Such practice gives the Division Bench sufficient authority to deal with such references without any special order allocating references under S. 14, Legal Practitioners Act, to the Bench. *Re Abinash Chandra Moitra*, 14 C.W.N. 275=37 C. 173=5 Ind. Cas. 406.

CHITTY and VINCENT, JJ.

(8) Ss. 13, 14—As amended by Act XI of 1896—Competency of District Judge to enquire into a charge of misconduct—Tutism—Chief Court's power of revision, *Held, that* :—

(1) S. 14 of Act XVIII of 1879 applies to all clauses of its S. 13 as amended by Act XI of 1896.

(2) When any of the charges mentioned in S. 13 of the said Act is brought to the notice of any Court within whose local limits the pleader is ordinarily practising, the presiding officer has jurisdiction to proceed against him (pleader) under its S. 14 and can report, in the manner prescribed thereunder, to the High Court for suspending or dismissing such pleader in case the charge is made out (a).

(3) In acting under S. 14 of the said Act, the Court is bound to hold preliminary inquiry in order to find out distinctly what is the charge, and after satisfying itself that it is *prima facie* a true one, but not before, the Court can proceed to issue notice required in paras 1 and 2 of the same section. Such a notice if issued on a vague report is liable to be set aside on revision by the High Court.

(4) In order to sustain a charge under clause (c) of S. 13 of the Act the gratification paid to the tout must be "out of any fee paid or payable to a pleader" but does not include a payment made out of the *Munshiana* of a pleader's *Munshi*. *Amolak Ram v. The Crown*, 31 P. W.R. 1909 (Or.).

JOHNSTONE and WILLIAMS, JJ.

References:—(a) 15 C. 152 (P.C.); 27 C. 1023, D.

(8-a) S. 14. See Nos. 2, 3, 4, 7 and 8, *supra*.

(9) S. 36—Tut—Procedure—Misjoinder—Multifariousness—High Court, powers of—Revision, nature of jurisdiction in.

1.—Imperial Acts—(Continued).

Act XVIII 1879 (Legal Practitioners)—(Cld.).

It cannot be affirmed as an inflexible rule of law that an enquiry under S. 36 of the Legal Practitioners Act cannot comprehend within its scope the case of more than one person alleged to be a tout.

An enquiry under S. 36 of the Act is neither a suit under the Civ. Pro. Code, nor a prosecution under Crim. Pro. Code. The objection of misjoinder or multifariousness does not, therefore, apply, unless it is proved that the petitioner has been prejudiced by the procedure adopted at the enquiry.

An objection on the ground of misjoinder may be waived, and, if not taken in the Original Court, will not be entertained on appeal or revision, unless the merits of the case or the jurisdiction of the Court have been affected.

The revisional jurisdiction under which the High Court can interfere with an order under S. 36 of the Legal Practitioners Act is of a very special nature, and cannot be invoked except in furtherance of justice. **Hari Churan Sircar v. District Judge of Dacca**, 11 C.L.J. 513—6 Ind. Cas. 327—11 Or. L.J. 320.

MOOKERJEE and CARNDUFF, JJ.

Act V of 1881 (Probate and Administration).

(1) Ss. 3, 5, 12—*Executor who has obtained order for grant but not taken out probate if may represent estate in suit—Intermeddling with estate—Lunatic, not found—Representation—Civil Procedure Code (Act XIV of 1882), S. 463.*

An executor who obtained an order for the grant to him of probate but took no further steps to complete the grant and who in no way intermeddled with the estate cannot properly represent the estate in a suit brought against it.

A decree purporting to have been passed against such an executor does not bind the estate.

The provisions of the Civil Procedure Code (Act XIV of 1882) with respect to representation of lunatics not being exhaustive a guardian *ad litem* should be assigned to a defendant who is of unsound mind although not so found. **Lakshya Daya v. Uma Kanta Chakerbutty**, 14 C.W.N. 256—2 Ind. Cas. 818.

CHITTY and CARNDUFF, JJ.

(1-a) S. 4—Mahomedan will—Probate. See MAHOMEDAN LAW (WILL) No. 1, 37 C. 839.

1.—Imperial Acts—(Continued).

Act V of 1881 (Probate and Administration)—(Continued).

(1-b) S. 5—See No. 1, *supra*.

(1-c) S. 12—See No. 1, *supra*.

(2) S. 23—*Dispute as to heirship—Dispute as to title of deceased to property mentioned by petitioner—Court to decide questions.*

In an application for letters of administration, question of title of the deceased to the properties mentioned by the petitioner is not a matter which is to be dealt with by Court at all.

As regards the questions as to whether the petitioner is the nearest heir to the deceased, that is a matter which should be settled by the Court. **Durga Das Misser v. Rada Raman Misser**, 7 Ind. Cas. 1.

WOODROFFE and RICHARDSON, JJ.

(3) S. 23—*Questions to be determined by Court—Dispute as to heirship—Question whether property was left by deceased.*

An application for letters of administration should not be refused on the ground that there is a dispute as to whether the petitioner is the heir of the deceased or not, and that it is not for the Probate Court to decide whether the property was left by the deceased or not. Those are the questions which the Court has to decide (a). **Kalidas Mukherjee v. Nritya Gopal Mukherjee**, 7 Ind. Cas. 1.

HOLMWOOD and SHARF-UD-DIN, JJ.

Reference :—(a) 7 Ind. Cas. 1, *R*.

(4) Ss. 23, 64—*Hindu, death of, leaving widow who survived over 30 years—Application for letters of administration, when no estate left to be administered.*

It is, no doubt, not necessary for the Probate Court to decide what assets are likely to come to the hands of a petitioner for letters of administration, but it is also the duty of the Court in granting letters of administration to consider whether there is any estate whatever to be administered (a).

Where the object of the life not appeared to be, not to administer the estate of the deceased, a Hindu, who had died so long ago as 1875 and was survived by his widow in possession till 1907, but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that may be instituted, the High Court held that no grant should be made, although objection on this ground was taken

1.—Imperial Acts—(Continued).**Act V of 1881 (Probate and Administration)**
—(Continued).

for the first time upon appeal from the order of the District Court granting letters of administration. **Lalit Chandra Chowdhury v. Balkuntha Nath Chowdhury**, 14 C.W.N. 463--5 Ind. Cas. 395.

CASPERSZ and DOSS, JJ.

References:—(a) 3 C.W.N. 635; 3 C.L.J. 116, *relied on*; 6 C.W.N. 345, *D.*

(5) S. 50, *application of*—*Revocation of probate where there has been no defect of jurisdiction.*

The Official Trustee of Bengal applied to the High Court in its testamentary and intestate jurisdiction for grant of probate, as being a person appointed by the will of the testator. The Court had jurisdiction over the subject matter, and the only question then to be decided was, whether the Official Trustee was the person entitled to apply for such probate. It was decided that the Official Trustee could do so, and an order was accordingly made for the issue of probate. But upon an application under S. 50, the Probate was revoked, on the ground that the Court had wrongly decided that the Official Trustee was entitled to apply for probate.

Held, since there has been no defect of jurisdiction, so as to bring the matter within the scope of S. 50, the probate is not capable of being revoked, even assuming the order of the Court was erroneous. **Official Trustee of Bengal v. Kumudini Dasi**, 37 C. 387.

JENKINS, C.J. and WOODROFFE, J.

Reference:—35 C. 156.

(6) S. 52—Delegation of powers to District delegate—*Legality*. See **PROBATE**, No. 4, 14 C.W.N. 1068.

(6-a) S. 61. See No. 4, *supra*.

(7) Ss. 70, 72—Opposing application for probate or letters of administration—*Caveat not compulsory*. See **LETTERS OF ADMINISTRATION**, No. 2, 6 Ind. Cas. 650.

(7-a) S. 72. See No. 7, *supra*.

(8) S. 81—Interest of the Caveator. See **ACT X OF 1865 (SUCCESSION)**, No. 11, 12 Bom. L.R. 366.

(9) S. 83. See **CIV. PRO. CODE**, (1882), No. 63, 14 C.W.N. 921.

(10) S. 86—*Appeal—Revision—Order of a District Judge that he has jurisdiction to entertain an application for letters of administration under.*

1.—Imperial Acts—(Continued).**Act V of 1881 (Probate and Administration)**
—(Continued).

Held, that an order of a District Judge, deciding that he has jurisdiction to entertain an application made to him for letters of administration under Act V of 1881, is neither subject to an appeal under S. 86 of the Act inasmuch as it is not an order made by him by virtue of the powers expressly conferred upon him by the Act, nor to a revision under S. 70 (a) of Act XVIII of 1894, because no revision is competent from such an interlocutory decision of a subordinate Court (a). **Shib Dit Singh v. Devindar Singh**, 94 P.W.R. 1910.

SHAH DIN, J.

References:—(a) C. 51 P.R. 1899, *F.*; 20 C. 245; 20 C. 539 and 27 C. 5, *R.*

(11) S. 87—*High Court—Jurisdiction to grant probate and letters of administration—Original side—Property not situate within jurisdiction*—"High Court" meaning of, in S. 87, *Probate and Administration Act (V of 1881)—Practice—Rule 740 of High Court rules.*

The High Court (of Calcutta) has jurisdiction to grant probate or letters of administration on the Original Side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal. Under S. 87 of the Probate and Administration Act, the High Court has jurisdiction to grant probate, though any portion of the property is not situate within the limits of its original jurisdiction; and Rule 740 of the High Court does not override the express provisions of S. 87, giving the High Court concurrent jurisdiction.

The expression "High Court" mentioned in S. 87 is not merely confined to the appellate jurisdiction of the High Court, but includes original jurisdiction (a). **Nagendra Bala Debi v. Kashipati Chowdhury**, 37 C. 224=5 Ind. Cas. 1003.

FLETCHER, J.

Reference:—(a) 5 C.W.N. 377, *F.*

(12) S. 90, cls. (3) and (4)—*Administrator acting in excess of his powers in entering into compromise—Effect*. See **COMPROMISE DECREE**, No. 1, 14 C.W.N. 451.

(13) S. 98—*Liability of legal representative of executor*. See **EXECUTOR**, No. 2, 7 Ind. Cas. 805.

1.—Imperial Acts—(Continued).

Act XXVI of 1881 (Negotiable Instruments).

(1) Ss. 1 and 74—How far provisions of the Act applicable to hundies written in oriental language—Meaning of section—Presentment of hundies for payment within reasonable time—Effect of failure—What is “reasonable time.” See PLEADINGS, No. 1, 6 N.L.R. 33.

(2) Ss. 4, 28—Applicability. See PRINCIPAL AND AGENT, No. 1, 5 Ind. Cas. 110.

(3) S. 8—Death of drawee without endorsing the pro-note in favour of any one—Right of members of Tarwad to sue upon the note. See PROMISSORY NOTE, No. 2, 8 M.L.T. 85.

(4) Ss. 8, 43 and 78—Pro-note—Plea of execution as name lender and want of consideration if allowable. See CONTRACT ACT, No. 2, 7 M.L.T. 85.

(5) Ss. 8, 46, 50, 78—Indorsement and delivery for collection—Death of indorser—Right of holder. See PROMISSORY NOTE, No. 5, 5 L.B.R. 198.

(6) Ss. 9, 16—Endorsement in full, requisites of.

Where the following words were written on the back of a pro-note:—“I have this day received in cash from you K—Rs. 1,169, made up of Rs. 1,000 being principal due under this note, and of Rs. 169 interest accumulated up to date, and assigned to you this note with power to recover the amount due under it by showing the same,”

held, that the above was an endorsement in full within the meaning of S. 16 of Act XXVI of 1881 (a).

Where there is nothing to show that payment of a pro-note (payable on demand) was demanded or that it was overdue before it is endorsed over, it must be taken that the endorsement is made before the pro-note became payable (b). **Sankara Subban Patter v. Mangalasheri**, 6 M.L.T. 237 33 M. 34 - 19 M.L.J. 509.

MUNRO and ABDUR RAHIM, JJ.

References :— (a) C. R. P. No. 603 of 1906, F. (b) 7 M.H.C.R. 271; 5 M. 108, R.

(6-a) S. 16. See No. 6, *supra*.

(6-b) S. 28. See No. 2, *supra*.

(7) Ss. 32, 37—Bill of exchange—Holder and acceptor—Accommodation acceptor—Contract to treat the acceptor as surety—Principal and surety.

1.—Imperial Acts—(Continued).

Act XXVI of 1881 (Negotiable Instruments)—(Concluded).

The general rule is that the acceptor of a bill of exchange is the principal debtor and the drawer the surety. A contract to the contrary may be entered into between these two parties inverting their positions, and such a contract may be proved in proceedings between them. No such contract can be set up as between the acceptor and the holder.

Mere notice of the defendant's position as an accommodation acceptor is not sufficient to preclude the holder from treating him as a principal debtor. He cannot be so precluded, in the absence of evidence proving that there is a contract under which he is bound to treat the acceptor as a surety. **Bellew v. Bank of Upper India, Limited, Lucknow**, 13 O.C. 206 7 Ind. Cas. 727.

PIGGOT and LINDSAY, JJ.

(7-a) S. 37. See No. 7, *supra*.

(7-b) S. 43. See No. 1, *supra*.

(7-c) S. 46. See No. 5, *supra*.

(7-d) S. 50. See No. 5, *supra*.

(7-e) S. 71. See No. 1, *supra*.

(8) S. 78. *Endorsee as holder—Payment*.

An endorsee of a negotiable instrument is the holder thereof, and under S. 78 of the Act, payment must be made to the holder. **Voleti Sreeramulu v. Gudisa Venkata Reddy**, 8 M. L.T. 247.

WALLIS and KRISHNASAWMI AIYAR, JJ.

(8-a) S. 78. See Nos. 4 and 5, *supra*.

(9) S. 98. *Want of notice—Damages—Burden of proof*.

In a suit by intermediate endorsers of a hundi against earlier endorsers, the Court found that the hundi had not been presented for payment within a reasonable time. *Held* that the onus lay upon the plaintiffs to prove that the party charged could not suffer damage by reason of want of notice. **Madho Ram v. Durga Prasad**, 7 A.L.J. 815—6 Ind. Cas. 793.

STANLEY, C.J. and GRIFFIN, J.

Reference :—6 A. 79, F.

(10). See NEGOTIABLE INSTRUMENTS.

(11). See PROMISSORY NOTE.

Act II of 1882 (Trust).

(1) Ss. 3, 15, 23—Position of administrator. See ADMINISTRATOR, No. 1, 12, Bom. L.R. 53.

1.—Imperial Acts—(Continued).**Act II of 1882 (Trust)—(Continued).**(1-a) S. 15. See No. 1, *supra*.(1-b) S. 23. See No. 1, *supra*.(2) S. 36—*Lease for a term of 25 years—Void or voidable.*

Leases for a term exceeding 21 years are not void as being *malum prohibitum* and illegal *per se*, though they no doubt are voidable at the instance of *cestui que trust*. **Kadir Ibrahim Rowther v. Arunachalam Chettiar**, 19 M.L.J. 737 = 4 Ind. Cas. 1082.

BENSON and ABDUR RAHIM, JJ.

References :—(1891) 2 Q. B. 237, D.; 22 M. 289; 22 M. 348; 25 B. 82, R.

(3) S. 90—*Co-owners of a mahal—Surrender of an occupancy holding in favour of one Co-owner—Advantage gained by one co-owner after expense—Nature of the right of others to a share in the advantage—Waiver or abandonment of right, what constitutes—Negligence in the enforcement of the claim, effect of—Distinction between laches and acquiescence—Election.*

S. 90, Trusts Act, does not create an absolute right, but a right subject to a condition, the condition being that the party seeking to benefit by its provisions must repay his due share of the expenses properly incurred in the acquisition of the advantage. The burden of these expenses may, in his estimation, prove to be such as to make it not worth his while to enforce his right. There is thus clearly an election to make, a condition to fulfil. If when called upon to make the election and to comply with the conditions, he holds back and shrinks from accepting the burden attaching to the right, he cannot afterwards be permitted to change his mind, especially when he so conducts himself as to induce a reasonable belief that the right is foregone, and his adversary, acting upon that belief, enters into a speculative transaction, which may end in placing him in a position of disadvantage.

The right recognised by this section is not an absolutely vested right or a right which can be enforced by an unconditional decree for joint possession, without any regard being paid to the nature of the property, or the defendant's right in it, or the equities arising in the case from the conduct of the parties (a). Where there is an element of uncertainty in a property, the Court requires a person to be active in the prosecution of his rights, and not to sleep over them.

1.—Imperial Acts—(Continued).**Act II of 1882 (Trust)—(Concluded).**

Distinction between laches and acquiescence explained. A and B were the co-owners of a certain *Mahal*. B accepted a surrender of an occupancy holding, but since the surrender was also followed by an application by the heirs of the tenant under S. 96 of the Tenancy Act to be placed in possession of the surrendered holding, B had to undergo certain expenses for securing the holding. While these proceedings, which were of a protracted character, were pending, B gave A a notice giving him the option to share in the benefit of the surrender on payment of his *quota* of all charges incurred in connection with it. But to this notice there was no response. The litigation, at last, ended in favour of B, and an order for possession of the holding was made in his favour by the revenue authorities. A then instituted the present suit for joint possession of the holding, offering to pay his share of the expenses properly incurred by B.

Held, the case is not merely one of neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, but of so conducting oneself as to induce the belief that it has been waived or abandoned, and that it would not be equitable in the circumstances to permit A now to enforce his right under S. 90 of the Trusts Act (b). **Moolchand v. Chittoo**, 6 N.L.R. 12 = 5 Ind. Cas. 431.

BEPIN KRISHNA BOSE, A.J.C.

References :—(a) 2 M.H.C.R. 270, D. (b) 18 C. 13 (21); 11 F.R. 769 (778); L.R. 5 P.C. 221 (239); 48 L.R. Ch. 73; 61 L.J. Ch. 193; 52 E.R. 387; and 52 F.R. 385, R.

(4) S. 90—Mortgagee, position of—Whether a trustee—Power to grant leases or make other dispositions of mortgaged property in his own favour—Grant of the property to undivided son—Presumption. See MORTGAGE (REDEMPTION), No. 4, 7 M.L.T. 148.

Act IV of 1882.

See TRANSFER OF PROPERTY ACT.

Act V of 1882 (Easements).

(1) S. 5, *Illus.* (b), and Ss. 13, 28, 33—*Right of way, whether a continuous easement—Right to light and air—Nature and extent of the prescriptive right in India—Difference between English and Indian Law—Interference with light and air that the*

1.—Imperial Acts—(Continued).

Act V of 1882 (Easements)—(Continued).

tenement was accustomed to receive during the statutory period—Substantial damage—Relief by way of injunction and compensation, when awardable.

Plaintiff and defendants became owners of adjoining houses, both of which belonged to one L. There was a lane between them through which plaintiff claimed a right of way for the scavenger to pass. It was found that the owner did not convey any interest in the lane to the plaintiff, and that the plaintiff did not have 20 years' enjoyment of such a right of way since the severance of the tenements. The defendants built a wall along the western edge of the lane so as to completely close up the window in the eastern wall of plaintiff's house opening into the lane. The window was found to have existed for more than 20 years, but it was also found that the room was rebuilt and the dimensions of the window enlarged by the plaintiff. Plaintiff claimed, (1) a right of way through the lane, and (2) an injunction restraining the defendant from interfering with the passage of light and air through his window:

Held, (1) that plaintiff was not entitled to the right of way which was not a continuous easement, and assuming that it was used as a passage for scavengers when L. owned both the premises, there was no apparent and continuous easement within the meaning of S. 13 of the Indian Easements Act;

(2) that plaintiff was entitled to light and air through the window to the extent of the old dimensions, and that defendant's action in blocking up all light to the window was actionable;

(3) that the English law laid down by the House of Lords, that (a) "to constitute an actionable obstruction of ancient lights, there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind" does not apply to India;

(4) that S. 28 of the Indian Easements Act adopts the rule of law laid down (b), that the right which can be acquired by statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which had come to the window during a period of 20 years (c);

(5) that the fact that plaintiff created a means for light to pass into the room by constructing new doorways did not justify defendant's action in obstructing the already existing

1.—Imperial Acts—(Continued).

Act V of 1882 (Easements)—(Continued).

source for passage of light, to which plaintiff had acquired a prescriptive right (d);

(6) that compensation in money was not an adequate remedy for the obstruction caused by defendants, which materially interfered with the physical comfort of the occupants of the room.

The High Court issued a mandatory injunction, directing defendants to remove so much of the wall as interfered with the free passage of light and air through the plaintiff's window to the extent of the old dimensions, and restrained defendants from building any wall in future so as to interfere with plaintiff's right to the extent of such dimensions (e). **Esa Abbas Sait v. Jacob Harron Sait**, 4 Ind Cas. 425 = 7 M.J.L.T. 215 = 20 M.L.J. 291.

BENSON, O.C.J., and KRISHNASWAMY AIYAR,

References:—(a) (1901) A.C. 179; 73 L.J. Ch. 484; 53 W.R. 30; 90 L.T. 687; 20 T.J.L.R. 475. (b) 15 W.R. 387. (c) L.R. 31 Ch. 1. 554; 55 L.J. Ch. 426; 50 J.P. 645; 54 L.T. 399; 31 W.R. 465; L.R. 1 Ch. 16 and L.R. 6 Ch. 809; 19 W.R. 665; 24 L.T. (N.S.) 890, L. (d) L.R. 9 Eq. 438 (412), R. (e) 15 B.L.R. 361 (367); (1895) 1 Ch. 287 (321, 322); (1905) 1 Ch. 180; (1907) (A.C.) 1; 76 L.J. Ch. 1; 95 L.T. 656; 23 T.L.R. 1; (1906) 2 Ch. 210; 29 B. 157; 35 C. 661; 12 C.W.N. 519, R.

(2) Ss. 5, 38, 47—*Drain whether a continuous easement—Continuous easement how extinguished.*

Per Wallis, J.—A drain is a continuous easement (a).

In the case of continuous easements, the period of twenty years under S. 47 begins from the day on which enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner.

Under S. 38, Expl. II, non-user, standing by itself without other evidence of abandonment, is not an implied release within the section (b). A continuous easement therefore is not extinguished by implied release or by mere non-user for more than 20 years.

Per Krishnaswami Iyer, J.—A continuous easement is extinguished when it totally ceases to be enjoyed for twenty years. This language presupposes that the easement was for some time enjoyed. There can be no cessation of

1.—Imperial Acts—(Continued).**Act V of 1882 (Easements)—(Concluded).**

enjoyment when there was no enjoyment at any time though the title to the easement was created. S. 47 does not apply where an easement is merely created and is not at all enjoyed though for upwards of 20 years (b). **Parvatamma v. Lanka Sanyasi**, 8 M.L.T. 292.

WALLIS and KRISHNASWAMI IYER, JJ.

References :—(a) 1 B. & S. 571; 1 H. & N. 916, R. (b) 16 Ves. Jun. 390, R.

(3) S. 13—*Apparent and continuous easement—Severance of tenements—Artificial channel subsequently made.*

Where there was no channel at the time when the two tenements were sold to the plaintiff and the defendant by the common owner, and where the plaintiff had the channel cut subsequent to the severance of the tenements.

Held, that there can be no claim to an apparent and continuous easement under S. 13 of the Act, and that the claim, if any, must be based upon enjoyment sufficient to enable the acquisition of a prescriptive right. **Kuttah Krishna Karnavan and Manager of Tarwad v. P.W. Chathu Menon and another**, 7 M.L.J. T. 72—5 Ind. Cas. 710.

BENSON, OFFG. C.J., and KRISHNASWAMI IYER, J.

References :—(1) 2 M. 46, *doubted and expl.*

(3-a) S. 13. See No. 1, *supra*.

(3-b) S. 28. See No. 1, *supra*.

(3-c) S. 33. See No. 1, *supra*.

(3-d) S. 38. See No. 2, *supra*.

(3-e) S. 47. See No. 2, *supra*.

(4) S. 60 (b)—*License to occupy house—Revocation.*

Where a person has been granted a license to occupy a house, he can be ejected from it at the will of the licensor.

S. 60, sub-section (b), applies to a case in which the licensor gives permission to a party to execute works of a permanent character and to expend money in the execution of such works, but not to a case where a licensor merely gives a license to occupy a house already existing. **Chuni Lal Bohra v. Heera Lal Bohra**, 5 Ind. Cas. 175.

STANLEY, C.J., and KNOX, J.

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies).**

(1) Ss. 12 and 76—*Memorandum of Association—Restrictions imposed by S. 12 on powers of alteration of—General meeting of shareholders—Alteration of articles of association under S. 76—Absence of agreement not to effect any such alteration.*

Anything which appears in the articles of association, but is not provided for by the memorandum of association, may be altered by special resolution, under S. 77 of the Act.

According to the memorandum of association, plaintiff and another, their heirs, executors and administrators were to be Secretaries of a Bank, whose duties, powers, and emoluments, were set out in the articles of association. Plaintiff continued to be the Secretary for many years, later on at a general meeting, the shareholders appointed a new Managing Agent to whom most of the powers of plaintiff, were transferred, modified the articles of association, and curtailed the powers and emoluments of the Secretary. Plaintiff then sued the Directors of the Bank, and prayed for an injunction for restraining them from interfering with the performance of his duties as Secretary, contending that the resolution of the shareholders was invalid, since it altered the memorandum of association, and also amounted to a breach of contract by the Company with regard to the terms on which he took up the Secretaryship.

Held, (i) the resolution of the shareholders did not alter the memorandum of association and was therefore valid :

(ii) that portion of the articles of association which sets out the powers of the Secretary is not a part of the memorandum of association, and is therefore liable to be altered by a special resolution under S. 76 :

(iii) That the resolution was again a valid one, there being no proof of any agreement between the Secretary and the Company to the effect that the subsequent alteration of the articles should not affect the terms of the contract upon which the plaintiff took up the Secretaryship. **N. P. N. M. Chithambaram Chettiar v. Krishna Aiyangar**, 5 M.L.T. 290 = 1 Ind. Cas. 903 = 33 M. 36.

MUNRO and ABDUR RAHIM, JJ.

References :—1 Ch. D. 361, R.; 30 Ch. D. 376; 19 Eq. Cas. 358, R.

(1-a) S. 76. See No. 1, *supra*.

I.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Concluded).**

(2) S. 89—Service of summons on Company registered under. See CIV. PRO. CODE (1882), No. 191, 12 Bom. L. R. 730.

(3) S. 169—*Time within which appeal should be filed—Power of Court to extend time for serving notice of appeal—Reasonable cause for such extension—Limitation Act (XV of 1877), S. 12, whether applies to appeals under the Companies Act.*

Appeals under the Indian Companies Act must be filed within three weeks from the date of the order appealed against (a).

S. 12 of the Limitation Act, 1877, has no application to appeals under the Companies Act, and the appellant cannot demand that the time requisite for obtaining a copy of the order appealed against should be excluded from the period of three weeks, within which notice of the appeal must be given, and within which the appeal itself must be filed (b).

Under S. 169 of the Companies Act, the Court of Appeal has power to extend the time for giving notice. The Court will only exercise that power on good cause shown. **The East Indian Distilleries and Sugar Factories, Ltd. v. The Tinnevely Sarangapani Sugar Mills Co., Ltd.**, 4 Ind. Cas. 872 = 19 M.L.J. 511.

MUNRO, J.

References :—(a) 25 M. 576, F. (b) 18 A. 215, F.

Act XIV of 1882.

See CIV. PRO. CODE.

Act XV of 1882 (Presy. S. C. Court).

(1) *Failure to apply for permission under the rule—Court allowing plaintiff to proceed with suit—Irregularity—Revision—Rules 89, 98, Madras High Court Rules.*

Where a plaintiff, who had to apply to Court under R. 98 of the Madras High Court Rules for permission to proceed with the suit, failed so to apply, but he was nevertheless permitted by Court to proceed with the suit and obtained a decree.

Held, that the High Court would not interfere in revision on the mere failure of the plaintiff to apply under R. 98. **Patchaperumal v. Sampathu**, 8 M.L.T. 362.

MILLER, J.

(1) S. 31, cl. b—*Court executing decree of Presidency Small Cause Court, if must be pecuniarily competent—Civ. Pro. Code (Act V of 1908), S. 24—Transfer.*

I.—Imperial Acts—(Continued).**Act XV of 1882 (Presy. S. C. Court)—(Cld.).**

Under S. 31 of the Presidency Small Cause Courts Act, the Court which a decree may be sent for execution is the Civil Court competent to deal with it under the provisions of the Civ. Pro. Code.

Pending proceedings which are without jurisdiction cannot be transferred to a Court which would have jurisdiction.

Where a decree of the Calcutta Small Cause Court exceed in value the pecuniary limit of the jurisdiction of the Munsiff to whose Court it was sent for execution :

Held, that the Munsiff had no jurisdiction to execute the decree. **Shamsundar Saha v. Anath Bandhu Saha**, 11 C.W.N. 662 = 6 Ind. Cas. 97.

JENKINS, C.J. and DOSS, J.

(3) Ss. 42, 45, 46, 48—*Order for ejectment without summons served on the defendant—Validity—Position of defendant—Applicability of the provisions of the Civ. Pro. Code.*

Where the respondent was not served with a summons under S. 42, before an ejectment order was passed, but not against him, and he was ejected under it,

Held that the respondent was not a party to the order under which he was ejected, but a person holding the position of a person other than the judgment-debtor when the case is one of dispossession under the decree.

Though Ch. VII of the Act makes no express provision of the procedure to be adopted in such a case, it merely states that the party aggrieved may have a remedy by suit under Ss. 45, 46, but it will not prevent the application of S. 48, which extends the provisions of the Civil Procedure Code to Small Cause Courts, other procedure not being prescribed. **Baggi-ammal v. Appadurai Gramany**, 7 M.L.T. 385 = 6 Ind. Cas. 722.

MILLER, J.

(3-a) S. 45. See No. 3, *supra*.

(3-b) S. 48. See No. 3, *supra*.

(3-c) S. 48. See No. 3, *supra*.

(4) S. 70—Payments under, whether makes money the property of the decree-holder. See INSOLVENCY ACT, No. 1, 7 M.L.T. 207.

I.—Imperial Acts—(Continued).**Act VII of 1887 (Suits Valuation).**

(1) S. 2—Redemption suit—Valuation of subject-matter. See **MORTGAGE (REDEMPTION)**, No. 19, 5 L.B.R. 208.

(2) S. 8—See **ACT II OF 1861 (ADEN)**, No. 1, 12 Bom. L.R. 149.

(3) S. 8—Suit by landlord against tenant for possession of the holding—Valuation for purposes of jurisdiction. See **LANDLORD AND TENANT**, No. 8, 27 P.R. 1910.

(4) S. 8. See **MESNE PROFITS**, No. 2, 7 Ind. Cas. 778.

(5)—S. 81—C.P.C. (*Act XIV of 1812*), S. 578—*Jurisdiction of Civil Court—Suit for removal of trustee for breach of trust—Forum—Effect of under-valuation or over-valuation of suit*

In a suit for removal of a trustee for breach of trust, the value of the trust property is the guide to the determination of the question of jurisdiction.

The effect of S. 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by S. 578, C.P.C., 1882, except that the objection must be taken either in the Court of first instance or in the lower appellate Court.

The mere change of *forum* consequent on an under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of S. 11 of the Act, for, that is the very case premised and provided for by the section. **Raghava Chariar v. Raghava Chariar**, 20 M.L.J. 726.

MUTHUSAWMI AIYAR and HANDLEY, JJ.

(6) S. 11—Valuation of suit—Appeal—Mortgage—Redemption suit—Jurisdiction of Court—Objection not taken by defendant—Objection on appeal.

The words "over-valuation" and "under-valuation" in S. 11 of the Suits Valuation Act, 1887, refer to those cases only in which the valuation is discretionary. When plaintiff cannot at his discretion fix a value for the suit, the section has no application.

A suit by a mortgagor for redemption of a house sold in execution of an *ex parte* decree obtained by a third person without the knowledge of the mortgagor, against the mortgagee, the decree-holder and the purchaser, must be valued at the amount which the decree-holder would recover if successful. **Mali v. Tulsi Ram**, 214 P.L.R. 1910.

JOHNSTONE, J.

I.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Court).**

(1) *Judgment—What it ought to contain.*

The law requires that a Judge of the Small Cause Court should set out in his judgment the points for determination. **Mukkhattum Prath Poovatham Kandi Ummacha v. Purushothama Das Prajji Dass Sait**, 7 M.L.T. 306—6 Ind. Cas. 682.

MILNER, J.

(2) *Specific performance—Agreement to convey immovable property to plaintiff—Conveyance executed by Court—Suit for money due under terms of conveyance whether lies in Small Cause Court—Mesne profits—C.P.C. (Act V of 1908), S. 47.*

A suit for recovery of money due to the plaintiff, under the terms of a conveyance of immovable property executed in his favour by the defendant, is not a suit for recovery of profits of immovable property wrongfully received by the defendant, within the meaning of the Art. 31 of Sch. II of the Provincial Small Cause Courts Act, and is cognizable by the Small Cause Court.

The plaintiff agreed to purchase certain immovable properties from the defendant who, in breach of that agreement, sold the properties to other persons. The plaintiff brought a suit for specific performance, and obtained a decree; the conveyance was not executed by the defendant and the Court executed it on behalf of the vendor. The plaintiff then sought to recover from the defendant the profits collected by him, between the date of the execution of the agreement for sale and the date of the execution of the conveyance, under the terms of the conveyance:

Held that the suit was not barred under S. 47 of the Civ. Pro. Code, for, as soon as the conveyance was executed by the Court, nothing further remained to be done in the execution proceedings, and a separate suit was maintainable to enforce the rights of the plaintiff under the conveyance. **Kali Narain v. Hari Nath**, 7 Ind. Cas. 484.

MOOKERJEE and CARNDUFF, JJ.

(3) S. 16—Small Cause suit instituted and tried on the original side—Appeal—Reversal of decree—Jurisdiction of appellate Court—Civ. Pro. Code (XIV of 1882), Ss. 646-A, 646-B.

Held that, where a Small Cause suit is tried by the Munsiff on the original side and his

I.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S. C. Court)—(Ctd.).**

decision is reversed by the appellate Court, the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction (a).

Held, also, that consent cannot give jurisdiction (b). **Collipara Seetapaty v. Kankipati Subbayya**, 6 M.L.T. 121 (F.B.)=33 M. 323.

WHITE, C.J., MILLER and RAHIM, JJ.

References:—(a) 27 M. 478, *overruled*; 26 M. 176; 25 B. 117, *Appr.* (b) 9 A. 191 (P.C.); 11 M. 26 (P.C.), *F.*

- (1) *S. 17—Failure to deposit security—Application not maintainable under S. 17—Notice under S. 248, C.P.C., 1882—Process in execution—Limitation.*

An application under S. 17, Provincial Small Cause Courts Act, 1887, cannot be heard before the security required by the section is furnished (a).

Notice under S. 248, Civ. Pro. Code, 1882, is a process for enforcing the decree, and the process is executed when the notice is served (b); and, in consequence, the present application is barred. **Chaturvedula Suryanarayana v. Chaturvedula Ramamma**, 7 M.L.T. 308 6 Ind. Cas. 400.

MILLER, J.

References:—(a) 13 M. 178, *R.* (b) 22 W.R. 5. *Appr.*

- (5) *S. 17—Ex parte decree, transfer of, for execution—Payment of decree amount into executing Court—Application to set aside Ex parte decree made in Court passing decree, before entering satisfaction of decree, whether proper.*

An *ex parte* decree was passed by the Small Cause Court at X and transferred for execution to Court Z. The judgment-debtor paid the decree amount into Court Z on 3rd June, 1908, and applied to the Court at X on the 16th June, 1908, for setting aside the decree against him. The application was neglected on the ground, apparently that the decree had been satisfied and had ceased to exist, possibly on the ground that the deposit ought to have been made in Court X. The decree-holder took the money out of the Court on the 17th June, and the decree was then recorded as satisfied.

Held, (1) the application for setting aside the *ex parte* decree was made when the decree was live :

I.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Court)—(Ctd.).**

(2) the payment into the Court Z was no bar to the application made to the Court X, and must be treated as a compliance with the rule laid down in S. 17, Act IX of 1887 ;

(3) a deposit of the decree amount may be made even before the application is presented. The words "at the time of presenting his application" are merely discretionary and not mandatory, the period being extendible at the discretion of the Court. **Rugh Nath Das v. Doctor Panna Lal**, 53 P.R. 1910.

ARTHUR REID, C.J.

Reference:—108 P.R. 1894.

(6) S. 17—Deposit or security imperative—Deposit made one year after *ex parte* decree—Limitation. See LIMITATION ACT (1877), No. 18, 6 Ind. Cas. 154.

- (7) *S. 25—Suit cognizable by Small Cause Court, filed as original suit—Reversibility under S. 25—Petition for revision unnecessary—Work done against defendant's will—Suit for contribution—Maintainability—S. 70, Contract Act (IX of 1872).*

Where a suit cognizable by a Small Cause Court was instituted as an original suit, the High Court has power to interfere with the decree in that suit under S. 25, Act IX of 1887, and no appeal lies against that decree.

S. 25, Act IX of 1887, does not require an application, before action is taken.

A natural stream cannot be the joint property of the various riparian owners.

Where a defendant did not want any work done for him and said so, and where the work (in this case, a work of irrigation on a natural stream of which the plaintiff and the defendant were riparian owners), was not done on his property or to save his property from destruction, the plaintiff would not be justified in doing the work, unless he intended to do it gratuitously. No suit for contribution can be brought against the defendant, S. 70, Contract Act not being applicable to such a case (b). **Mr. Robert Fischer and another v. S. Kanasabapathy Mudaliar**, 7 M.L.T. 74—5 Ind. Cas. 742.

BENSON and MILLER, JJ.

References:—(a) L.P.A. No. 6 of 1908 (Madras), *F.* (b) 18 M. 88, *D.* and *Expl.*

- (8) *S. 25—Finding of fact—High Court's power of revision.*

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Court)—(Ctd.).**

Held, that a Provincial Small Cause Court's finding of fact can be set aside on revision under S. 25 of Act IX of 1887, if it is based upon ostensibly unreliable or no evidence, especially where it ignores the testimony of a witness of high social position. **M. Nazir Ahmad v. Abdul Hamid Khan**, 89 P.W.R. 1910.

SHAH DIN, J. .

(8-a) S. 25—*Petition for revision—Three years after order—Bar of limitation—Limitation Act, IX of 1908, Sch. II, Art. 181.*

An application for revision under S. 25 Provincial Small Causes Court Act, 1887, presented more than three years after the date of the order complained against, is barred under Art. 181, Limitation Act, 1908. **Behari Lal v. Kalu**, 92 P.R. 1910 (Civ.).

JOHNSTONE, J.

(9) Sch. II, Art. 8—*Rent of a ferry, suit for, if cognisable by a Small Cause Court.*

To determine whether an amount payable under a contract is rent or not, each case must be judged by its own circumstances.

In a suit to recover sums due under a contract for the defendant plying boats in a private ferry :

Held that, in the circumstances of the case, the sum payable was in no sense a rent. **Prohlad Patni v. Sashadhar Rai**, 14 C.W.N. 994 = 7 Ind. Cas. 553.

JENKINS, C.J., and DOSS, J.

(9-a) Art. 8—*Land given in lieu of service—Non-performance—Suit for damages—Jurisdiction.* See DAMAGES, NO. 3, 12 C.L.J. 480.

(10) Art. 15. See ZURPESHGI LEASE, NO. 1, 6 Ind. Cas. 704.

(11) Art. 18—*Suit relating to a trust—Whether a suit for subscription against a trust is a—.*

Suit by a limited liability company, for subscriptions due to the company, alternatively against the first defendant, the trust, or against defendants 2 to 4, trustees, either in their personal capacity or as trustees, the subscriptions being due by defendants 2 to 4 as members of the company under its articles of association and rules.

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Court)—(Ctd.)**

Held, *Per C.J. and Sankaran Nair, J. (Benson, J. diss.)*, that the suit is not one relating to a trust within the meaning of Art. 18. Act IX of 1887, as the defendants are sued, not because they are trustees, but because they, as members, are liable for the subscriptions, and the suit is cognizable by the Small Cause Court. **Sri Venkataschellapathy Sahaya Vyavasaya Co. v. Kanakasabapathi Pillai**, 20 M.L.J. 146 5 Ind. Cas. 912 = 8 M.L.T. 67. --33 M. 494.

SIR ARNOLD WHITE, C.J., BENSON and SANKARAN NAIR, J.J.

References :—26 M. 200; 21 M. 245; 26 M. 368, R.

(12) Sch. II, Art. 31—*Jurisdiction Property common to plaintiff and defendant—Suit for recovery of plaintiff's share of produce taken by defendant.*

A suit by the plaintiff for his share of the value of the produce realised by defendant, from property common to both plaintiff and defendant, is cognizable by a Provincial Small Cause Court, and is not excepted by Art. 31 of Sch. II of Act IX of 1887 (a). **Subbu Reddi v. Veera Reddi**, 7 Ind. Cas. 390.

KRISHNASWAMY AIYAR, J.

References :—(a) 25 M. 103; 11 M.L.J. 428; 13 M.L.J. 136; 18 M.L.J. 89, D.; 21 B. 248, F.

(13) Art. 31—*Redemption suit—Claim for mesne profits—Maintainability of separate suit.* See MORTGAGE (REDEMPTION), NO. 13, 6 Ind. Cas. 336.

(14) Sch. II, cl. 8 *Suit for burga rent—Maintainability.* See BURGADAR, NO. 1, 14 C.W.N. 629.

(15) Sch. II, Cl. (11)—*Suit for damages for the cutting of plaintiff's trees by defendant—Defendant not claiming trees as his own but alleging non-existence of trees—Jurisdiction of Small Cause Court—Plea of jurisdiction—Duty of Court—High Court's power to interfere—Revision—Practice.*

A suit for damages for the cutting of plaintiff's trees by the defendant, who did not claim that the trees were his own property, but alleged that there were no trees and none cut down, does not involve the determination of any right to immoveable property, within the meaning of the cl. 11 of Sch. II to the Provincial Small Cause Courts Act, and is, therefore, cognizable by a Small Cause Court.

I.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Court)—(Cld.).**

A High Court is not bound to interfere in every case in revision from the decree of a Court of Small Causes. **Chingan Gir v. Babu Lal**, 5 Ind. Cas. 322.

KNOX and PIGGOTT, JJ.

(16) *Sch. II, cl. 31—Profits of immoveable property, suit for, not cognizable by Small Cause Court—Jurisdiction.*

A suit for a definite sum of profits of immoveable property is not cognizable by a Court of Small Causes, although it involves no rendition of accounts. **Srimati Nand Rani v. Swashwa Neswar**, 8 Ind. Cas. 270.

KARAMAT HUSSAIN, J.

References:—23 A. 137; 26 A. 321, F.; 23 C. 88; 35 P.R. 1902; 84 P.L.R. 1902; 24 M. 118; 25 M. 103; 29 M. 184; 13 M.L.J. 136; 25 B. 87; 10 Bom. L.R. 733, R.

Act VII of 1889 (Succession Certificate).

(1) *S. 4—Receiver appointed to take possession whether “person claiming to be entitled to the effects of the deceased”—Whether receiver bound to take out Succession Certificate.*

A receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court (a).

Therefore, where, in a suit for partition amongst the sons of a deceased person, one of the sons is appointed receiver and he seeks to take possession of the Government promissory notes and the cash in deposit in a Bank belonging to the estate of the deceased, he cannot be said to “claim to be entitled to the effects of the deceased person” within the meaning of S. 4 of the Succession Certificate Act, and is competent to take possession of the securities and monies in the hands of the Bank without a certificate under the said section. **Harihar Mukherjee v. Harendra Nath Mukherjee**, 6 Ind. Cas. 416 - 12 C.L.J. 252.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 34 C. 305; 5 C.L.J. 270, R.

(1-a)—*S. 4—C.P.C. (Act V of 1908), S. 113, O. XLVI, r. 1—Hindu Law—Mitakshara family—Bond in name of deceased father—Impartible Raj—Whether Succession Certificate necessary to be taken out by son—Succession Certificate Act (VII of 1889)—S. 4—“Effects of deceased”—Succession by survivorship.*

I.—Imperial Acts—(Continued).**Act VII of 1889 (Succession Certificate)—(Concluded).**

A succession certificate is confined to the case in which the claim is to the effects of the deceased, and not to family property when the claim is by right of survivorship (a).

Succession to impartible estates has always been determined by the rule of survivorship (b).

Therefore, a successor to an impartible *Raj* does not succeed as an heir to the effects of the deceased holder of the *Raj*, but he succeeds by right of survivorship. And consequently, when a bond stands in the name of the last holder of an impartible *Raj*, his successor is not bound to produce a succession certificate before he can obtain a decree on the bond. **Gur Per shad Singh v. Dhori Rai**, 7 Ind. Cas. 806.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 19 B. 338; 23 C. 912; 1 C. W.N. 32, F. (b) 11 I.A. 149; 7 A. 1; 5 I.A. 149; 4 C. 190 at p. 201, F.

(2) *Ss. 4, 7—Debt No certificate for part of a debt.*

A Mahomedan lady died leaving several heirs and her dower unpaid. One of the heirs was entitled to Rs. 17,000 out of the dower debt. She relinquished her claim to all but Rs. 800, and applied for a succession certificate for Rs. 800 only and offered to pay duty for the same. *Held*, that no certificate could be granted for a part of the debt. **Bismilla Begam v. Tawassul Husain**, 7 A.L.J. 255 = 5 Ind. Cas. 424.

KNOX and KARAMAT HUSSAIN, JJ.

References:—19 A. 129, F.; A.W.N. (1901), 125, R.

(2-a) *S. 7—See No. 2, supra.*

(3) *Ss. 7 and 19—Orders under Ss. 7 and 19—Appeal.*

No appeal lies against an order under S. 7 of Act VII of 1889, directing security to be given, but an appeal lies against an order passed under S. 19 of the Act. **Mayilkothil Kunjunnai Nair v. Yadakeveetil Kongathil Elaya Nair**, 7 M.L.T. 216 = 6 Ind. Cas. 599.

BENSON and ABDUR RAHIM, JJ.

References:—19 M. 199 and 20 M. 442, R.

(4) *S. 8—Widow's application for succession certificate—Objection by reversioner—Suit by widow for declaration of abstract right—Maintainability. See SPECIFIC RELIEF ACT, No. 18, 7 A.L.J. 311.*

(5) *S. 19. See No. 3, supra.*

1.—Imperial Acts—(Continued).**Act XIII of 1889 (Cantonments).**

- (1) *S. 4 (2)—Power of Government to define the limits of any cantonment so as to extend them—"Define the limits" meaning of the term—Power exercised from time to time—General Clauses Act, S. 14.*

Under S. 4 (2) of the Cantonment Act, the power of the Local Government to define the limits of a cantonment includes the power to extend the limits of a cantonment, by the inclusion of areas clearly outside the limits already defined.

Such power may, under S. 14 of the General Clauses Act, be exercised from time to time.

The word "define" must be interpreted to mean "define by way of extension, as well as by way of retrenchment." **Sheik Fazal Ilahi, v. The Secretary of State for India in Council**, 2 P.R. 1910 -37 P.W.R. 1910 -5 Ind. Cas. 905.

REID, C.J. and ROBERTSON, J.

Act VIII of 1890 (Guardians and Wards).

- (1) *Property in possession of trustee—Minor beneficiary—Appointment of guardian of property of minor—Jurisdiction of Court.*

Where the estate of a minor is in the actual possession of trustees on behalf of the minor, and the minor has no interest in the property beyond that of a beneficiary until he comes of age, the Court has no jurisdiction to appoint a guardian of the property of the minor (a). **Ashrafi Kuar v. Jai Narain**, 6 Ind. Cas. 862.

KNOX and KARAMAT HUSSAIN, JJ.

References:—(a) I.L.R. 20 Eq. 527; 41 I.J. Ch. 541, *It.*

- (2) *Ss. 7, 10, sub-sec. 1, cl. (k)—Key-note of Act -Welfare of minor—Application to be bona fide—Cause for making application to be disclosed—If not disclosed application summarily liable to be dismissed.*

The key-note of the Guardians and Wards Act lies in the introductory words of S. 7: the proceedings are to be taken for the benefit of the minor and the minor alone. If an application has been made for an ulterior purpose, such application ought not to be entertained.

Ordinarily a Court must decide upon the evidence whether the appointment of the guardian is or is not for the welfare of the minor concerned. But there may be exceptional cases in which the Court may find upon undisputed facts that the application is not *bona fide*.

1.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards—(Continued)).**

An application presented under the Act ought not to be registered as a matter of course and without examination, before the Judge is satisfied that there is a ground for proceeding on the basis thereof. One of the material facts to be taken into consideration by the Judge is the cause or causes which have led to the making of the application. And a Judge acts within his powers if he rejects an application on the ground that it did not disclose the cause or causes which led to the making of the application as required by S. 10, sub-sec. 1, cl. (k) of the Act.

Where the petitioner had retained the ornaments of his minor wife and driven her to a suit for their recovery and had taken a second wife and then applied to be appointed the guardian of her person and property, but in the application did not disclose any cause which led him to the making of the application. *Held*, that the Judge was right in summarily dismissing the application. **Sarat Chandra Nandan v. Girindra Chandra Guin**, 7 Ind. Cas. 702.

MOOKERJEE and SHARF-UD DIN, JJ.

- (3) *Ss. 7 and 39—Minor girl—Her father and maternal grandmother—Guardian of person.*

Held, that a person, who is not a lawful guardian himself under the minor's personal law, cannot appoint a guardian for the minor's person. According to Mahomedan Law, maternal grandmother's right to the guardianship of the person of a minor girl is in preference to the father; therefore, the latter cannot appoint by a will guardian for the person of his minor daughter. **Bahadar Ali v. Mussammat Biwi**, 66 P.W.R. 1910.

REID, C.J.

- (4) *S. 9—Jurisdiction—Minor ordinarily resides—Domicile of the minor.*

At his father's death, a minor lived at Kapadwanj within the jurisdiction of the Court and had his property there. The minor was then taken to Baroda, outside the jurisdiction, where he was kept by the American Mission for two and a half years. He was thereafter again brought to Ahmedabad within the jurisdiction of the Court for a period of 28 days: but was again removed to Baroda. After his removal to Baroda, the minor's

1.—*Imperial Acts—(Continued).*

Act VIII of 1890 (Guardians and Wards) —(Continued).

brother applied to the Ahmedabad Court to be appointed a guardian of the minor's person. The Court held that, as the minor's father lived up to the time of his death at Kapadwanj, the minor's domicile was in British India, and he resided ordinarily within the district, and appointed a guardian of the minor's person.

On appeal, held that the Ahmedabad Court had no jurisdiction to appoint guardian of the minor, for the minor was living in Baroda and had no other place of residence, and, therefore, Baroda was the place where he ordinarily resided within the meaning of S. 9 of the Guardians and Wards Act, 1890.

Held, also, the question of domicile was wholly irrelevant to the question of jurisdiction in a case like the present. **Rev. Robert Ward v. Velchand Umedchand**, 11 Bom. L.R. 1137 = 31 B. 121 : 4 Ind. Cas 262.

SCOTT, C.J. and BATCHELOR, J.

(1-a) S. 10. See No. 2, *supra*.

(5) Ss. 10 and 11—*Failure to comply with its provision.*

Held, that omission to give in the application the several particulars mentioned in sub-S. (1), non-fulfilment of the requirements of Sub-Ss. (2) and (3) of S. 10 of Act VIII of 1890, and non-observance of the procedure laid down in Ss. 11 of the Act, are grave irregularities which vitiate the whole proceedings and the order appointing the guardian of a minor. **Bhai Suchet Singh v. The Collector of Amritsar**, 58 P.W.R. 1910.

SHAH DIN, J.

Reference :—C. 135 P.R. 1893, *F*.

(5-a) S. 11. See No. 5, *supra*.

(6) S. 17—*Guardian of minor, qualifications for appointment as—*.

On a reference to S. 17 of Act VIII of 1890, held, that, other things being equal and the minor not expressing or being old enough to express an intelligent preference, the Court should decide in favour of the person who is entitled to the custody of the minor under the law to which the minor is subject.

Held further, that a Court is not bound to appoint the person, who is entitled to the custody of the minor under the law to which the minor is subject. The Court should weigh all the circumstances of each particular case

1.—*Imperial Acts—(Continued).*

Act VIII of 1890 (Guardians and Wards) —(Continued).

and decide what would be for the welfare of the minor, which ought to be the paramount consideration in every case. **Mirza Mohammad Anjum Qadar v. Persons of Mirza Azam Qadar, Minor**, 13 O.C. 140.

CHAMIER and EVANS, JJ.

(7) S. 17—*Guardian of a minor—Proper person—Test to be applied.*

For the appointment of a guardian of a minor, the proper test is what will be for the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow who was living happily with her father, held that the father of the minor widow was her proper guardian. **Tota Ram v. Ram Charan**, 7 A.L.J. 1119.

KNOX and KARAMAT HUSAIN, JJ.

Reference :—16 Cal. 581, *R*.

(8) S. 17—See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 5 Ind. Cas. 571.

(9) S. 17, cl. 2—*Minor—Guardian of person—Matter, to be considered by Court—Adopted son—Natural father to be preferred to relations of adoptive parents after their death.*

After the death of the adoptive parents, the natural father of a minor adopted son is a more fit person to take charge of the person of the minor than the relations of the adoptive father or even his daughters, and, therefore, the natural father should be appointed as the guardian of the person of the minor (a). **Ganga Prasad Bhattacharyya v. Hara Kanta Chowdhury**, 7 Ind. Cas. 231.

• SHARFUDDIN and DOSS, JJ.

Reference :—(a) 3 B. 1, *R*.

(10) Ss. 17 and 19 (b)—*Right of natural father to guardianship of property of minor—Right to guardianship of the person of the minor, when might be lost—Right of adoptive father under Hindu Law—Matters to be considered by Court in appointment of a guardian.*

The Act gives the father no superior rights to the guardianship of the property of his children; under certain circumstances it may be even undesirable that he should be guardian of the boy's property.

As regards his claim to be declared guardian of his person, where the summary powers of

I.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)**
—(Continued).

the Act are invoked, the Court will not support the rights of the father against the interest of the child (a).

A father may lose his right to the guardianship of his children, when he has permitted another person to maintain and educate them and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their education (b).

Under Hindu Law, the adoptive father acquires a right of guardianship even against the natural father (c) and so, a step-father, who has done everything that he can, short of formally adopting him, to make the boy as his own son, may acquire the rights of guardianship of the person of the minor even as against his natural father (d).

The appointment or declaration of a guardian must be made consistently with the law to which the minor is subject.

In appointing a guardian of a minor, the Court ought to take into consideration the wishes of a minor old enough to form an intelligent preference, and see whether the appointment of a person as a guardian will be for the moral, bodily, and intellectual well-being of the minor, and for the welfare of his estate. **Po Cho v. Ma Nyen Myat**, 5 L.B.R. 133.

FOX, C.J. and PARLET, J.

References :—(a) Trevelyan on Minors (Ed.) 1906, p. 76. (b) 1883 Ch. D. p. 333. (c) Trevelyan on Minors (Ed.). 1906, p. 64. (d) 1 L.B.R. 161 and P.J.L.B. 469.

(10-a) S. 19 (b). See No. 10, *supra*.

(11) Ss. 27, 41, sub-Ss. (3) and (4)—*Guardian's liability to account—Discharge from liability by Court—Guardian of property, power of—Arrangement between old and new guardians regarding minor's property.*

The terms of S. 41, sub-Ss. (3) and (4) of the Act clearly imply that a guardian is not discharged from his liability to account, unless he has obtained from the Court an express order to that effect. The mere fact that the guardian has filed *nikshes* or abstract statements of assets and liabilities does not release him from liability to account, unless he gets a discharge from such liability from the District Judge (a).

I.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)**
—(Continued).

The value of the moveable properties of a minor amounted to Rs. 1,929, and the discharged guardian entered into an agreement with the newly appointed guardian, by which the latter agreed to accept only Rs. 875, not in cash, but in bonds :

Held, that the arrangement, being made without the knowledge and sanction of the District Judge and not being beneficial but detrimental to the minor's interest, was not binding upon the minor; and that S. 27 of the Act did not confer on the guardian any power to make such an arrangement. **Nabad-wipa Chandra Shaha v. Jugol Dasi Dassya**, 7 Ind. Cas. 214.

SHARFUDDIN and DOSS, JJ.

Reference :—(a) 34 C. 211, *relied upon*.

(12) Ss. 29, 30—Powers of guardian. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

(13) Ss. 29, 39—*Minor's property, Judge's power to deal with—Court's direction of its own motion to sell minor's property, ultra vires—Removal of guardian—Notice on guardian necessary, for showing cause.*

S. 29 of the Guardians and Wards Act, which empowers the District Judge to deal with a minor's property, only enables him to give permission to the guardian to sell such portion of the properties as may be necessary, on an application properly framed by the guardian for that purpose. It confers no power whatever on the Judge to deal with the minor's property on his own motion in any way.

Therefore where the Judge directed the guardian, of his own motion, to sell all properties of a minor, and convert them into cash to be invested in G.P. Notes : *Held*, that the order was wholly *ultra vires*.

It is the duty of the Court, when it acts upon its own motion against the interest of any person subject to its jurisdiction, to issue a rule informing the persons what there was against him and upon what evidence or information it was based and calling upon him to show cause.

Where the Court removes a guardian of its own motion without hearing what he has to say, the order removing him is bad and must be set aside. **Jagat Bai v. Gajadhar Upadhya**, 7 Ind. Cas. 46=12 C.L.J. 322.

HOLMWOOD and CHATTERJEE, JJ.

1.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)**
—(Concluded).

(13-a) S. 30. See No. 12, *supra*.

(14) S. 31—Order, if to substantially comply with the provisions of the section. See GUARDIAN AND MINOR, No. 1, 11 C.L.J. 197.

(14-a) S. 39. See Nos. 3 and 13, *supra*.

(14-b) S. 41, sub-secs. (3) & (4). See No. 11, *supra*.

(15) S. 43—Order against trustee—Jurisdiction.

The District Court has no authority, under S. 43 of Act VIII of 1890, to make any order against trustees. **Ashrafi Kuar v. Jai Narain**, 6 Ind. Cas. 863.

KNOX and KARAMAT HUSSAIN, J.J.

(16) S. 46—Practice—Procedure—Reference to Munsiff to record evidence and submit report—Report of Munsiff treated by Judge as evidence—Refusal to appoint guardian.

Where an application was made to the District Judge by a *pardanashin* lady to be appointed guardian to her minor son, and, after fixing a date for hearing the application, the District Judge, under S. 46 of the Guardians and Wards Act, sent the case to the Munsiff to take evidence and to report as to the fitness of the lady, and the Munsiff acted as directed, and the Judge, treating the Munsiff's report as evidence and upon the objection of the minor who was also examined, rejected the application, and the lady was not appointed guardian, *held* that the procedure was regular and legal, **Janakraj Kuari v. Pateshri Parta Narain Singh**, 7 A.L.J. 328 = 6 Ind. Cas. 565.

KNOX and KARAMAT HUSSAIN, J.J.

References:—23 Bom. 698 and 26 Bom. 716, *D*.

(17) S. 52—Guardian appointed under—Competency of minor to make will. See WILL, No. 10, 6 Ind. Cas. 6.

Act IX of 1890 (Railways).

(1) S. 75—Contents declared—No Insurance charges demanded—Liability of Company—Bye-laws framed by Company—Bye-law No. 26—Modifying S. 75—Effect of.

The plaintiff booked a box requesting that special care should be taken of the contents. On being required to declare the contents, he showed a list of the same. The Company did not require him to pay any extra charges.

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Continued).**

They handed him a receipt on the back of which was printed Bye-law No. 26 (framed under S. 75, Railways Act) which declared that the Company is not responsible for any loss, destruction or deterioration of goods. The goods were damaged in transit, *held* that the declaration made by the plaintiff was a sufficient declaration within the meaning of S. 75, and the Railway Company, not having demanded any extra payment, were not exonerated from liability by reason of the provisions of that section.

Held further that the Bye-law 26 framed under S. 75, so far as it made the making of a demand from the owner of the goods unnecessary, was *ultra vires*. The bye-law could not be considered as amounting to a demand, and a reference to them on the receipt did not affect the plaintiff. **Rohilkhand and Kumaon Railway v. Jagadamba Sahai**, 7 A.L.J. 606 = 6 Ind. Cas. 333.

RICHARDS and TUDBALL, J.J.

Reference:—19 Bom. 165, *D*.

(2) Ss. 17, 140—Notice of claim—Sending notice by post—Registration.

Where notice of claim is given to a Railway by post, it must be forwarded in a registered cover. The word "may" in S. 140 means "must." **Martin and Co., Managing Agents, Bukhtiarpur, Bihar Light Railway Co., Ltd. v. Fakir Chand Sahu**, 12 C.L.J. 14 = 14 C.W.N. 888 = 7 Ind. Cas. 241.

CHATTERJI and VINCENT, J.J.

References:—35 C. 194; 12 C.W.N. 450, *F*.; 22 M. 137; 26 Bom. 669, *dissented from*.

(3) S. 80—Through booking—Loss upon another line—Liability of Railway where goods booked—Wilful neglect.

A Railway Company, receiving goods for carriage over a Foreign Railway, is liable for loss of the goods, even though the loss did not occur upon their system.

Certain goods were booked on B. and N.W. Ry. to be carried to Howrah, *via*, the E.I. Ry. A risk note was written by the plaintiff's agent, according to which the Company was to be liable for loss only in case of the negligence of its servants. Some packages were stolen during the transit. The Courts found that the carriages were not properly locked and that thefts were constant. *Held* that it was the duty of

I.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Concluded).**

the Company to see that the carriages were properly locked, and they having failed to do so, there was wilful neglect on their part, and they were liable. **Bengal and North Western Railway Co. v. Haji Mutesaddi**, 7 A.L.J. 833.

STANLEY, C.J., and GRIFFIN, J.

Act IV of 1893 (Partition).

- (1) S. 4—*Elements necessary to attract operation of the section*—"Family," "undivided family" and "house," meaning of—*High Court—Jurisdiction—Interference with interlocutory order—C.P.C. (Act V of 1908), S. 115.*

An application under S. 4 of the Partition Act, 1893, may be made after the preliminary decree (a).

The operation of S. 4 of the Partition Act cannot be avoided, if the property comprised in the suit includes, in addition to the dwelling house other lands owned by the parties. The elements which must co-exist to attract the operation of S. 4 are, *first*, that the dwelling house should belong to an undivided family; *secondly*, that a share thereof should have been transferred to a person who is not a member of such family; and *thirdly*, that the transferee should sue for partition. The circumstance that the plaintiff had purchased, in addition to a share of the dwelling-house, a share of other lands as well, of which he sought partition in the suit, does not render inapplicable the provisions of S. 4 (b).

The word "family" as used in the Partition Act ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in that Act to support the suggestion that the word was intended to be used in a very narrow and restricted sense, namely, a body of persons who can trace their descent from a common ancestor.

The words "undivided family" in the section must be taken to mean undivided *qua* the dwelling house in question, and to be a family which owns the house but has not divided it (c). **Khirode Chandra Ghoshal v. Saroda Prosad Mitra**, 7 Ind. Cas. 436.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 3 Ind. Cas. 247; 10 C.L.J. 503, R.; 5 C.W.N. 128; 24 M. 639; 21 A. 409;

I.—Imperial Acts—(Continued).**Act IV of 1893 (Partition)—(Concluded).**

32 B. 103; 10 Bom. L.R. 23; 3 M.L.T. 141, F.; 7 C.L.J. 98, D. (b) 23 B. 77, R (c) 30 A. 324; A.W.N. (1908) 126; 5 A.L.J. 352; 4 M.L.T. 38 (F.B.), followed; 29 A. 308; 4 A.L.J. 209; A.W.N. (1907) 52, diss.; 30 A. 324 (F.B.); A.W.N. (1908) 126; 5 A.L.J. 352; 4 M.L.T. 38; 23 B. 73, relied; L.R. 1 Ch. App. 275; 12 Jur. (N.S.) 218; 14 L.T. 3; 14 W.R. 367; 1 J. & H. 400; 30 L.J. Ch. 395; 7 Jur. (N.S.) 256; 4 L.T. 13; 9 W.R. 411; 3 DeG. and S. 653; 33 Beav. 103; 2 N.R. 566; 33 L.J. Ch. 29; 9 L.T. 134; 11 W. R. 1088; 57 L.J. Ch. 270; 58 L.T. 445; 36 W. R. 431; 52 J.P. 487; 16 T.L.R. 134; 64 J.P. 212, relied on; 6 Ind. Cas. 574; 4 Ind. Cas. 364; 10 C.L.J. 407, followed.

- (2) S. 4—Property not conveniently divisible—Procedure. See PARTITION, No. 11-a, 7 Ind. Cas. 844.

Act I of 1894 (Land Acquisition).

- (1) *Compensation—Award made by the Special Judge—Appeal—Procedure adopted by the High Court.*

Where, on appeal from an award made by the Special Judge in a case arising out of proceedings under the Land Acquisition Act (I of 1894), the High Court, reviewing the earlier awards and comparing the prices realised on sales of land in the neighbourhood, having regard to the special advantages of, and drawbacks to, their respective situations, and having heard the evidence of experts on both sides, came to the conclusion that the total compensation due to the claimants ought to be increased, their Lordships affirmed the decision of the High Court. **The Secretary of the State for India in Council v. The India General Steam Navigation and Railway Company, Limited**, 36 C. 967 = 10 C.L.J. 281 (P.C.) = 11 Bom. L. R. 1197 = 19 M.L.J. 648.

LORD MACNAGHTEN, LORD DUNEDIN,
LORD COLLINS, SIR ANDREW SCOBLE
and SIR ARTHUR WILSON.

- (2) *Compulsory acquisition—Compensation—Residential property—Essential ingredient for valuation—Acquisition officer, inquiry by—Proof before him should not be in the strict judicial form—Practice.*

The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation. But it is not the only element to be taken into consideration.

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

In the case of residential property, to endeavour to arrive at the market-value solely on the basis of hypothetical rent may work grave injustice to the owner. There are many commodities which may possess a value in the market, not for the return they give on capital invested, but for the advantages and enjoyment which accrue from their possession. Residential property (used in the sense of property which a purchaser wishes to acquire for his own residence) is such a commodity.

The first question to determine is, whether there is a demand and if there is a demand, the original cost is the most important element for consideration. A man who buys land and builds thereon does not necessarily produce a marketable commodity of the value of his outlay, but it does not follow that he never does. A man, who wishes to acquire a residence for himself in a particular locality will consider not only the procurable rent of houses in the market, but the cost to himself of building a new one.

It is the claimants' duty to assist the Acquisition officer in arriving at a valuation, by putting before him all the information and materials at their disposal. The officer should not treat all such information produced by a claimant with suspicion, and throw out everything which is not proved according to the rules of evidence which prevail in a Court of Justice, thus necessitating a claimant incurring heavy costs, and extending the time occupied by the inquiry to an inordinate length. The Acquisition officer is in a position to make any inquiry that he may think may help him in making his award, but he can hardly expect each individual claimant to produce substantial proof in respect of all the details, which occur to him either from his own conscience or from the suggestion of the public body or company for whom the Government are acquiring the land. *In re Land Acquisition Act; In re Sukhanand Gurumukhari*, 11 Bom. L.R. 1176=34 B. 496.

MACLEOD, J.

- (3) *Hereditary Offices Act (Bom. Act III of 1874), S. 10—Compensation for building and land of Maharki vatan—Land acquired by owner of building by adverse possession—Compensation for land and building awarded to claimants—Collector's certificate under S. 10 for compensation as to Maharki vatan land—Jurisdiction of the*

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

Collector to issue the certificate—Order under Land Acquisition Act not a decree—C.P.C. (Act V of 1908), S. 2—Decree.

In the course of an inquiry into the amount of compensation to be awarded for a building and the Maharki vatan land on which it stood, the Court, on finding that the land was acquired by adverse possession by Ladhia Ebrahim & Co. (the owners of the building), ordered compensation for both to be paid to them. Subsequently, the Collector issued a certificate under S. 10 of the Hereditary Offices Act, 1876, and forwarded it to the Court in order that the order of payment of compensation of the land might be set aside in accordance with the provisions of Ss. 10 and 13 of the Act. The Court, acting upon the certificate, cancelled its order directing payment of compensation for the land. On appeal to the High Court:

Held that the certificate was *ultra vires*, since the award of the Court was not a decree or order; neither had the rights of Ladhia Ebrahim & Co., objected to by the Collector, been acquired "by virtue of any decree or order" but by adverse possession; nor was the award, which the Collector treated as a decree, obtained "without the sanction of Government," since it had been made in pursuance of proceedings initiated by Government. *Ladhia Ebrahim and Co. v. The Assistant Collector, Poona*, 12 Bom. L.R. 839.

SCOTT, C.J. and BATCHELOR, J.

- (1) *Ss. 3(a), 11, 15, 23, 30 and 31—"Land," meaning of—Acquisition of interest in land—Compensation where Government has some interest in land to be acquired.*

Per Chandavarkar, J.—To acquire a piece of land under the Land Acquisition Act is not necessarily the same thing as to purchase the right of fee simple to it, but means the purchase of such interest as clogs the right of Government to use it for any purpose it likes.

The word "includes" in S. 3(a) of the Land Acquisition Act shows that the Legislature intended to lump together in one single expression "land" several things or particulars such as the soil, the buildings on it, any charges on it, and other interests in it, all which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.

1.—*Imperial Acts—(Continued).*

Act I of 1894 (Land Acquisition)—(Continued).

The legislature having given a general direction that the amount of compensation payable for a plot of land shall be determined according to its market value, left the decision, as to the interests subordinate to the right of ownership or fee simple, to rest upon principles which the Collector or the Court may see fit to apply in each case on grounds of law and equity. Interests in or benefits arising out of land are various, and it would have been practically impossible to mention them exhaustively and provide for each of them in the Act.

Per Batchelor, J.—The Government are not debarred from acquiring and paying for the only outstanding interests, merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation, based upon the market value of the whole land, must be distributed among the claimants. In such circumstances, there is no insuperable objection to adopting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for.

Ss. 11, 15 and 23 of the Land Acquisition Act must be read with Ss. 30 and 31. **The Government of Bombay v. Usufali Salebhai**, 12 Bom. L.R. 34—5 Ind. Cas. 621—34 B. 618.

CHANDAVARKAR and BATCHELOR, JJ.

(5) *S. 6 (1)—Land acquisition proceeding—Legality of acquisition, question as to, if can be raised—Acquisition for purposes not contemplated by the Act—Valuation, principle of—Statute, construction of.*

When statutory rights of an exceptional character have been created, the conditions prescribed by the statute for the exercise of such right must be strictly fulfilled, and if an attempt is made at merely nominal compliance with the provisions of the statute in the exercise of such rights, the Courts are not powerless to afford relief to a person who is aggrieved by the adoption of such a course.

The scope of the reference made at the instance of a claimant, under S. 18 of the Land Acquisition Act, is of a limited character. The question of the legality of the acquisition does not form the subject of enquiry by the Land Acquisition Judge. The questions which may be determined by the Court upon the reference relate to valuation, to apportionment and to other matters of a like nature (a).

1.—*Imperial Acts—(Continued).*

Act I of 1894 (Land Acquisition)—(Continued).

To determine the market value of the land, one has to find out the price which would be obtainable in the market for the concrete parcel of the land with its particular advantages and its particular drawbacks, both advantages and drawbacks to be estimated rather with reference to commercial value than with reference to any abstract legal rights. In other words, the future utility must be estimated by prudent business calculation, and not by mere speculation and impracticable imagination (b).

A hypothetical building scheme, considered as the basis of market value, affords generally evidence of a remote, speculative and conjectural character (c).

When evidence is adduced of prices realised at sales of neighbouring lands, it is not possible to obtain instances precisely parallel, in all their circumstances, to the particular land acquired; differences, small or great, exist in various conditions, and what precise allowance should be made for these differences, is not a matter which can be reduced to any hard and fast rule. At the same time, the instances produced must relate to lands which, on the whole, have the same conditions of quality and situation as the land acquired.

The mode of valuation by division into belts is artificial, and does not always afford a reliable guide to the ascertainment of the market value (d).

No hard and fast rule can be laid down as to the proportion between the value of front-land and back-land. **Raghnath Das v. Collector of Dacca**, 11 C.L.J. 612—6 Ind. Cas. 457.

MOOKERJEE and TEUNON, JJ.

References:—(a) 7 C.L.J. 445; 35 C. 525; 8 C.L.J. 39, *doubted* and *D.* (b) 33 Bom. 483; 32 C. 343; 34 C. 599, *R.* (c) 10 Bom. L.R. 907, *R.* (d) 10 C.L.J. 281; 36 C. 967, *R.*

(5-a) S. 11. See No. 4, *supra*.

(6) *Ss. 11, 18—Land acquisition proceeding—Collector when makes award, if Court—High Courts Act (XXIII of 1861), S. 15, applicability—High Court, if can review the order of Collector—Land Acquisition Judge, if can review the award of the Collector—“Any person interested,” in S. 18, if includes—Secretary of State—Claimant, if can claim discharge of reference—Land Acquisition Act (I of 1894),*

1.—*Imperial Acts*—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

S. 18, scope of enquiry under—Land Acquisition Judge, if can review matters not challenged by claimant—Discovery, Land Acquisition Judge, if can order—C.P.C. (Act V of 1908), O. 11. r. 12—Discovery, order for, when allowed and disallowed—Interlocutory order—Revision, High Court's power of.

The Collector, when he holds an enquiry and makes an award under S. 11 of the Land Acquisition Act, is not a Court within the meaning of S. 115 of the C.P.C. of 1908 and is not subject to the appellate jurisdiction of the High Court within the meaning of S. 15 of the High Courts Act of 1861 (a).

To attract the operation of S. 15 of the High Courts Act of 1861, it must be established in the first place that the order assailed has been made by a Court subject to the appellate jurisdiction of the High Court. The section does not entitle the High Court to rectify what may be called executive or administrative injustice in contradistinction to judicial injustice; nor can forms of procedure be legitimately ignored altogether to bring a case within S. 15 of the said Act.

The Secretary of State cannot invite the High Court to review the award of the Collector in the exercise of its revisional jurisdiction or of the power of superintendence vested in it under the Charter Act.

The Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by the Statute, and a Court of this description cannot be legitimately invited to exercise inherent powers, so as to assume jurisdiction over matters not intended by the Legislature to be comprehended within the scope of the enquiry before it (b).

Hence, the Land Acquisition Judge has no jurisdiction to review the award of the Collector at the instance of the Secretary of State, to set it aside as illegal and made in contravention of the provisions of the law, and to direct him to recast, modify and reduce it.

A claimant, although he has obtained a reference under S. 18 of the Land Acquisition Act, can subsequently resile from that position, and invite an order for what really amounts to a discharge of the reference.

1.—*Imperial Acts*—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

The expression "any person interested" in S. 18 of the Land Acquisition Act does not include the Secretary of State.

The scope of enquiry under S. 18 of the Land Acquisition Act cannot be enlarged at the instance of parties who have not obtained, or, who cannot obtain any order of reference.

The Land Acquisition Judge has no authority to review the award of the Collector in regard to matters not challenged by the claimant and to set it aside on the ground of illegality. The matter of which the Judge is properly seised is the objection of the claimant, and he should proceed to determine its validity.

The Land Acquisition Judge has jurisdiction to make an order for discovery under O. 11, r. 12 of the C.P.C.

If there are any objections which must fall on the ground that they cannot be entertained at all upon any principle of law, no discovery should be directed as regards them.

In cases where the right to discovery in any form depends upon the determination of any issue or question in dispute in the cause or matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue or question has been determined.

The High Court is competent to set matters right, when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants (b). **British Indian Steam Navigation Co. v. Secretary of State for India**, 12 C.L.J. 505.

MOOKERJEE and SHARFUDDIN, JJ.

Reference :—(a) 12 C.W.N. 241; 7 C.L.J. 445; 35 C. 525; 8 C.L.J. 39, D. (b) 10 C.L.J. 407, R.

(6-a) S. 15. See No. 4, *supra*.

(7) S. 18—Reference to Civil Court—What is referred—Market value, determination of.

Where a claimant fails to prove the value of the land at the rate or upon the principle claimed by him, the Judge is not bound to accept the award, but it is his duty, having regard to all the evidence and to all the circumstances of the case, himself to determine what is the fair compensation for the land acquired.

I.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

Where the condition and amenities of the land have completely changed and the land has gone up greatly in value, the following three elements should be taken into consideration in determining its market value.

(a) The position of the land acquired, its general advantages, and its special adaptability for the use of the owners.

(b) The purposes for which that land can be utilised in the most lucrative way.

(c) The damages sustained by the claimant by reason of the acquisition injuriously affecting his other property.

In large towns where the increase in value is the result of improvements in the town and the surroundings of the lands acquired, the present rental and a supposed increase thereon cannot be safely accepted as the basis of valuation. **Hughli Mills Co. v. Secretary of State for India in Council**, 12 C.L.J. 489.

HARRINGTON and BRETT, JJ.

(7-a) S. 18. See No. 6, *supra*.

(7-b) S. 23. See No. 4, *supra*.

(8) S. 28—*Right to interest on the difference between the sum offered and that awarded.*

Under S. 28, Land Acquisition Act, the claimants are entitled to interest at 6 per cent. per annum on the difference between the award and the Collector's offer. **Rangasami Chetty and others v. The Collector of Coimbatore**, 7 M.L.T. 78 = 5 Ind. Cas. 744.

WALLIS and MILLER, JJ.

(9) Ss. 29, 30, 53—*Objection in Court by persons not parties before Collector—Parties, addition of—Persons not made parties to reference not to be added by Civil Court.*

Under Part III of the Land Acquisition Act, the Special Court has no jurisdiction to deal with objections except those which are made by persons who were parties to proceedings before the Collector, or who have since within six months applied to the Collector to make a supplementary reference in their case. The Land Acquisition Act does not contemplate any decision by the Special Court unless reference is made by the Collector (a).

The addition of parties by the Civil Court, who have not been made parties to the reference by the Collector, is wholly inconsistent with the Land Acquisition Act and, therefore, the Civil Court cannot add such parties to a Land

I.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

Acquisition proceeding before it, nor can it award any compensation to one who joined in the proceeding for the first time in the Court of the Special Judge without applying to the Collector for any order of reference. **Mahananda Roy v. Srish Chandra Tewari**, 7 Ind. Cas. 10.

HOLMWOOD and SHARFUDDIN, JJ.

Reference :—(a) 12 C.W.N. 987, R.

(9-a) S. 30. See Nos. 4 and 9, *supra*.

(9-b) S. 31. See No. 4, *supra*.

(10) S. 32—*Hindu Law—Reversioner—Widow—Court, inherent power—Money, withdrawal and refund of.*

A, a Hindu widow, sold to B, without legal necessity, a portion of the lands inherited by her from her husband. The portion so transferred was acquired under the Land Acquisition Act, and the compensation money deposited was withdrawn by B. The reversionary heirs brought a suit for declaration that the transfer was not operative against them, and to compel B to bring the money into Court for investment.

Held, that the Court has inherent power to compel B to bring the money into Court, and to direct its investments in Government or other approved securities (a).

Section 32 of the Land Acquisition Act, applies to cases where land in possession of a Hindu widow as heiress of her husband is acquired (b). **Mrinalini Dasi v. Abinash Chandra Dutt**, 11 C.L.J. 533.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) (1851) 15 Beavan 22, *appl.*
(b) 21 A. 354; 24 A. 189; 26 M. 287, D.

(11) Ss. 32, 54—*Investment of compensation money—Appeal from order under S. 32, whether lies.*

An order under S. 32 of the Land Acquisition Act, by which the Court directed that the sum awarded as compensation is to be invested in Government securities, is part of an award made in a proceeding under the Act within the meaning of S. 54, and is appealable. **Trinagani Dassi v. Krishna Lal Dey**, 6 Ind. Cas. 157.

MOOKERJEE and TEUNON, JJ.

References :—29 M. 117, F.; 32 C. 921; 2 C. L.J. 595; 26 M. 287; 21 A. 354; 28 C. 526, R.

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

(12) S. 53—Addition of party—Purchaser at revenue sale, rights of. See CIV. PRO. CODE, (1908) No. 100, 11 C.L.J. 420.

(12-a) S. 53. See No. 9, *supra*.

(13) S. 54—Right of appeal under—Appeal against preliminary order whether lies.

An appeal under S. 54 of the Act only lies subject to the provision relating to appeals from original decrees under the Code of Civil Procedure.

Consequently, it is premature to appeal against a preliminary order of the District Judge, holding that the question of compensation was not included in the order of the Collector under S. 18 of the Act, before the passing of the final award by the District Court. **Mowlo Sabzali v. Dewan Mushtaksing**, 4 S.L.R. 34.

HAYWARD and CROUCH, JJ.

(14) S. 54—Reference for apportionment—Interest of one of claimants attached before reference—Compromise amongst claimants—Abandonment of claim by claimant whose interest was attached—Party—Attaching creditor, whether should be made party in apportionment proceedings—Dismissal of his application—Appeal, whether lies—C. P.C. (Act V of 1908), Ss. 64, 115, O. XXIII, r. 10.

In a reference by the Collector to the Civil Court for the apportionment of the compensation money awarded under the Land Acquisition Act, the dispute was amongst three persons, one of whom was A. Before the reference was made by the Collector, the petitioner had obtained an attachment upon the fund in Court in so far as it represented A's interest. In the Civil Court, A put in a petition of compromise by which he abandoned his claim to the compensation money. The petitioner applied to be made a party, but the Judge held that he had no *locus standi* and dismissed his application. The petitioner moved the High Court.

Held that the order did not fall under S. 54 of the Land Acquisition Act, as it was not made between parties to the proceedings before the Judge, and also that the order was not made under Rule 10 of O. XXII of the C.P.C., 1908, because, the rule deals with cases of assignment, etc., of interest during the pendency of a suit, but here the interest claimed by the petitioner

I.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Concluded).**

was acquired by him before the reference by the Collector, and that the order was not appealable.

Held, also, that the petitioner was entitled to be added as a party, on the ground that he was a person interested in the subject-matter of the litigation, and that no order ought to have been made for its disposal without any opportunity afforded to him to establish his claim.

The High Court may treat an application for revision as a memorandum of appeal (a).

Held, also, that the effect of the compromise was to transfer the interest of A to the other claimants, and that such transfer after the attachment and the subsequent delivery of the funds pursuant thereto were contrary to the provisions of S. 64 of the C.P.C. of 1908; that the Court below ought not to have given effect to such a compromise, because under O. XXIII, Rule 10 of the C.P.C., the Court must determine whether the compromise was lawful before effect is given to it.

The High Court has ample powers to set matters right, when the Court below disposed of the question of apportionment without affording an opportunity to the petitioner to establish his allegations (b). **Golab Khan v. Bhola Nath Marik**, 7 Ind. Cas. 481.

MOOKERJI and CARNDUFF, JJ.

References:—(a) 25 C. 757; 2 C.W.N. 529 (F.B.), *relied upon*. (b) 11 C.L.J. 420; 6 Ind. Cas. 546; 11 C.L.J. 126; 11 C.W.N. 703; 6 Ind. Cas. 549; 6 Ind. Cas. 570, *relied upon*.

(15) S. 54—See No. 11, *supra*.

Act X of 1897 (General Clauses).

(1) S. 6—Applicability of, to Law of Limitation. See CIV. PRO. CODE, (1908) No. 55, 7 M.L.T. 115.

(2) S. 6—Retrospective effect of statutes. See CIV. PRO. CODE, (1882) No. 191, 12 Bom. L.R. 730.

(3) S. 6, cls. (c), (d) and (e). See ACT III OF 1907 (PROVINCIAL INSOLVENCY), Nos. 11 and 9, 11 P.R. 1910 and 12 P.R. 1910.

(4) S. 14—Power conferred on Local Government exercised from time to time. See ACT XIII OF 1889 (CANTONMENTS), No. 1, 24 P.R. 1910.

Act V of 1898.

See CRIM. PRO. CODE.

I.—Imperial Acts—(Continued).**Act II of 1899.**

See STAMP ACT.

Act IX of 1899 (Arbitration).

- (1) *S. 2—Cause of action arising where performance is to be completed—Completion of sale of unascertained goods.*

The defendant in this case entered into a contract with the plaintiff's agents at M for supply of goods which were then unascertained, and agreed either to deliver the goods to the plaintiff's agent at M to be forwarded to K at the defendant's risk, or to forward the goods himself direct to K. The agreement also provided that in both the cases goods had to be tested and accepted or rejected by the plaintiffs at K.

Held that (1) As the contract was for sale of unascertained goods, the property in the goods could not pass to the purchasers till they were ascertained and appropriated by the M. (S. 83, Contract Act).

(2) Delivery to the plaintiff's representatives at M would amount to delivery to them *qua* agents of the sellers for goods being forwarded at the risk of the sellers to the purchasers at K, and not delivery under the contract.

(3) Therefore, the performance of the contract could be only completed at K, and the Courts at K, have jurisdiction to entertain a suit based on the contract, and also to entertain an application to file the award based on the submission contained in the contract. **Louis Dreyfus & Co. v. Girdharidas Rughnathdas**, 4 S.L.R. 20.

LEGGATT, J.

Reference :—3 S.L.R. 156, *Appr.* ; 4 C. 801 ; 27 M. 355 ; 32 C. 816, *R.*

(2) *S. 2—Application of the Act.* See CIV. PRO. CODE, (1882) No. 24, 3 S.L.R. 156.

- (3) *Ss. 2, 8—Jurisdiction of Karachi Courts to appoint arbitrator.*

The Karachi Courts have jurisdiction to appoint an arbitrator under this Act, where differences have arisen between the parties to a contract for purchase of goods, entered into on terms known as the K.P. or "Karachi Pass Terms." **Sanday, Patrick & Co. v. Mayamal Bishendas**, 4 S.L.R. 10=7 Ind. Cas. 588.

CROUCH, J.

Reference :—3 S.L.R. 56, *R.*

- (4) *Ss. 4 and 12—Submission to arbitration, form of.*

I.—Imperial Acts—(Continued).**Act IX of 1899 (Arbitration)—(Continued).**

Under this Act, no special form of submission is required ; only there must be an agreement to refer and that agreement should be reduced in writing. **Seth Utoomal Yasoomal v. Seth Haridas Asanand**, 4 S.L.R. 26=7 Ind. Cas. 595.

LEGGATT, J.

- (5) *Ss. 5 and 8—Death of a party to the submission, effect of.*

In this case the plaintiff applied for appointment of an arbitrator under S. 8 of the Act, to settle differences arising out of an indent. The indent was signed by a representative of the defendant's firm and contained a clause providing for submission of future differences to an arbitrator to be appointed by the parties. The defendants contended that one of their partners died since the signing of the indent and that consequently the submission clause was rendered ineffective.

Held that S. 5 of Act IX of 1899 has laid down the general rule that a reference was irrevocable unless with the permission of the Court, and that the Act contains no provision to justify treating the death of a party as an exception to this rule. **Sanday, Patrick & Co. v. Ramratton**, 4 S.L.R. 14.

CROUCH, J.

References :—1 Q.B.D. 748, 757, 758 ; L.R. 6 C. 212 ; 12 Q.B.D. 310 ; 20 Q.B.D. 177, 180 ; 25 Q.B.D. 545 ; 12 M.I.A. 112, 130, 131, *R.*

- (5-a) *S. 8.* See Nos. 3 and 5, *supra*.

- (6) *Ss. 8, 9—Failure to follow procedure under S. 8—Jurisdiction of Court to appoint arbitrator—Statute conferring jurisdiction—Interpretation.*

Before the Court can appoint a single arbitrator, it must be satisfied that the provisions of S. 8 have been complied with, and it cannot accept, as equivalent to such compliance, a procedure appropriate to a wholly different set of circumstances and to the attainment of a result wholly different from that to which the application before it is directed. Where the provisions of S. 8 have not been followed, the Court has no jurisdiction to appoint an arbitrator.

Statutory provisions which confer jurisdiction must be strictly construed. **Sanday, Patrick & Co. v. Shivaldas Lokaram**, 3 S.L.R. 221.

CROUCH, A J.C.

1.—Imperial Acts—(Continued).**Act IX of 1899 (Arbitration)—(Continued).**

- (7) *S. 9—Clause providing for arbitrator's appointment within six days—Appointment before six days—Effect—Computation—Six days clear days—"Days" meaning of—Fractions of days.*

Where a clause, providing for a reference to arbitration of future differences under a contract, stated that "if either party shall fail to nominate an arbitrator within six days after being required to do so, the other party shall be at liberty to appoint both arbitrators, and where the reference was signed at the earliest on the sixth day—five clear days and broken portions of two other days.

Held, that the time limited by the condition precedent had not elapsed, and that the plaintiffs had no power to make the appointment "within six days after an act" means so many clear days after it. A day is, generally speaking, a period from midnight to midnight and the law admits not of fractions in time but in case of necessity. **Louis Dreyfus & Co. v. Seth Meharchand Fatechand**, 3 S.L.R. 237.

CROUCH, A.J.C.

References:—10 L.J.Q.B. 10; 18 L.J.Q.B. 250, R.

- (7-a) *S. 9.* See No. 6, *supra*.

(8) *S. 10—Difference in opinion of arbitrators on a question of law—Statement of a special case for the opinion of the Court—Appeal from the Court's order.* See CIV. PRO. CODE, (1908) No. 52, 12 Bom. L.R. 852.

- (9) *S. 11—Failure to make a written award, effect of—Suit relating to matter on which such an award is given, maintainability of.*

S. 11 requires that the award should be signed and filed. The arbitrators are bound, at the request of any party, to file the award or a copy thereof in Court, and such an award, unless it is set aside or remitted for reconsideration, becomes enforceable as if it were a decree of Court. The writing and signing of an award is not, therefore, a formality that may be dispensed with by the parties. It stands in this respect on the same footing as a decree.

So, where the arbitrators gave their decision in the presence of the parties, but there was no award in writing as the parties thought it would be sufficient to actually carry out the award, *held*, the award is not binding upon the parties, and that a suit relating to the matter upon

1.—Imperial Acts—(Continued).**Act IX of 1899 (Arbitration)—(Concluded).**

which such an award has been made is not barred by the award. **Gotha Krishnasawm Chetty v. Thatha Seetharam Chetty**, 7 M.L. T. 355 = 5 Ind. Cas. 374.

BENSON and SANKARAN NAIR, JJ.

- (9-a) *S. 12.* See No. 6, *supra*.

- (10) *S. 15—C.P.C. (Act V of 1908), O. XXI, r. 29—Award—Enforceable as if it were a decree—Stay of award pending decision of a suit between the same parties.*

An award passed under the Indian Arbitration Act, 1899, can be enforced as if it were a decree of the Court (S. 15); but the stay of its execution cannot be ordered under O. XXI, r. 29 of the C.P.C., 1908. **T.K. Gajjar v. Lallubhai Dharamchand**, 12 Bom. L.R. 860.

SCOTT, C.J.

- (11) *S. 19—Arbitration—Stay of proceedings—Application for stay.*

S. 19, Arbitration Act, applies only where there has been a submission to arbitration before the commencement of legal proceedings. **Peruri Suryanarayan and Co v. Gullapudi Chianna Narsingham**, 11 Bom. L.R. 1060 = 34 B. 372.

MACLEOD, J.

Reference:—35 C. 199, F.

(12) *S. 19—Application for stay of suit, whether can be made under cl. 18, Sch. II, C.P.C., 1908, in places where Arbitration Act applies.* See CIV. PRO. CODE, (1908) No. 168, 3 Sind L.R. 162.

Act III of 1905 (Paper Currency).

(1) *S. 24—Pro-note infringing section--Right of suit to recover on pro-note.* See PROMISSORY NOTE, No. 3, 5 L.B.R. 191.

- (2) *Ss. 24, 25—Bill payable to bearer on demand—Right of suit on bill—Construction of the Act.*

In this case the suit was for recovery of a sum due on a promissory note. The note ran as follows:—

"I promise to pay on demand to the bearer the sum of rupees seven hundred and forty-four, Rs. 744, with interest at the rate of six pias per rupee per mensem for value received."

Held that the plaintiff's right to sue for the money was not barred under S. 24. S. 24, does not prohibit a person from lending money on a bill payable on demand to bearer or from claiming repayment of the same. Nor does

1.—Imperial Acts—(Continued).**Act III of 1905 (Paper Currency)—(Concl'd.).**

is declare such a bill illegal or void or prohibit its being taken in evidence.

S. 25 penalises any act done in contravention of S. 24. But Act III of 1905 (Paper Currency) being a highly penal one, its effect must be strictly limited to its proper scope. **Dhanji G. Desmanay v. Taylor**, 4 S.L.R. 44 = 7 Ind. Cas. 604.

CROUCH, J.C. *

References :—16 B. 689, *not F.*

(3) S. 25. See No. 2, *supra*.

Act III of 1907 (Provincial Insolvency).

(1) *Ss. 2, sub-sec. 1, cl. (g), 17, 16, 16 (6), 13, 18—High Court if may grant interim protection and appoint receiver pending appeal—Inherent jurisdiction—Civ. Pro. Code (Act V of 1908), S. 151.*

Where an appeal has been preferred against an order refusing the appellant's application to be declared an insolvent, the High Court has power, in the exercise of its inherent jurisdiction as a Court of appeal, to make an *ad interim* order for protection of the appellant, and for the appointment of a receiver of his assets during the pendency of the appeal (a).

As there appeared to be substantial points in controversy in the case, which required consideration, the High Court granted *ad interim* protection pending appeal to the appellant, and also appointed a receiver of his assets. **Abdul Razah v. Basiruddin Ahmed**, 14 C. W. N. 586 = 11 C.L.J. 435 = 6 Ind. Cas. 95.

MOOKERJEE and TEUNON, JJ.

References :—(a) 3 A.L.J. 29; 3 C.L.J. 67, *relied on*.

(2) *Ss. 5, 6, 13, 11, 15, 13, 11—Petition in insolvency—Act of bad faith by petitioner—No ground for dismissing petition at preliminary stage—Distinction between C.P.C., 1882, and Provincial Insolvency Act, pointed out.*

The question whether a petitioner in insolvency has or has not committed acts of bad faith is to be determined by the Court, not at the preliminary stage when the order of adjudication has to be made under Ss. 15 and 16 of the Provincial Insolvency Act, but at the final stage when application is made for an order of discharge under S. 44.

1.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency)—(Continued).**

Therefore, a petition in insolvency cannot be dismissed under S. 15 of the Act on the ground that the conduct of the petitioner has not been satisfactory and that he has made a false statement in his petition, inasmuch as he has mentioned the name of a certain person as creditor in whose favour he had created a fictitious debt.

The fundamental distinction between the provisions of the C.P.C., 1882, and the Insolvency Act of 1907 is this : whereas, under the former law, before the petitioner could be adjudged an insolvent, his conduct in respect of his creditors and in relation to the disposal of his own properties had to be taken into account, under the latter Act, the order of adjudication follows almost as a matter of course upon the presentation of the insolvency application, and the question of the conduct of the petitioner becomes material only when he asks for an order of discharge. **Udai Chand Maity v. Ram Kumar Khara**, 7 Ind. Cas. 394.

MOOKERJEE and CARRDUFF, JJ.

(2-a) S. 6. See No. 2, *supra*.

(3) *Ss. 6, 15, 16, 11—Petition of insolvency—Preliminary stage—Bad faith, act of—Dismissal of petition—Appeal—Party—Non-opposing creditor not to be made respondent—Right to apply in insolvency.*

It is not necessary for an appellant, who was a petitioner in insolvency, to add, as a party respondent to his appeal, a creditor mentioned in his petition, who did not appear in the Court below to oppose the application.

At the preliminary stage contemplated by S. 15 of the Provincial Insolvency Act, it is not open to the Court to dismiss the petition on the ground that the petitioner had improperly alienated a portion of his property in lieu of dower.

The question of bad faith or improper dealing with the property of an insolvent arises for consideration at a much later stage of the proceedings. If the debtor applies for an order of discharge, it becomes obligatory upon the Court under S. 44 of the Provincial Insolvency Act to investigate whether or not he has been guilty of acts of bad faith.

The contingencies mentioned in sub-sec. (3) of S. 6 of the Act are to be taken in the

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Continued).

alternative, and if any one of them happens, the debtor becomes entitled to present an insolvency petition. **Sheikh Samir-ud-din v. Kadar Moyee Dassi**, 7 Ind. Cas. 691.

MOOKERJI and SHARF-UD-DIN, JJ.

References :—7 Ind. Cas. 394 ; 7 Ind. Cas. 39 ; 7 A.L.J. 835, *F.* ; 7 A.L.J. 602 ; 6 Ind. Cas. 870, *Not F.*

(4) Ss. 6 (1), 15, 16, 44, 45—*Insolvency petition, presentation, and admission of—Order of adjudication—Order of discharge—Fraud or other acts of bad faith by debtor, consideration of.*

Held that, where an insolvency petition has been put before a Court by a debtor under Act III of 1907, the Court is entitled to dismiss the application, only when it is satisfied that the debtor had no right to present the petition under S. 6 (3) of the Act.

Held further, that the provisions about proof of the service of notice on the debtor or of the alleged act of insolvency, or of the debtor's ability to pay his debts or of any other sufficient cause contained in S. 15 (1) of Act III of 1907, refer to cases where the insolvency petition is put in by the creditor.

Held also that, where a debtor has a right to present the petition, the Court is bound under S. 16 (1) to make an order of adjudication. Questions relating to alleged bad faith or fraud, etc., on the part of the debtor arise for decision only when the debtor applies for an order of discharge. **Hamid Ali v. M. Ihtisham Ali**, 13 O.C. 94.

EVANS, O.J.C.

(5) S. 13—*Insolvency—Execution of decree—Judgment-debtor in jail—Power of insolvency Court to release him.*

When a judgment-debtor is arrested in execution of a decree and confined in jail, the Insolvency Court has no jurisdiction under S. 13, Act III of 1907, to order his release. **E. D. Sassoon & Co., Bombay v. Kishen Chand**, 30 P.L.R. 1910.

RATTIGAN, J.

Reference :—8 Mad. 503, *R.*

(5 a) S. 13—See Nos. 1 and 2, *supra*.

(6) Ss. 13 and 16—*Application for insolvency presented from jail—Effect of—Release of prisoner before adjudication.*

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Continued).

If a prisoner under arrest omits to express his intention to apply to be declared an insolvent and is then committed to prison under S. 55 of the Code of Civil Procedure, he cannot obtain his release from prison upon the mere admission of his subsequent petition of insolvency under S. 13 of the Provincial Insolvency Act but only upon the order or adjudication thereon under S. 16 (2) (b) of the Act. *In re Haji Umar*, 4 S.L.R. 47 = 7 Ind. Cas. 606.

HAYWARD, J.C.

(6-a) S. 14. See No 2, *supra*.

(6-b) S. 15. See Nos. 2 to 1, *supra*.

(7) S. 15 (1)—*Grounds for dismissing petition—Acts of bad faith—Whether section exhaustive—Any sufficient cause.*

The last words of S. 15, sub-sec. (1), refer only to cases of insolvency petition presented by a creditor. The words "that for any sufficient cause" are governed by the words "satisfied by the debtor"—that is to say, the cause referred to is cause to be shown by the debtor. Under the Insolvency Act of 1907, transfer of property by the debtor with intent to defraud his creditors, or reckless contracting of debts or giving unfair preference to any of his creditors or committing any other act of bad faith, are grounds for refusing an order of discharge, but not grounds for refusing to make an order of adjudication. Where, therefore, a petitioner for declaration of insolvency feigned ignorance about the existence of his account books and prevaricated about other matters, *held* that his petition could not be dismissed on these grounds, the object of the Legislature, by enacting the Insolvency Act, being to make it easier to obtain an order of adjudication. **Girwar-dhari v. Jai Narain**, 7 A.L.J. 835 = 7 Ind. Cas. 39.

KARAMAT HUSSAIN and CHAMIER, JJ.

(7-a) S. 16. See Nos. 3, 4 and 6, *supra*.

(5) S. 16 (2)—*Arrest—Judgment-debtor—Competency of executing Court to imprison a judgment debtor after he has applied to be declared insolvent—S. 55 (3) and (4) of Act V of 1908.*

Held, that, the pendency of insolvency proceedings neither takes away from the executing Court the power of committing the judgment-debtor to civil jail, nor he is entitled to get

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Continued).

time to apply to be declared insolvent. The object of the provisions in cl. (3) of S. 55, C.P.C., 1908, is to give the debtor time to apply, but if he has already done so and proceedings are going on, there would be no sense in giving further time. **Kishan Chand v. E. D. Sassoon & Co.**, 83 P.W.R. 1910.

SCOT-SMITH, J.

(8-a) S. 16 (2)—Release of judgment-debtor from prison—Whether can be ordered prior to adjudication—Creditor's right.

Under S. 16, Provincial Insolvency Act, 1907, the Insolvency Court has no jurisdiction to direct the release, prior to an order of adjudication, of a judgment-debtor who has been imprisoned, rightly or wrongly, in execution of decree by an executing Court.

Prior to adjudication, the creditor's right against the person and property of the judgment-debtor remains unaffected. **Kishan Chand v. E. D. Sassoon & Co.**, 95 P.R. 1910.

RATTIGAN, J.

Reference :—8 M. 503, R.

(8-b) S. 16 (6). See No. 1, *supra*.

(8-c) S. 18. See No. 1, *supra*.

(9) S. 27 Not applicable to the Punjab Laws, Act IV of 1872, S. 28—General Clauses Act (X of 1879), S. 6, *cls.* (c), (d) and (e).

Held that, as the provisions of S. 27 of the Punjab Laws Act, 1872, under which the Court was bound to give effect to a composition, is materially different from S. 28 of the Provincial Insolvency Act, 1907, under which the Court can impose conditions before accepting such a composition, and as the latter Act makes important alterations in the substantive rights of the parties, orders in connection with a composition deed, filed before Act III of 1907 came into force, should be made under the old law. (See S. 6 of the General Clauses Act, 1897.) **Seth Radha Kishan v. Binj Raj and others**, 12 P.R. 1910 = 5 Ind. Cas. 806.

RATTIGAN and WILLIAMS, JJ.

Reference :—11 P.R. 1910, P.

(10) Ss. 36, 46, sub-sec. (2), 50—"Aggrieved person," who is—Appeal, right of—Transferee's right of appeal when transfer annulled—Jurisdiction of Court under S. 36 in respect of property situate outside jurisdiction—Auxiliary Court.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Continued).

An aggrieved person is a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something (a).

Therefore, a person who claims to be the transferee of a property for valuable consideration and alleges that he has acquired title in good faith, is an aggrieved person within the meaning of sub-sec. (2) of S. 46 of the Provincial Insolvency Act, if the Court has annulled the transfer made in his favour under S. 36, and is entitled to appeal from the order, and in such appeal the Receiver of the insolvent property is a proper party (b).

A proceeding under S. 36 is not in the nature of a suit, and a Court can deal with the question of the validity of the transfer in respect of property situated outside its jurisdiction.

A Court which has no jurisdiction cannot act as auxiliary to a Court which has jurisdiction (c).

To make the provisions of S. 50 applicable, the Court in which the proceedings have been initiated as well as the Court which is invited to assist it, must both have jurisdiction in insolvency matters.

Where a proceeding was instituted at Dacca under S. 36 in respect of property situated in Bhagalpore: held that the Dacca Court should take action under S. 50 and transmit the petition to the Court at Bhagalpore to take evidence and transmit its finding to Dacca Court which will deal with the proceeding. **Lalji Sahay Singh v. Abdul Gani**, 7 Ind. Cas. 765.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 14 Ch.D. 458; 49 L.J. Bk. 41; 42 L.T. 783; 28 W.R. 715, *Rel.* (b) (1901) 2 Q.B. 354; 70 L.J.Q.B. 699; 84 L.T. 666; 17 T.L.R. 536; 8 Manson 247, R. (c) (1891) A.C. 460; 60 L.J.P.C. 33; 65 L.T. 297, *Rel.*

(11) S. 43 not applicable to proceedings under S. 25, the Punjab Laws Act, IV of 1872—Alteration of law involving change in the nature of punishment—Acts of Procedure—General Clauses Act, X of 1897, S. 6, *cls.* (c), (d) and (e).

Where proceedings were begun against an insolvent under S. 25 of the Punjab Laws Act

1.—*Imperial Acts*—(Continued).

Act III of 1907 (Provincial Insolvency) — (Continued).

IV of 1972, under which certain acts of the insolvent rendered him liable to detention in the civil prison, and where, pending proceedings, the Punjab Laws Act was repealed by the Provincial Insolvency Act, III of 1907, and S. 25 of the former Act was substituted by S. 43 of the latter Act, under which the same acts of the insolvent rendered him liable to simple imprisonment in the criminal jail,

held, that the proceedings should be continued, and punishment should be inflicted, if necessary, under the old Act, as if the new Act had not been passed.

Whatever view may be taken of the general practice of the Courts to treat S. 6 of the General Clauses Act as not applying to Acts of Procedure, and whatever interpretation may be put upon the word 'procedure,' it is not capable of serious argument that a repealing Act, which substitutes imprisonment on the criminal side for the imprisonment on the civil side, is not calculated to affect the punishment. **Ganpat Rai and another v. Malla Mal and another**, 11 P.R. 1910—24 P.W.R. 10—5 Ind. Cas. 801.

RATTIGAN and WILLIAMS, JJ.

(11-a) S. 43. See No. 2, *supra*.

(12) S. 43 (ii)—*Imprisonment of insolvent—Offence committed on specific occasion—Evidence, nature of.*

An insolvent cannot be convicted for an offence under S. 43 of the Provincial Insolvency Act, unless he is shown by legal evidence to have committed an offence on some specific occasion (a). An insolvent cannot be punished on the evidence given on behalf of the creditors when they were opposing his application for adjudication of insolvency, but that evidence ought to be recorded *de novo* after the charges are framed. **Nathu Mal v. The District Judge of Benares**, 7 C.L.J. 732=6 Ind. Cas. 870.

RICHARDS and TUDBALL, JJ.

Reference: —17 C. 209, R.

(12-a) S. 44. See Nos. 2 to 1, *supra*.

(13) S. 44 (3) —*Points to be considered in granting discharge to insolvent—Reckless conduct of borrower—Effect*

S. 41, sub-S. 3, is imperative and obliges the Court to refuse to grant an absolute order of discharge on proof of certain facts. A discharge cannot be granted, unless the insolvent satisfies the Court that the fact that the assets are not of a value equal to eight annas in the

1.—*Imperial Acts*—(Continued).

Act III of 1907 (Provincial Insolvency) —(Concluded).

rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible.

If a person enters into trade possessing no property and relying entirely on making a profit in order to repay what he borrows for the trade and interest on that, as well as to provide for himself and his family, it cannot be said that he is not justly responsible for his debts, if a loss instead of a profit is the result of the trading. If a man borrows money, he is responsible for the payment of it, whether the man who lends him money is foolish or otherwise in lending it. No one is justified in incurring debts when he has no reasonable prospect of being able to discharge them.

Under the Provincial Insolvency Act, the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor, who by reason of misfortune is unable to pay his debts. It is not and could not have been intended for the reckless and careless borrower or the dishonest trader.

The conduct of the seeker for the benefit of the Act, not the conduct of the creditors, is what has to be considered. **R.M.P. Kalleappa Chetty v. Maung Kywe**, 5 L B R. 189.

FOX, C.J. and TWOMEY, J.

(13-a) S. 45. See No. 4, *supra*.

(14) S. 46—*Order made by District Court—Appeal—Divisional Court in the Punjab deemed to be the District Court—Punjab Government Notification No. 889, dated 18th November, 1908.*

By virtue of the Punjab Government Notification No. 889, dated 18th November, 1908, for the purposes of S. 46 of the Provincial Insolvency Act, the Divisional Court in the Punjab is deemed to be the District Court. Therefore, an order made in the exercise of insolvency jurisdiction by an ordinary District Court is appealable to the Divisional Judge.

The above notification mistakenly refers only to sub-S. (1) of S. 46, but it is intended to refer to and cover the whole section. **Manasa v. Nathumal**, 8 Ind. Cas. 485.

REID, C.J.

(15) S. 46. See No. 1, *supra*.

(16) S. 46, sub-S. 2. See No. 10, *supra*.

(17) S. 47. See No. 1, *supra*.

(18) S. 50. See No. 10, *supra*.

I.—Imperial Acts—(Continued).**Act V of 1908.**

See CIV. PRO. CODE.

Act IX of 1908.

See LIMITATION ACT.

Act XVI of 1908.

See REGISTRATION ACT.

Act III of 1909 (Presy. Towns Insolvency).

- (1) *Ss. 17, 103—Adjudged insolvent—"Suit or other legal proceedings" against the insolvent—Penal Code (Act XLV of 1860), S. 421—Fraudulent transfer of property—Magistrate jurisdiction to try the offence.*

M, applied to the Insolvent Debtors Court at Bombay for relief under the Presidency Towns Insolvency Act, 1909, and was adjudicated an insolvent the same day. Ten days later, a creditor of his filed a complaint in the Magistrate's Court, against him for an offence under S. 421, Penal Code, and against two others for abetment of the offence. M contended that the Magistrate's jurisdiction to entertain the complaint under S. 121 was excluded by the Insolvency Act, 1909, and that only the Insolvency Court at Bombay had jurisdiction to entertain the complaint :

Held, that the Magistrate's jurisdiction to try an adjudged insolvent for an offence under S. 121, Penal Code, was not taken away by the Insolvency Act, 1909.

The expression "or other legal proceedings" in S. 17 of the Insolvency Act, 1909, following as it does the word "suit," a word of more limited application, must be construed on the principle of *ejusdem generis*.

Where the Insolvency Act, 1909, creates an offence, it is the Insolvency Court which has jurisdiction as to it. But as to offences under the Indian Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to be excluded, unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences.

S. 103 of the Act does not substantially interfere with S. 121 of the Code. As its essential ingredient shows, it is more or less a new offence, created by the Act in addition to the offence under the Code.

One statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but the inconsistency must be so great that they cannot both be to their full extent obeyed.

I.—Imperial Acts—(Concluded).**Act III of 1909 (Presy. Towns Insolvency)—(Concluded).**

Emperor v. Mulshankar Harinand Bhat, 12 Bom. L.R. 750.

CHANDAVARKAR and HEATON, JJ.

- (2) *S. 25—Protection order—Insolvent—Practice—Change effected by the new Act—Stare decisis—Orders interim—Binding character of.*

The Presidency Towns Insolvency Act, 1909, gives to the Court and its officers the fullest powers to investigate into the conduct and affairs of an insolvent: the Official Assignee conducts his public examination and reports on his conduct when he applies for his discharge; while the burden which has hitherto rested upon creditors of protecting commercial morality has been entirely removed from their shoulders.

S. 25 of the Act clearly intends that, while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors, and should not be rendered liable to pressure, whereby one creditor may get undue advantage over another. The section does not deprive the Court of its discretion in granting or refusing protection, but sub-S. 4 indicates clearly the line along which that discretion should be exercised when a creditor opposes the grant. If an insolvent can produce the certificate referred to, the *onus* is thrown on an opposing creditor of showing cause why the protection order should not be granted, but he is not entitled to ask the Court to enter into an inquiry whether the insolvent has been guilty or not of commercial immorality, or of an offence under the Act. It is open to a creditor to show that an insolvent has imposed on the Official Assignee, and that in spite of the certificate he has not conformed to the provisions of the Act or that an insolvent has been guilty of delay in applying for his discharge; for the Court will not countenance an insolvent resting unreasonably beneath the shade of the protection order.

It has never been the practice for the Commissioners in Insolvency under the Indian Insolvency Act to consider themselves bound by their previous decision on applications for *interim* orders when it has been a matter for their discretion. *In re Meghraj Gangabax*, 12 Bom. L.R. 517.

MACLEOD, J.

- (3) S. 103. See No. 1, *supra*.

2.—Bengal Acts.

Act X of 1859 (Rent Recovery).

- (1) *Ss. 27, 105, 108—Distinction between sales under S. 105 and S. 108—Purchase by plaintiff in execution of money-decree—Subsequent purchase by defendant in execution of decree obtained by co-sharer landlord for his share of rent—Priority of title—Non-registration of purchaser's name at landlord's sherista—Locus standi of purchaser to bring suit in ejectment.*

S. 105 of the Rent Recovery Act contemplates a decree by the landlord or the whole body of landlords for the entire rent due in respect of an under-tenure; and the consequence of such a decree is, that what is brought to sale in execution under it is the tenure. But what is contemplated by S. 108 is a decree for money due on account of a share of rent by a sharer in a joint undivided estate, and in execution of that decree what is sold is the right, title and interest of the judgment-debtor in the under-tenure.

A purchaser in execution of a decree under S. 108 acquires a title, and is entitled to sue in respect of trespass on the under-tenure purchased by him, although his name has not been registered in the manner contemplated by S. 27 (a).

The plaintiff purchased an under-tenure at a sale held in execution of a money-decree against the defendant No. 1, the holder of the under-tenure. Subsequently the under-tenure was again put up to sale in execution of a decree against defendant No. 1 obtained by some of his landlords for their share of the rent, and the defendant No. 3 purchased at this sale. The plaintiff has sued for recovery of possession :

Held, that the defendant No. 3 took nothing by his sale as against the plaintiff inasmuch as the decree, in execution of which defendant No. 3 purchased, was not a decree for rent, but a decree for money, and what was purchased was the right, title and interest of defendant No. 1 which had been previously purchased by the plaintiff.

Held, also, that the plaintiff was entitled to sue, notwithstanding the absence of registration of his name in the manner contemplated by S. 27 of the Rent Recovery Act. **Niladari Mahanti v. Bichitranand Roy**, 6 Ind. Cas. 605.

JENKINS, C.J., and DOSS, J.

References.—(a) 12 C. 24; 13 B.L.R. 146 (156); 20 W.R. 380; 24 W.R. 407 (Note), R.

2.—Bengal Acts—(Continued).

Act X of 1859 (Rent Recovery)—(Concluded).

- (1-a) S. 105. See No. 1, *supra*.

(2) S. 108—Applicability of Civ. Pro. Code to cases under—Effect of S. 108. See CIV. PRO. CODE (1882), No. 99, 7 I. C. 387.

- (3) S. 108. See No. 1, *supra*.

Act XI of 1859 (Revenue Sale Law).

- (1) *Sale for arrears of revenue—Fraud and collusion between defaulter and purchaser to injure subordinate tenure-holders—Effect of sale—Declaratory suit by tenure-holder maintainable.*

Although a Government sale for arrears of revenue gives a title against all the world with certain exceptions, a fraudulent purchase at such auction sale places the purchaser in a very different position (a).

A Court will strip off all disguises from a case of fraud, and look at the transaction as it really is (b).

Therefore, where the proprietors of a revenue-paying estate deliberately made default in payment of the Government revenue, with the object that the estate might be sold free of the interests of the tenure-holders under them and they might realise the full value of the property undiminished by the incumbrances of the holders of the subordinate interests, and fixed the purchaser and the price before the sale took place under colour of the provisions of the Revenue Sale Law: *Held*, that, as the sale was brought about by fraud and collusion, the purchaser did not acquire the rights and privileges of a purchaser at a sale for arrears of revenue, and that the sale had the same effect as a private alienation, because it was, in substance, a transfer under pre-arranged conditions to a purchaser who was a party to the arrangement, and that the tenure-holders were entitled to the declaration that the sale clothed the purchaser with the rights and privileges of a private purchaser and not with those of a purchaser at a revenue sale (c). **Harendra Lal Roy v. Saïmullah**, 7 Ind. Cas. 21—12 C. Ind. 336.

MOOKERJEE and CARNDUFF, JJ.

References.—(a) 10 M.L.A. 510; 5 W.R. 83 (P.C.), *relied on*. (b) 2 Wils. 341, F. (c) 10 M.L.A. 540; 5 W.R. 83 (P.C.) and 9 B.L.R. 220; 18 W.R. 240, F.

- (2) *Ss. 2, 18, 26—Hardship whether matter to be considered by Civil Court in suit to set*

2.—Bengal Acts—(Continued).**Act XI of 1859 (Revenue Sale Law)—(Ctd.).**

aside revenue sale—Carelessness and negligence of plaintiff—Payment after last day, no bar to sale—Order to accept payment, not exemption from sale—Exemption to be absolute—Instalment, meaning of, in S. 2.

In a suit to set aside a revenue sale in the Civil Court, hardship is a matter which cannot govern the decision of the Court, as the Revenue authorities alone have the power to set aside a sale on the ground of hardship under S. 26 of Act XI of 1859.

Where there had been gross carelessness on the part of the plaintiff in a suit to set aside a revenue sale, and, owing to the fact that the plaintiff's co-sharers had defaulted in payment of the previous *kist*, he had every reason to expect default in the current *kist*, but never looked for it till fourth day before the sale, and when he had got orders for payment to be accepted he did not follow them up but dawdled until in the end the estate was sold before he could produce the *chalan*:—

Held, that, as the plaintiff was not as diligent as he ought to have been in the payment of the arrears, the sale could not be set aside.

The fact of payment of the revenue after the latest day is no bar to the sale of a revenue-paying property.

An order under S. 18 of the Revenue Sale Law should be an absolute exemption, and not an order which may have effect as an exemption or not, according to what may happen, or be done, afterwards. The reason for the exemption must be recorded at the time. An order of the Collector to accept payment does not amount to an absolute exemption such as is contemplated by S. 18 of Act XI of 1859 (a).

S. 2 of Act XI of 1859 refers to the *kist* or instalment by which the settlement and *kistbandi* of a *mahal* have been regulated, and not the *kist* or instalment noted in the Collectorate Touzi Department. **Radha Kussen Roy v. Radha Kanta Dutt**, 7 Ind. Cas. 130.

BRETT and VINCENT, JJ.

Reference:—(a) 17 C. 809 (P.C.) 17 I.A. 57, P.

(3) Ss. 5, 6, 33—*Pulbandi or embankment charges—Sale for arrears of pulbandi, no sale for arrears of land revenue.*

A sale of an estate for arrears of embankment charges (*pulbandi*) is not a sale for arrears of

2.—Bengal Acts—(Continued).**Act XI of 1859 (Revenue Sale Law)—(Ctd.).**

land revenue, and it is not competent to the Collector to hold such a sale under Act XI of 1859. **Harl Dasi Debi v. Dharaj Chandra Bose**, 7 Ind. Cas. 43.

HOLMWOOD and SHARFUDDIN, JJ.

(3-a) S. 6 See No. 3, *supra*.

(4) Ss. 6, 7, 33—*Sale-notification, mis-statement of proprietor's name in—Irregularity—Service of notice in wrong mahal, if may be proved—Act VII (B. C.) of 1868, Ss. 8, 11.*

Where a mis-statement of the name of the proprietor in a sale-notification issued under S. 6 of Act XI of 1859 has misled intending bidders, it is irregularity such as is contemplated by S. 33 of the Act (a).

S. 8 of Act VII (B.C.) of 1868 would prevent a plaintiff in a suit to set aside a sale for arrears of revenue, from proving that there was irregularity in the serving or posting of the notice required by the provisions of S. 11 of the Act, but it would not prevent him from proving that the notice has been served in the wrong mahal in contravention of the Act. **Raj Yani Dassi v. Ganesh Proshad**, 14 C.W.N. 626 = 5 Ind. Cas. 650.

BRETT and SHARFUDDIN, JJ.

Reference:—32 C. 111 = 8 C.W.N. 757, D.

(4-i) S. 7. See No. 4, *supra*.

(4-ii) S. 18. See No. 2, *supra*.

(4-a) Ss. 22, 37—“*Purchaser*,” meaning of—*Adverse possession—Incumbrance—Thak map—Evidence of possession and title—Specified land included in estate at thak survey—Presumption that it was included within estate at Permanent Settlement, does not arise as matter of law.*

The expression “*purchaser*” in S. 37 of the Revenue Sale Law, Act XI of 1859, does not mean the certified purchaser only, that is, the term is not confined to the person who has been declared the purchaser of the estate under S. 22 of the Act (a).

An adverse possessor is an encumbrancer within the meaning of S. 37 (b).

A *thak* is valuable evidence of possession, and as evidence of possession, it is also valuable evidence of title (c).

But this principle is not directly applicable to the case where the *thak* papers show on the

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Ctd.).

face of them that, although the lands in dispute were surveyed as part of the estate of the predecessor of the plaintiff, yet they were at the time in the possession of the predecessors of the defendant.

It cannot be affirmed as a proposition of law that merely because certain specified lands were included in an estate at the time of the *thak* survey in 1859, they must have been included within that estate at the time of the Permanent Settlement. It is open to the Court to draw such inference from all the surrounding circumstances (d). **Molzuddi Biswas v. Ishan Chandra Das**, 7 Ind. Cas. 849.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—(a) 1 C.L.J. 579, R. (b) 25 C. 167, F. (c) 22 C. 252; 30 C. 291; 5 Bom. L.R. 1; 7 C.W.N. 193; 30 I.A. 44, F. (d) 30 C. 291; 5 Bom. L.R. 1; 7 C.W.N. 193; 30 I.A. 44; 9 C.W.N. 383; 3 C.L.J. 316, F.

(4-b) S. 26. See No. 2, *supra*.

(4-c) S. 33. See Nos. 3 and 1, *supra*.

(5) S. 37—*Irregularly settled estate—Bengal Government—Indemnity Regulation (XI of 1882)*. S. 34—*Representation—Entire estate in Collector's rent roll*.

Under S. 34 of Reg. XI of 1882, the Governor-General in Council could, on a proper representation being made, order a new allotment of the *jamma*, if such representation was made within ten years after the separation of the estate. Where no such representation was shown to have been made, and the estate actually continued in the Collector's rent roll as an entire estate paying separate revenue to Government, the provisions of S. 37 of Act XI of 1859 applied. **Rai Mohan Saha v. Sashanka Mohan Roy**, 12 C.L.J. 407.

BANKERJEE and RAMPINI, JJ.

(5-a) S. 37—*Garden, what constitutes—Elements to be considered—Question of fact—Second Appeal—C.P.C. (Act V of 1908), S. 100, O. XXI, r. 31—Judgment of appellate Court—Reasons for decision*.

Whether there is a garden in the land so as to bring the case within Excep. 4 of S. 37 of the Revenue Sale Law is a question of fact.

But the determination of the question, whether there is a garden or not, is dependent upon several elements which should be taken into consideration, namely, *first*, the number of trees on the land; *secondly*, their relative

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Ctd.).

situation; *thirdly*, their number in relation to the area covered by them; and *fourthly*, the classes to which they belong.

Where the lower appellate Court had not directed its attention to any of these elements, but had laid down a general rule that, because there were only some fruit trees, they did not make the land a garden:

Held, that its finding³ could be interfered with in second appeal (a).

If there is only a limited number of trees on a very large area, they may not constitute a garden; but if there is a large number of trees, especially fruit trees, on a limited area, they may constitute a garden.

If a portion only of the disputed land is covered by a garden, the proper course to follow is not to dismiss the suit in its entirety, but to make a partial decree (b). **Sagore Nath Bode v. Rakhai Dasi Debi**, 7 Ind. Cas. 912.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—(a) 12 C. 327; 3 C.W.N. 212, R. (b) 9 C.W.N. 852, R.

(5-b) S. 37. See No. 4 a, *supra*.

(6) S. 37, *Excep. (4) and Proviso—Lease—Dwelling house—Garden—Protection from eviction—Purchaser at revenue sale*.

An occupier of the land, which forms part of an estate sold for arrears of Government revenue, cannot claim protection under Excep. 4 of S. 37 of the Revenue Sale Law, unless he can prove that there was a lease for the purposes mentioned in the exception and that the dwelling-house was of a permanent character (a).

Pet Doss, J.—The existence of a few trees scattered over the land does not comply with the requirements of the condition of the fourth exception to S. 37 of the Revenue Sale Law. **Basant Kumari Debi v. Kali Tara Dassy**, 7 Ind. Cas. 327.

SHARF-UD-DIN and DOSS, JJ.

References:—(a) 3 C.W.N. 212; 9 C.W.N. 852, F.

(7) Ss. 40, 41. See TRANSFER OF PROPERTY ACT, No. 49, 14 C.W.N. 186.

(7-a) S. 41. See No. 7, *supra*.

(8) S. 54—*Attachment, if an incumbrance—Sale for arrears of revenue, if alienation by proprietor*. See LIS PENDENS, No. 1, 14 C.W.N. 677.

2.—Bengal Acts—(Continued).**Act VII of 1868 (Recovery of Arrears of Land Revenue).**

(1) Ss. 6, 11.—Irregularity—Service of notice in wrong mehal, if may be proved. See ACT XI OF 1859 (REVENUE SALE LAW), No. 4, 14 C.W.N. 626.

(2) S. 11. See No. 1, *supra*.

Act VI of 1870 (Village Chowkidari).

S. 50.—Resumption and transfer of Chowkidari Chakran lands—Rights of Patnidars and Darpatnidars. See CHOWKIDARI CHAKRAN LANDS, No. 1, 37 C. 57.

Act V of 1875 (Bengal Survey).

(1) S. 41—Crim. Pro. Code (Act V of 1898), Chap. XII—Competent Court—Survey authorities.

An order by the Survey authorities under S. 41 of the Bengal Survey Act has the force of a Civil Court decree and is therefore tantamount to an order passed by a competent Court as provided for in Chap. XII of the Crim. Pro. Code. On such an order being passed with respect to any lands attached under S. 146, Crim. Pro. Code, they should be released from attachment. **C. T. Ambler v. Shah Somi Ahmed**, 11 C.L.J. 417.

STEPHEN and CARNDUFF, JJ.

Act VI of 1876 (Chota Nagpur Encumbered Estates).

(1) *As amended by Act (III B.C. of 1909), Ss. 3, 12—“Civil Court,” meaning of—Whether includes Revenue Courts—Stay of proceedings while estate declared encumbered—Rent decree—Limitation.*

S. 3 of the Chota Nagpur Encumbered Estates Act enacts that, as soon as an estate is taken charge of under the Act, all proceedings pending in Civil Courts in respect of the debts of the disqualified owner shall be barred; and under S. 12 of the Act, the debts barred under S. 3 are revived when the estate is released.

Held, that the words “Civil Court” are comprehensive enough to include the Revenue Court deciding rent suits and executing rent decrees (a).

A decree-holder obtained decree against the judgment-debtor from the Revenue Court for arrears of rent on April 19, 1905. The estate of the judgment-debtor was in charge of the Encumbered Estates Department from May 23, 1906 to April 21, 1908 on which last date it was released. The decree-holder applied for execution of his decree on February 13, 1909 :

2.—Bengal Acts—(Continued).**Act VI of 1876 (Chota Nagpur Encumbered Estates)—(Concluded).**

Held, that the application was quite within time. **Maharaj Protap Udai Narain Shahu Deo v. Thakur Madan Mohan Nath Shahu**, 7 Ind. Cas. 787.

CHATTERJEE and RICHARDSON, JJ.

References :—(a) 9 C. 295 ; 12 C.L.R. 361 ; 9 I.A. 174, R.

Act VII of 1876 (Land Registration).

(1) S. 26—Effect. See ACT VIII OF 1885 (BENGAL TENANCY), No. 29, 11 C.L.J. 147.

(2) S. 78—“Proprietor,” meaning of—Section not applicable where lands comprised in number of estates in one of which alone landlord is interested.

The proprietor mentioned in S. 78, Land Registration Act, is the proprietor of one estate, within the ambit of which the lands in possession of the tenants are comprised, and the section has no application to cases where the lands in occupation of the tenants are comprised in a number of estates in or more of which alone the landlord is interested. **Rakhal Das Adhya v. Maharaja Bahadur Sir Prodyot Kumar Tagore**, 6 Ind. Cas. 121.

MOOKERJEE and TEUNON, JJ.

References :—30 C. 773 ; 30 C. 880, D.

(3) Ss. 78, 81—Rent, suit for—Landlord's name not registered—Written contract.

A landlord, who has not had his name registered under the Land Registration Act, is not precluded from recovering rent from his tenant who has taken a lease of the land in writing, which document contains a contract to pay rent. S. 79 of the Act is controlled by S. 81. **Bhugwan Das v. Raghunath Sahai**, 11 C.L.J. 477.

HARRINGTON and CHATTERJEE, JJ.

(4) S. 81. See No. 1, *supra*.

Act VIII of 1876 (Bengal Estates Partition).

(1) Ss. 111, 149—Suit for declaration of title and fixity of rent—Prior Revenue proceedings under the Estates Partition Act—Whether jurisdiction of Civil Court excluded—Scope and effect of S. 111—Mirasi or permanent tenure—Circumstances leading to the inference of the existence of such tenure—Fixity of—Rent—Separate suit.

Plaintiff instituted the present suit for a declaration of his title as a *Mirasdār* in respect

2.—Bengal Acts—(Continued).

Act VIII of 1876 (Bengal Estates Partition) —(Continued).

of a portion of land in a taluk of which plaintiff and the defendants are co-owners, and also for a declaration that the rent was fixed in perpetuity. In the course of prior proceeding for partition of the estate by the revenue authorities under the Estates Partition Act (Bengal Act VIII of 1876), the present plaintiff set up title as *Mirasdar* in respect of the land now in dispute, and the Collector came to the conclusion that the *miras* set up by the plaintiff was not proved. It was contended on behalf of the defendants that the order of the Collector was made under S. 111 of the Act and that the suit was not maintainable under S. 149 of the Act.

Held, that S. 111 did not apply, because neither the existence of a permanent tenure nor the fact that the rent of the tenure was fixed in perpetuity was admitted.

S. 111 provides for cases of permanent intermediate tenures, and prescribes the mode in which the partition is to take place when the fact of such tenures is established.

Held, also, that S. 149 does not exclude the jurisdiction of Civil Courts in matters which involve a question of title (a).

If, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It would be unreasonable to hold that a party, who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings.

Where the tenure had been in existence for at least seventy five years prior to the commencement of the suit, and the plaintiff was in undisturbed possession of the lands in dispute from the date of his purchase up to the time when, in the partition proceedings, the existence of the tenure was denied by his co-sharers, and, on the conveyance executed in favour of the plaintiff, his vendors asserted that they had a *miras* right in respect of the lands in dispute.

Held, that, under such circumstances, the inference is perfectly just that the tenure was of a permanent character (b).

2.—Bengal Acts—(Continued).

Act VIII of 1876 (Bengal Estates Partition) —(Concluded).

The only effect of the decree in favour of the plaintiff in this suit is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose. **Janaki Nath Chowdhury v. Kali Narain Chowdhury**, 37 C. 662.

MOOKERJEE and TRUNON, JJ.

References:—(a) 36 C. 726, R. (b) 32 C. 51; 34 C. 602, R.; 21 C. 196, D.

(2) S. 149. See No. 1, *supra*.

Act I of 1879 (B.C.) (Chota Nagpur Landlord and Tenant Procedure).

(1) S. 6—*Non-occupancy raiyat, position of, after notice to quit—Trespasser—Occupancy right*.

After the service of a valid notice to quit a non-occupancy raiyat holding land under the Chota Nagpur Landlord and Tenant Procedure Act of 1879 became a trespasser, and the fact that when the suit for ejectment consequent upon the notice was instituted, the raiyat had been already holding the land for twelve years did not entitle the raiyat to claim occupancy rights (a). **Nathun Ram v. Raja Paresh Nath Singh**, 11 C.W.N. 297 3 Ind. Cas. 436.

CONE and RYVES, JJ.

References: (a) 1 W.R. 119; 8 W.R. 501; 9 W.R. 513; 1 W.R. 21; 15 W.R. 133, *considered*.

Act IX of 1880 (Bengal Cess).

(1) S. 4—*Hat, profits from, not liable to Road cess—Rule of Board of Revenue to the contrary, ultra vires—Payment of road-cess on hat by landlord not recoverable from tenant*.

The profits derived from a *hat* cannot be said to be rent or revenue or annual value of land within the meaning of S. 4 of the Bengal Cess Act, and are, therefore, not liable to road-cess (a). Therefore, a landlord who pays road cess upon such profits cannot recover it from his tenant.

The Rule of the Revenue Board, authorizing the assessment of *hats*, being at variance with the provisions of the Bengal Cess Act, is *ultra vires* (b). **Surajdeo Narain v. Mackenzie**, 5 Ind. Cas. 254.

CHATTERJEE, J.

References:—(a) 6 C.L.J. 342; 11 C.W.N. 1053 (F.B.), F. (b) 28 C. 637, F.

2.—Bengal Acts—(Continued).

Act III of 1884 (Bengal Municipal).

- (1) *Ss. 46, 112, 113, 114, 351-A. Model Rules, Rule 33—Appointment of paid Assessor, whether valid—Question of appointment raised as amendment and lost—Raising of the same question as substantive proposition within six months—Validity of.*

At a meeting of the Municipal Commissioners of a certain Municipality, the question of appointing a paid Assessor was raised as an amendment which was lost. Within six months from that date, the question was again raised as a substantive proposition which was carried. An Assessor was appointed accordingly, who revised the assessment of the plaintiff, which was confirmed by the appeal committee under S. 114 of the Bengal Municipal Act. The plaintiff brought this suit, to have the assessment of his holding declared void as being made by an assessor appointed in contravention of law :

Held, that the appointment of a paid assessor had not been " finally disposed of " at the first meeting, within the meaning of Rule 33 of the Model Rules under S. 351-A of the Act ; that, therefore, its reconsideration at the second meeting was permissible ; that the validity of the determination of the Appeal Committee could not be impeached, and that the plaintiff's suit must fail. **Chairman of Chittagong Municipality v. Jogesh Chandra Rai**, 3 Ind. Cas. 1 = 37 C. 44.

CHITTY and CARNDUFF, JJ.

References :—S.A. No. 2499 of 1906, decided on April 1, 1908, *F.*

- (2) *S. 85—Arable land—Assessment—Court when can override plain language of statute—Proviso, use of.*

A parcel of arable land, occupied as such, is a holding and liable to be rated under the Bengal Municipal Act, 1884.

In order to justify a Court in over-riding the plain language of a statute by reference to its spirit and general tenor, the argument must be cogent and convincing.

A proviso may be used as a guide in the selection of one or other of two possible constructions of the words to be found in an enactment, where there is doubt as to its scope or as to the proper view to be taken of it. **Mohadeb Aon v. Chairman, Howrah Municipality**, 11 C.L.J. 524.

MOOKERJEE and CARNDUFF, JJ.

Reference :—L.R. (1896) A.C. 647, *F.*

2.—Bengal Acts—(Continued).

Act III of 1884 (Bengal Municipal)—(Ctd.).

- (2-a) *S. 112. See No. 1, supra.*
 (2-b) *S. 113. See No. 1, supra.*
 (2-c) *S. 114. See No. 1, supra.*
 (3) *S. 116—Assessment of Municipal rates—Suit to declare it erroneous, as being based on wrong valuation—Maintainability.*

The Civil Court cannot interfere in matters regarding the amount of assessment of tax made by a Municipality, jurisdiction in such matters having been withdrawn from it by S. 116 of the Bengal Municipal Act.

Where the assessment by the Municipality was sought to be set aside on ground that the same had not been made upon a proper valuation of the holding, in that the Assessor had not inspected the holding and the plaintiff did not have a proper hearing before the Objection Committee,

held that the Civil Court could not interfere on these grounds. **The Chairman, Municipal Board, Chapra v. Basudeo Narain Singh**, 11 C.W.N. 437 = 5 Ind. Cas. 321 = 11 C. L.J. 400 = 37 C. 37.

HOLMWOOD and CHATTERJEE, JJ.

References :—1 C. 409, *F.* ; 3 C.W.N. 73 ; 27 C. 849, *D.*

(4) *S. 260 A—Agreement with Municipality to officiate as priest—Specific performance—License to employ cremation priest if can be granted. See C.P.C. (1908), No. 10, 12 C.L.J. 74.*

- (4-a) *S. 351-A. See No. 1, supra.*

(5) *S. 363—Notice before suit against Municipality—Premature institution of suit—Objection not taken in written statement but in course of argument.*

The plaintiff's cause of action against a Municipality accrued on August 30 ; he served the required notice under S. 363 of the Bengal Municipal Act on October 28, and instituted the suit on November 28, on which date the plaint was returned for amendment, and it was again presented on December 1. The objection that the suit was premature was not taken in the written statement but in the course of argument ;

Held, that, if the suit be considered to have been instituted on December 1, the suit was barred under the second paragraph of S. 363, and if it be considered to have been instituted on November 28, it was premature by one day under the first paragraph.

2.—Bengal Acts—(Continued).**Act III of 1884 (Bengal Municipal)—(Ctd.).**

Held, further, that a plea of want or insufficiency of notice may be taken in the course of argument though not taken in the written statement. **Bisambhar Lal v. Chairman of the Municipal Board of Chapra**, 5 Ind. Cas. 81.

TEUNON, J.

References :—5 C.L.J. 148; 34 C. 257, D.; 24 C. 306; 25 A. 187, *Relied on*.

(6) S. 363—Limitation. See MALICIOUS PROSECUTION, No. 2, 6 Ind. Cas. 675.

Act VIII of 1885 (Bengal Tenancy).

(1) *Consideration—Title-deed of plaintiff—Right of stranger to impugn—Right of defendant sued in ejectment to impugn—Pleadings—Record-of-rights—Entry in descriptive column—Settlement Officer, power of, to declare jointness of tenants—Construction of document.*

Although a stranger cannot impugn the validity of a title-deed on the ground that no consideration passed, yet a defendant, who is sued in ejectment, can put the plaintiff to the proof of his title.

The Bengal Tenancy Act does not authorize a Settlement Officer to make any declaration as to the jointness or separateness of tenants, in the column which is set apart for their names.

Therefore, where, in the descriptive column in a record-of-rights, it is stated that one J and his two nephews are the tenants *Bahissa Brabar*.

Held that the expression does not mean that the three are the tenants in equal shares, and that the nature of the tenancy is changed into one of common tenancy, but only means that the first name is the uncle's and the following two names are the nephews', and that there are only two shares in the *jote* and not three. **Har Lal Raut v. Jai Lal Raut**, 5 Ind. Cas. 291.

HOLMWOOD and CHATTERJEE, JJ.

(2) *Tenure—Transferability—Purchasers from same tenant—Competency to question validity of transfer.*

A licensee from some of the representatives of a tenant is not entitled to question the validity of the purchase from some other representative of the same tenant. **Tamij Mandal v. Golam Rabbani Biswas**, 7 Ind. Cas. 720.

MOOKERJEE and TEUNON, JJ.

References :—11 C.W.N. 76; 6 C.W.N. 624; 2 C.W.N. cclxxix, *Rel.*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

(3) Ss. 3 (7), 5 (1), 65—*Tenure—Tenureholder—Interest in land—Sarbarakari patta—Construction—Permanent tenure between zamindar and patnidar, creation of, whether valid.*

If a *pattah* do not confer on the lessee any interest in land, it does not create a tenure.

Where a zamindar gave a *sarbarakari jamai* settlement of certain *putni mehals* by a *pattah*, which conferred on the person to whom the *pattah* was given all the powers which the zamindar had to realise the rents payable by the *patnidars*, including the power of suing the latter using the zamindar's name: *Held*, that the zamindar merely made arrangements for the collection of rents; that he did not create any interest in land as that of a *tenureholder* in the *sarbarakar*, and that, what was intended to be created was a personal obligation between the parties, and that the *sarbarakar* could not maintain a suit for rent against the *patnidar*.

Obiter dictum : A zamindar cannot lawfully create a permanent tenure between his own interest and a *putni taluk* under him. **Bibi Jarraw Kumari Saheba v. Hanifuddin Akanda**, 4 Ind. Cas. 471 = 14 C.W.N. 389.

CASPERSZ and DOSS, JJ.

(4) S. 3 (9), Sch. III, Art. 3. See LANDLORD AND TENANT, No. 13, 5 Ind. Cas. 397.

(5) Ss. 3 (13), 15, 16—“*Succession*”—“*Representation*”—*Suit by administrator not barred under S. 16.*

Ss. 15 and 16 of the Bengal Tenancy Act do not refer to the case of representation, but to that of beneficial succession.

Therefore, a suit for arrears of rent brought by the surviving administratrix to an estate is not barred by virtue of the provisions of Ss. 15 and 16 of the Bengal Tenancy Act. **Bipro Das Khasnavis v. Pachi Bibi**, 5 Ind. Cas. 434.

WOODROFFE, J.

Reference :—3 C.W.N. 371, R.

(5-a) S. 5 (1). See No. 3, *supra*.

(6) S. 5 (2). See CHARIRAMNA HOLDINGS, No. 1, 14 C.W.N. 372.

(7) S. 5, cl. (5)—*Tenure or holding—More than 100 bighas—Presumption—“Lands to be brought into cultivation,” meaning of—Character of holding, how to be determined.*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

The words of S. 5, cl. (5) of the Bengal Tenancy Act, afford no ground for holding that the fact that the quantity of the land exceeds 100 *bighas* is conclusive evidence that the land forms a tenure. The final determination of the question depends upon the facts as disclosed in each case (a).

In determining the question of the character of the holding, not only the origin of the tenancy should be taken into consideration, but also the subsequent conduct of the parties in regard to the land.

Where 200 *bighas* of jungle land were leased for the purpose of being brought into cultivation: *Held*, that the words would not necessarily imply that the tenant was to bring the lands under cultivation himself or by members of his own family or by his servants, and that the intention might be to bring under cultivation by establishing tenants thereon.

Where the original area of jungle lands taken by a tenant was considerably more than what could be cultivated by him or by members of his family or by hired servants or with the aid of partners, and the tenant himself did not appear to be a man of the cultivating class, and where the subsequent settlements were also of large area and the total amount of land exceeded 1,300 *bighas*: *Held*, that the lands were taken as a tenure. **Midnapur Zemindary v. Sham Lal Mitra**, 6 Ind. Cas. 362.

BRETT and SHARFUDDIN, JJ.

Reference:—(a) 10 C.W.N. clxiv, F.

(8) S. 7—Tenure—Enhancement—Permanent tenure, evidence of—Second appeal—Question of law—Nature of tenancy—Civ. Pro. Code (Act V of 1908), S. 100.

In a suit for enhancement of the rent of a tenuro, it was proved that the object of the lease forming the tenure was the realisation of rent from the tenants and the reclamation of jungle lands, that the conduct of the parties for more than sixty years showed that, notwithstanding one transfer and several successions, the same rate had been maintained, that there was a covenant for the assessment of rent at the same rate upon excess lands found upon measurement, and that the rent was progressive:

Held, that an inference of permanency as to the rate of rent was legitimate (a).

The question as to the nature of a tenancy is a question of law which can be dealt with by

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

the High Court in second appeal (b). **Ram Dayal Giri v. Midnapur Zemindary Co., Ltd.**, 7 Ind. Cas. 785.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 1 C.L.J. 572, F. (b) 8 C.W. N. 774 (F.B.), F.

(9) Ss. 10, 11, 155—Lease—Condition restraining alienation—Validity—Breach of condition—Right to re-enter—Whether S. 10. Transfer of Property Act, is impliedly repealed by. See LEASE, No. 15, 6 Ind. Cas. 685.

(9 a) Ss. 10, 89, 155, 178, (1) (c). See LANDLORD AND TENANT, No. 50, 8 Ind. Cas. 44.

(9-b) S. 11. See No. 9, *supra*.

(9-c) S. 15. See No. 5, *supra*.

(10) Ss. 15 and 16—Joint landlords, one of whom failed to comply with the requirements of S. 15—Effect—Civ. Pro. Code (Act V of 1901), S. 115—Charter Act (24 and 25 Vict., Chap. 104), S. 15.

S. 16 of the Bengal Tenancy Act was not intended to defeat in its entirety a suit brought by one of several landlords, who is not in default in respect of the requirements of S. 15, merely by reason of the failure of his co-sharers to comply with those requirements.

Where, a co-sharer of the plaintiff landlord not having complied with the requirements of S. 15 of the Bengal Tenancy Act, the plaintiff brought a suit against the tenants for the entire rent, making the defaulting co-shares *pro forma* defendants;

held—that the plaintiff was not entitled to get a decree in respect of the entire rent payable jointly to himself and his co-sharer, but a decree should be made in favour of the plaintiff in respect of the share of rent payable to himself, and if his co-sharer does not comply with the requirements of S. 15 before the decree is made, the claim in respect of the share of rent payable to the co-sharer should be dismissed.

Where the lower Court dismissed the plaintiff's suit for rent in its entirety, on the ground that, his co-sharer not having complied with the requirements of S. 15 of the Bengal Tenancy Act, the whole suit must fail:

Held—That the High Court can interfere in such a case under S. 115, Civ. Pro. Code, 1908,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

and under S. 15 of the Charter Act. **Tarini Charan Banerjee v. Chandra Kumar Dey**, 11 C.W.N. 788.

MOOKERJEE and TEUNON, JJ.

- (11) *Ss. 15, 16, 17—Receiver in partition suit—Rent suit by Receiver—Whether barred under S. 16.*

A Receiver appointed in a partition suit is not a person who has become entitled to a permanent tenure by succession within the meaning of S. 16 of the Bengal Tenancy Act, and the terms of that section do not bar a suit for rent by the Receiver. **Harendra Nath Mukherjee v. Abinash Chandra Banerjee**, 7 Ind. Cas. 761.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—6 Ind. Cas. 416; 12 C.L.J. 252, R.

(11-a) S. 16. See Nos. 5, 10 and 11, *supra*.

(11-b) S. 17. See No. 11, *supra*.

- (12) *Ss. 20, 29—Holding, sub-division of—Landlord and Tenant—Tenant, several holdings owned by one—Tenancy, creation of new.*

It is open to a landlord to include in one suit claims for rent of several holdings held under him by the tenant-defendant. The decree in such a suit however can be enforced only as a money decree and the execution purchaser, does not acquire the holdings with power to annul incumbrances.

S. 20, sub-sec. 7 of the Bengal Tenancy Act does not apply to a suit for rent which is not a proceeding under the Act within the meaning of the section.

S. 29, proviso controls merely clause (a) and not clause (b) of the section. The fact therefore that rent at the enhanced rate has been realized for three years is no answer to the defence that it has been illegally enhanced in contravention of S. 29.

When lands of a tenancy have been sub-divided, if a question arises whether, new tenancies have been created, the answer must depend upon the intention of the parties; no inflexible rule apart from intention can be laid down. **Mulluck Chand Das v. Satis Chandra Das**, 11 C.L.J. 56=3 Ind. Cas. 306=14 C.W.N. 335.

MOOKERJEE and CARNDUFF, JJ.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

- (13) *Ss. 20, cl. (7), 43, 180, sub-sec. (1)—Chur land—Non-occupancy raiyats—Enhancement of rent—Agreement with landlord in contravention of latter's covenant with Government if enforceable—Stranger benefited by covenant if may enforce it.*

Quere—Whether a stranger to a contract is entitled to claim performance of a covenant inserted therein for his benefit or protection.

The benefit of such a covenant, if enforceable, may be waived by the party benefited.

Where a settlement-holder of Government *Khas mehal* lands by his *kabuliyat* undertook not to enhance the rents of the tenants,

held—That tenants, who entered into agreements with the settlement-holder for payment of higher rents, waived the benefit of the covenant and were not entitled to set it up in defence, in suits for enhanced rents based on these agreements (a).

The presumption under S. 20, cl. 7 of the Bengal Tenancy Act, that a raiyat has continuously held the land as such for 12 years, arises only in proceedings under Bengal Tenancy Act, but a suit for rent is not a proceeding under that Act (b).

Tenants holding *chur* lands are liable, until such time as they have acquired occupancy rights therein, to pay rents at rates agreed upon between them and the landlord irrespective of the provisions of S. 43. The introductory words of sub-sec. (1) of S. 180 govern the whole of the remaining sub-section, including the clause about payment of rent during the period preceding the acquisition of a right of occupancy, so as to exclude the operation of S. 43 of the Act to such cases. **Jehander Baksh Mullick v. Ram Lal Huzra**, 14 C.W.N. 470=5 Ind. Cas. 565=11 C.L.J. 364.

MOOKERJEE and TEUNON, JJ.

References:—(a) 32 C. 463, F. (b) 12 C.W.N. 249; 35 C. 331; 7 C.L.J. 139; 11 C.L.J. 56, *relied on*.

- (14) *Ss. 22, 49—Meaning of "Otherwise" in S. 22. See OCCUPANCY HOLDING, No. 3, 5 Ind. Cas. 264.*

- (15) *Before amendment by Act I (B.C.) of 1907, Ss. 22, 159—Purchase of occupancy jote by co-sharer landlord—Merger of occupancy right—Fresh acquisition of occupancy right, if takes place—Sale of holding for its arrears—Purchaser acquires non-occupancy right—Right to annul sub-lease.*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

Co-sharer landlords, having purchased an occupancy jote, do not, by twelve years' occupation of it after their purchase, acquire occupancy right in it. A purchaser of the jote, at a sale in execution of a decree for (16 as.) rent obtained against them, only acquires a raiyati holding without occupancy right.

Such a purchaser has power to annul incumbrances under S. 159 of the Bengal Tenancy Act.

A purchaser of a non-occupancy holding at a sale for its own arrears can avail himself of the general provisions of Chap. XIV of the Act, and if the previous tenants has sublet the land (which he is not prohibited by law from doing), the sub-lease can be annulled by the purchaser under S. 159. **Ram Lal Sukul v. Bhela Gazi**, 14 C.W.N. 814 = 6 Ind. Cas. 370.

WOODROFFE and RICHARDSON, JJ.

(16) S. 23—Occupancy raiyat—Use of land of holding—Impairing value or rendering unfit—Bandh—Digging tank—Making bricks—Effect. See CUSTOM (GENERAL), No. 1, 6 Ind. Cas. 291.

(17) S. 23—Tenant of homestead land—Right to cut and appropriate trees. See TREES, No. 1, 6 Ind. Cas. 796.

(18) S. 29—Enhancement of rent by addition of rent in kind.

S. 29 of the Act applies whether money-rent is enhanced in money or by the addition of a rent in kind. **Kishory Mohan Bose v. Sheik Uzir**, 14 C.W.N. 693 = 6 Ind. Cas. 335 = 37 C. 610.

JENKINS, C.J., and DOSS, J.

(19) S. 29—Enhancement of rent—Settlement of bona fide dispute. See DECISIONS, No. 1, 11 C.L.J. 106.

(19-a) S. 29. See No. 12, *supra*.

(20) Ss. 30, cls. (a) and (b), 31, cl. (b), 32, cl. (a), 39, cls. (1), (4) and (6)—Enhancement of rent, suit for—Existing rent below prevailing rent—Rise in prices of food crops—Comparison with average price list, obligatory on Court—Where prevailing rent in village is paid in contravention of S. 29, the rate in neighbouring villages to be considered—Revenue Officer—Local inquiry—What directions to be given by Court.

In a suit for enhancement of rent under S. 30, cl. (b) of the Bengal Tenancy Act, on the

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

ground of a rise in prices, it is obligatory on the Court to compare the average prices under S. 32, cl. (a) and to refer to the price list of staple food crops prepared under S. 39, cl. (1). It is illegal to dismiss such a suit without the comparison and reference imposed by the terms of the law.

Where enhancement is claimed on the ground that the existing rent is below the prevailing rent, under cl. (a) of S. 30, if the Court is satisfied that all the rent in the village should be excluded from consideration because it is fixed in a mode which contravenes the provisions of S. 29 of the Bengal Tenancy Act, then an enquiry should be directed, which will bring to light the prevailing rate of rent paid by occupancy raiyats for similar lands in neighbouring villages.

A Revenue Officer can hardly be expected to know the requirements of the Civil Courts, and it is proper that the Civil Court, in directing a local inquiry under cl. (b) of S. 31 of the Bengal Tenancy Act, should indicate to the Officer what it is that the Court precisely requires. **Nabin Chandra Saha v. Kula Chandra Dhur**, 6 Ind. Cas. 506 = 14 C.W.N. 914.

JENKINS, C.J. and DOSS, J.

(20-a) S. 31, cl. (b). See No. 20, *supra*.

(21) S. 32, cl. (a)—Decennial periods to be distinct.

The two decennial periods, mentioned in S. 32, cl. (a) of the Bengal Tenancy Act, ought to be entirely distinct, and should not even partially overlap each other. **Anoda Prosad Bhattacharjee v. Nibarani Dasi**, 5 Ind. Cas. 290 = 11 C.L.J. 380.

MOOKERJEE and TEUNON, JJ.

(21-i) S. 32, cl. (a). See No. 20, *supra*.

(21-ii) S. 39, cls. (1), (4), and (6). See No. 20, *supra*.

(21-iii) S. 43. See No. 13, *supra*.

(21-iv) S. 49. See No. 14, *supra*.

(21-a) Ss. 49, 65, 160 (c)—Injunction, suit for—Restraining defendant, as under-raiyat, from building pucca house—Permanent lease granted by raiyat to under-raiyat—Lease registered, rights of under-raiyat under.

The defendant, an under-raiyat of the plaintiff, was in occupation of *bastee* land under a written lease granted by the plaintiff and

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

purporting to be of a permanent character. The lease had been admitted to registration, notwithstanding the provisions contained in cl. (2) of S. 85 of the Bengal Tenancy Act.

The plaintiff sued for a perpetual injunction restraining the defendant from building a *pucca* house on the land and for an order for the demolition of a *pucca* plinth said to have been already built.

Held, that the plaintiff was not entitled to either of the reliefs prayed for, and that the fact that the lease would constitute a protected interest at a sale of the holding for arrears of rent was no reason why the defendant should be deprived of the right to build if he has that right under his lease.

Semle: The lease would be void and the defendant would be liable to be ejected under cl. (c) of S. 49, after due notice to quit, as an under-*rai*yat holding otherwise than under a written lease. **Sadhu Charan v. Sarbamangala Dasi**, 8 Ind. Cas. 65.

RICHARDSON, J.

(22) Ss. 49, 167—*Landlord and tenant—Incumbrance, avoidance of—Sale of several tenures together—Special incidents of sale under rent decree—Bona fide purchaser—Under-tenants, eviction of.*

A sale, it is to be invested with the incidents of a sale under the Bengal Tenancy Act, ought to be of single holdings and not of more than one holding jumbled together, and the mere fact of the purchaser being a *bona fide* purchaser would not invest the Court with authority to give him the title which would accrue only under a special procedure laid down in the Bengal Tenancy Act (a).

The procedure under the S. 49 of the Bengal Tenancy Act would have to be gone through in order to evict an under-tenant from year to year. **Gopal Chandra v. Basir Gazi**, 7 Ind. Cas. 17.

CHATTERJEE, J.

References:—(a) 34 C. 298; 6 C.L.J. 153; 11 C.W.N. 497, F.

(23) S. 50—*Presumption—Tenure—Amalgamation.*

No tenant can, after amalgamation of his separate tenures, claim the presumption given by S. 50 of the Act, if the holding is not shown to have been held in its entirety since the permanent settlement. **Ghanashyam Misser v. Kalanund Singh**, 6 Ind. Cas. 790.

HOLMWOD and SHARF-UD-DIN, JJ.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

(24) Ss. 50, 105—*Amalgamation of tenures—Uniform payment of rent for twenty years—Presumption of holding from permanent settlement.*

Where, in a proceeding under S. 105 of the Bengal Tenancy Act, it is found that the defendant is the owner of six separate tenures, which have been amalgamated into one after the permanent settlement, and uniform payment of rent for more than twenty years before the suit has been proved:

Held, that the presumption, which would have applied to the six different tenures if they had stood separately, would apply to the amalgamated tenure under S. 50 of the Bengal Tenancy Act. **Prithi Chand Lal Chowdhury v. Sheikh Hazari**, 5 Ind. Cas. 453.

CHATTERJEE, J.

References:—1 Ind. Cas. 4¹; 13 C.W.N. 410; 36 C. 287, D.

(25) Ss. 50, 105, 106, 109-A, cl. (3)—*Presumption of holding from permanent settlement—“Until the contrary is shown” meaning of—Proceeding under S. 105—Matter coming under S. 106—Bar of second appeal—Finding without consideration of evidence and without giving reasons—Civ. Pro. Code (Act V of 1908), S. 100—Proposal to party of fair rent.*

A tenant is entitled, even though the proceeding was taken under S. 105 of the Bengal Tenancy Act, to a second appeal, provided that in that proceeding, questions were raised and decided which properly come under the provisions of S. 106 (a).

Therefore, where in a proceeding under S. 105 the defendant raised the objection that he was a tenant holding at fixed rate, as that question involved the determination of his status as a tenant, which is a question coming under S. 106, a second appeal lies from the decision of the Special Judge.

The words “until the contrary is shown,” in S. 50 of the Bengal Tenancy Act, mean that either it must be shown that the rate had been raised at sometime after the creation of the tenancy and prior to the suit, or that the tenancy was created after the time of the permanent settlement, and do not cover any conduct of the tenant, that is, it cannot be found that the presumption has been rebutted by any conduct of the tenant.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

A finding of the lower Appellate Court, arrived at without any consideration of the evidence and without giving any reasons for differing from the findings of the first Court, cannot be accepted.

Where the Settlement Officer, without stating what rents he proposed as fair and equitable under S. 105, clause (5), took the consent of the tenant to accept whatever rent the Court would settle as fair and equitable:

Held, that the proceedings were not in accordance with law. **Choa Loll Mondal v. Maharajah Sir Rameshwar Singh Bahadur**, 5 Ind. Cas. 160.

BRETT and SHARFUDDIN, JJ.

References:—(a) 3 Ind. Cas. 449; 13 C.W. N. 1149; 10 C.L.J. 343 (F.B.), F.

(26) *Ss. 50 and 106—Presumption of fixity of rent—Suit to establish right without bringing suit under S. 106, whether maintainable.*

Where it is proved that certain holdings of certain tenants had been held at the same rents for periods of 27, 60 and 57 years respectively, and there was no evidence to prove that any different rents had ever been realised:

Held, that, apart from any presumption under S. 50 of the Bengal Tenancy Act, the status of the tenants must be held to be that of occupancy *raiya*s holding at fixed rents.

The failure of a person to institute a case under S. 106 of the Bengal Tenancy Act, for the purpose of correcting an entry in a record of rights, does not debar him from bringing a regular suit to establish his right. **Golab Misser v. Kumar Kalanand Singh**, 6 Ind. Cas. 217.

BRETT and SHARFUDDIN, JJ.

References:—11 C.W.N. 48; 28 C. 28, F.; 35 C. 1013; 12 C.W.N. 1032; 9 C.L.J. 322, dissented from.

(27) *Ss. 50, 111, 111-A—Suit for correction or alteration of record-of-rights, if maintainable—Whether such suit is one under Bengal Tenancy Act—Presumption under S. 50.*

After the final publication of the Record-of-rights, in which the plaintiffs were entered as tenure-holders without fixity of rent, they brought a suit for a declaration that the record was wrong and that they were *raiya*s with a fixed rent:

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

Held, that the suit was maintainable (a).

Although such a suit is for a declaration of right under the Specific Relief Act, it is nevertheless a suit authorised by and, therefore, under the Bengal Tenancy Act; and consequently the presumption under S. 50 applies. **Maharaja Sir Rameshar Singh Bahadur v. Raghunandhan Chowdhury**, 5 Ind. Cas. 266.

CHATTERJEE, J.

References:—(a) 35 C. 1013; 12 C.W.N. 1032; 9 C.L.J. 322, D.; 35 C. 176; 7 C.L.J. 103; 12 C.W.N. 122; 11 C.W.N. 48; 28 C. 28; 3 Ind. Cas. 639; 9 C.L.J. 83; 13 C.W.N. 111; 13 C.W.N. 181; 4 Ind. Cas. 577; 9 C.L.J. 284; 4 Ind. Cas. 54, *Relied upon*.

(28) S. 52—Scope—Abatement of rent when can be claimed. See CIV. PROC. CODE, (1882) No. 214, 6 Ind. Cas. 206.

(29) S. 60—Rent, suit for, maintainability of—Registered proprietor—Unexpunged registered mortgage—Land Registration Act (VII of 1876 B.C.), S. 26.

S. 60 of the Bengal Tenancy Act, read with S. 26 of the Land Registration Act, is no bar to a suit for rent by a registered proprietor, in the face of an unexpunged entry in the register in the name of a former mortgagee. **Syed Hasan Mustaab v. Mabar Mahto**, 11 C.L.J. 147 = 5 Ind. Cas. 163.

HOLMWOOD and CHATTERJEE, JJ.

(30) S. 65—Sale of tenure out and out for rent—Re-sale for previous arrears, whether valid—Limitation Act (IX of 1908), Sch. I, Art. 181—Right to make the application.

After a tenure has been sold out and out for the satisfaction of certain arrears, a portion of the same tenure cannot afterwards be sold for a second time for recovery of rent which had previously accrued

Where such a sale for a second time takes place, an application to have it set aside under O. XXI, Rule 91, of the Civil Procedure Code, is governed by Art. 181, Limitation Act, and time runs from the date when the right to make the application accrues. **Gopal Saran Narain Singh v. Mahomed Sheikh Ashham**, 6 Ind. Cas. 804 = 14 C.W.N. 1096.

BRETT and VINCENT, JJ.

(31) S. 65—Conflict with S. 17 (3) of the Putni Regulation—Rent—First charge. See REGULATION, VIII OF 1819 (PUTNI), No. 2, 6 Ind. Cas. 371.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

(31-a) S. 74—Kabuliat—Payment of interest in default. See *LEASE*, No. 23, 12 C.L.J. 593.

(31-b) S. 85. See No. 21-a, *supra*.

(32) S. 85 (6), (7)—“Incumbrance,” meaning of—Transfer of non-transferable holding—Effect. See *LANDLORD AND TENANT*, No. 6, 11 C.L.J. 16.

(33) *Ss. 86, 161—Incumbrance—Sale of part of holding—Surrender of part of holding, whether valid.*

Sale of a part of an occupancy holding is not an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act (a).

There is no bar to a part surrender of a holding by arrangement with the landlord as provided by cl. 7 of S. 86 of the Act.

Defendant No. 2 sold a portion of his non-transferable occupancy holding to defendant No. 1 who did not pay rent for the part purchased, and defendant No. 2 surrendered the portion sold to the plaintiff, his landlord, who brought a suit for ejectment of defendant No. 1 :

Held, that the landlord plaintiff was entitled to *khas* possession. **Ananda Mohan Roy Chowdhury v. Guru Dayal Saha**, 7 Ind. Cas. 19.

CHATTERJEE, J.

References :—(a) 5 Ind. Cas. 116 ; 11 C.L.J. 16 ; 14 C.W.N. 229, F.

(34) S. 87—*Specific Relief Act (I of 1877)*, S. 9—*Due course of law*.

A landlord, who proceeds to take possession of a holding after service of notice under S. 87 of the Bengal Tenancy Act, on the allegation that there has been an abandonment by the tenant, does so at his own risk. He cannot be said to take possession in due course of law, so as to bar a suit by the tenant for recovery of possession under S. 9 of the Specific Relief Act. **Suresh Chandra Mookerji v. Srimati Nesa Bibi**, 11 C.L.J. 433 - 6 Ind. Cas. 553.

MOOKERJEE and TEUNON, JJ.

(34-a) S. 89. See No. 9-a, *supra*.

(35) *Ss. 89, 155—Ejectment—Notice—Tenant—Transferee from tenant.*

Defendant No. 4 took a lease from the plaintiff, which provided that the tenant would not be entitled to alienate the land nor to place it

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

in possession of anybody else, and that, if the tenant acted in contravention of the condition, the landlord would be entitled to take possession without recourse to Court. The defendant No. 4 having alienated the land to defendants Nos. 1 to 3, the plaintiff brought a suit for ejectment, which was decreed. The defendants Nos. 1 to 3 appealed :

Held, that *Ss. 89 and 155* of the Bengal Tenancy Act were of no assistance to the appellants, as they were not tenants, and that, therefore, they were not entitled to any notice. **Buddhimanta Pramanik v. Sarat Chandra Banerjee**, 6 Ind. Cas. 147.

MOOKERJEE and CARNDUFF, JJ.

(36) *Ss. 91, 92—Application for requiring attendance of tenants at measurement of holdings by landlord—One application against several tenants if competent.*

S. 91 of the Bengal Tenancy Act, does not contemplate that there should be separate applications under that section by the landlord against each tenant.

An application by the landlord, with reference to the several tenants having holdings in the land which the zamindar desires to measure, is competent under the section. **Haji Shah Momtaz Hossain v. Raghu Nandan Sahu**, 14 C.W.N. 231 = 5 Ind. Cas. 153 - 11 C.L.J. 216.

BRETT and SHARFUDDIN, JJ.

(36-a) S. 92. See No. 36, *supra*.

(37) *As amended by Act III of 1898, S. 803, cls. (a), (c), (i), S. 106—Trespasser in possession of holding—Name erroneously recorded—Suit to declare him trespasser under S. 106—Amending of entry.*

The terms—“occupier” and “occupant” in cls. (a) and (c) of S. 102, were presumably added to cover the case indicated in clause (i) added at the same time. A purchaser of a non-transferable occupancy holding, being a trespasser, is not entitled to have his name entered in the record-of-rights under cls. (a) or (c) of S. 102 of the Bengal Tenancy Act.

Where such a person's name was recorded, *held*, that the Revenue Officer proceeding under S. 106 acted properly in adding a note to the effect that he was a trespasser. **Umedulla Sardar v. Ram Chandra Bhaduri**, 14 C.W.N. 812.

JENKINS, C.J. and DOSS, J.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

(37-a) S. 105. See Nos. 24 and 25, *supra*.

(38) Ss. 105, 106, 109 (before amendment by Act I, B.C. of 1907 or Act I, F.B. & A.C. of 1908)—*Suit to declare entry in record-of-rights erroneous, after decision under S. 105, if lies—Suit under S. 106, not exclusive remedy—Question of correctness of entries if should be raised under S. 105—Erroneous practice of revenue officers.*

A proceeding under S. 105 of the Bengal Tenancy Act (before amendment by Act I, B.C. of 1907 or Act I, F.B. & A.C. 1908), if properly conducted, should have dealt exclusively with the question of fair and equitable rent, the correctness of the entries in the record-of-rights as finally published being assumed for the purpose of such a proceeding. Questions as to the correctness of the entries could not therefore properly form the subject of an enquiry under S. 105 (a).

S. 109 of the Act clearly indicated that S. 106 did not provide an exclusive remedy against erroneous entries in the record-of-rights (b).

A decision in a proceeding under S. 105, in which no question as to the correctness of the entries was raised, would therefore be no bar to a civil suit questioning the correctness of the entries in the record-of-rights. **Pandab Dowari Das v. Ananda Kishun Chakrabutty**, 14 C.W.N. 897=7 Ind. Cas. 102=12 C.L.J. 195.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 37 C. 30 S.C.; 10 C.L.J. 543; 13 C.W.N. 1149 (1909); 35 C. 176 S.C.; 12 C.W.N. 122, R. (b) 35 C. 1013 S.C.; 12 C.W.N. 1032, diss.

(39) Ss. 105, 106, 109—*Defence taken to application under S. 105, "whether subject-matter of application under S. 105" within S. 109—Res judicata—Decision of matter under S. 106 given in proceeding under S. 105, whether res judicata.*

A defence taken to an application under S. 105 of the Bengal Tenancy Act that a certain land his *lakheraj* is not the subject-matter of an application made under S. 105 or 106 within the meaning of S. 109 as it stood before 1907; and a subsequent suit for declaration that the land was the *millik lakheraj* of the tenant-plaintiff is competent and not barred under S. 109.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

If the tenant pleads a bar to the settlement of rent, which can properly come under S. 106, without any apparent objection by the landlord, who is making the application, the decision is a competent one, but is open to second appeal. But the decision operates as *res judicata* so far as the question under S. 105 is concerned, that is, the question of the settlement of rent, and does not operate as *res judicata* in regard to the question whether the tenant has a *millik lakheraj*. **Misri Chowdhury v. Rameshwar Singh Bahadur**, 7 Ind. Cas. 71.

HOLMWOOD and SHARFUDDIN, JJ.

(40) Ss. 105, 109 (3)—*Second appeal—Failure of plaintiff to establish ground of enhancement—Decision settling rent—Sub-division of tenancy—Creation of new tenancies—Intention of parties.*

When, in a proceeding under the Bengal Tenancy Act, S. 105, the Special Judge has held that the plaintiff has failed to establish his grounds for asking for a settlement of rent at a higher rate, the decision is one settling a rent within the meaning of S. 109 (3) of the Act, and no second appeal lies to the High Court (a).

When the lands of a tenancy have been subdivided, if a question arises whether new tenancies have been created, the answer must depend upon the intention of the parties; no inflexible rule apart from intention can be laid down (b). **W. M. Grant v. Ram Rakhar Bhagat**, 6 Ind. Cas. 501.

HOLMWOOD and SHARF-UD-DIN, JJ.

References:—(a) 4 C.L.J. 138; 33 C. 837, F. (b) 3 Ind. Cas. 306; 14 C.W.N. 335; 11 C.L.J. 56, Appr.; 1 Ind. Cas. 4; 36 C. 287; 13 C.W.N. 411; 2 Ind. Cas. 415; 10 C.L.J. 45; 13 C.W.N. 962, R.

(41) *As amended by Act III (B.C.) of 1898, and before amendment by Act I (B.C.) of 1907, Ss. 105, 115—Ss. 50, 102 (b), 103-A, 103-B, 106, 107, 109-A, 111—Record-of-rights, final publication of—Landlord's application for settlement of rent of tenant entered as occupancy raiyat—Raiyat if may plead fixity of rent under S. 50—Question of status if may be raised in such proceeding—Second appeal.*

In proceedings by the landlord for settlement of rent under S. 105 of the Bengal

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

Tenancy Act as it stood before its amendment by Act I (B.C.) of 1907, the tenants were in practice allowed to take objections which would properly come under S. 106 of the Act; and when, in such a proceeding, the lower courts decided any such matter, a second appeal would be entertained by the High Court.

A tenant in such a proceeding is entitled to the benefit of the presumption of fixity of rent arising under S. 50 of the Bengal Tenancy Act from proof of uniform payment of rent for twenty years, S. 115 of the Act not displacing such a presumption in a proceeding under S. 105 or S. 106.

Quere:—Whether the words “recorded under this chapter” in S. 115 mean “recorded after all chances of amendment of the record under any other provision of the chapter are over, including a suit as contemplated by S. 111.”

The view expressed in 26 C. 617, that “S. 115 contemplates a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record-of-rights was framed” disapproved, as being opposed to the plain terms of the section. **Pirithi Chand Lal Chowdhry v. Sheik Basarat Ali**, 13 C.W.N. 1149 (F.B.) = 10 C.L.J. 343 = 3 Ind. Cas. 449 = 37 C. 30.

JENKINS, C.J., STEPHENS, MOOKERJEE, COXE and CHATTERJEE, JJ.

(42) S. 106—*Suit for declaratory decree—Court Fees Act, VII of 1870, Sch. II, Art. 17, cl. (3) and S. 7, sub-sec. IV, cl. (c).*

A suit under S. 106 of the Bengal Tenancy Act is a suit for a declaratory decree, and the Court-fee payable is Rs. 10, in all cases (a). **Satis Chandra Giri Mohant v. Gopal Chandra Rai**, 7 Ind. Cas. 627.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—(a) 5 Ind. Cas. 141; 11 C.L.J. 158, Diss.

(42-a) S. 106. See Nos. 25, 26, 37, 38 and 39, *supra*.

(43) Ss. 106, 109, 111 (a)—*Record-of-rights—Suit under S. 106, whether exclusive remedy—Suit only to correct or alter entries—Suit claiming other reliefs—Maintainability of suit in Civil Court.*

Although it may be that a suit solely for alteration and correction of certain entries made

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

in a record-of-rights would not lie in the Civil Court, yet a suit in which other reliefs also are claimed—a declaration that the land in dispute is the *lakheraj milik* land of the plaintiff and not *mal* land, and a declaration that the plaintiff had acquired the right of *milikdar lakherajdar* of the land by virtue of his adverse possession thereof for upwards of twelve years, and a declaration that certain of the entries were incorrect—is maintainable in the Civil Court. **Mukti Nath Thakur v. Hon'ble Maharaja Rameshur Singh Bahadur**, 7 Ind. Cas. 340.

WOODROFFE and TEUNON, JJ.

References:—12 C.W.N. 1032; 35 C. 1013; 8 C.L.J. 322, *dist.*; 6 Ind. Cas. 217; 12 C.L.J. 107; 14 C.W.N. 884; 7 Ind. Cas. 102; 14 C.W.N. 879, *Appr.*

(43-a) S. 109. See Nos. 38, 39 and 43, *supra*.

(43-b) S. 109 (3). See No. 40, *supra*.

(43-c) S. 109-A, cl. (3). See No. 25, *supra*.

(43-d) S. 111. See No. 27, *supra*.

(43-e) S. 111-A. See Nos. 27 and 43, *supra*.

(43-f) S. 115. See No. 41, *supra*.

(44) Ss. 116 as amended by Act III of 1819 (B.C.)—*Decision by Revenue Officer—Lakheraj or no lakheraj—Jurisdiction of Officer—Res judicata.*

The question whether the land is *lakheraj* or not is one which the Revenue Officer is not competent to decide under S. 106 of the Bengal Tenancy Act as amended by Act III of 1899 (B.C.); and, therefore, his decision on that question, being without jurisdiction, does not operate as a decree and is not binding as *res judicata* between the parties in a subsequent suit.* **Rowland Hudson v. Mahibir Tewari**, 5 Ind. Cas. 133.

HARINGTON and CHATTERJEE, JJ.

References:—21 C. 38 (F.B.), F.; 17 C. 721, D.

(44-a) Ss. 148-A, 158-B, sub-s. (2) 176—*Suit by co-sharer landlord for his share of rent, making co-sharer party and offering to raise valuation if anything found due to co-sharer—Decree for arrears due on account of holding—Claim not allowable in such case—C.P.C. (Act XIV of 1882), S. 278—C.P.C. (Act V of 1908), O. XXI, r. 58.*

Certain co-sharer landlords in a suit for rent stated that they had not been able to obtain precise information as to what might be due to their co-sharer whom they made *pro forma*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

defendant, but they had reason to believe that nothing was due to him, and that they consequently sued for what was due to themselves but they offered to increase the valuation of the suit if it should turn out in the end that rent was still due to their co-sharer. Neither the co-sharer nor the tenant entered appearance and an *ex parte* decree was passed.

Held, that, as the co-sharer did not appear, the plaintiffs were entitled to proceed on the assumption that nothing was due to him, and the decree, therefore, was a decree for the whole sum then due to the entire body of landlords, and the plaintiffs were entitled to treat the decree as one for arrears of rent in respect of the entire holding within the meaning of S. 170, sub-S. (1) of the Bengal Tenancy Act, so as to exclude the application of r. 58 of O. XXI of the C.P.C., 1908, and, therefore, no claim could be allowed to be made to the holding which was put up for sale in execution of the decree. **Nanda Lal v. Kala Chand**, 8 Ind. Cas. 50.

MOOKERJEE and TERNON, JJ.

(45) *S. 153—Second appeal—Determination of annual rent—Decree not at admitted rate but as a lesser one—Admitted rate—Admission to be taken as a whole.*

Where the lower appellate Court gives a decree to the plaintiff in a suit for arrears of rent, not at the rate admitted by the tenant, but at a lesser rate which is not the *jama* set up by the defendant-tenant, a second appeal lies to the High Court (a).

In decreeing a rent suit at the admitted rate, it is incumbent on the Court to accept the admission of a tenant as a whole, regard being had to the question whether the land in the possession of the defendant is the same as when the tenancy was created. **Shib Nath Dhar v. Annoda Prosad Dhar**, 5 Ind. Cas. 340 = 11 C.L.J. 382.

CASPERSZ and DOSS, JJ.

Reference :—(a) 1 C.W.N. 711, D.

(46) *Ss. 153, 154—Question relating to title to land decided incidentally—Bar of appeal—Suit for rent of tank, whether governed by Bengal Tenancy Act—Fishery, meaning of—Civil Procedure Code (Act V of 1908), S. 115—Decree—Refusal to exercise jurisdiction—Appeal.*

S. 153 of the Bengal Tenancy Act does not say that the question of title decided in a rent

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

suit must be decided as an issue substantial and material to the case. Therefore, if an issue as to title is decided even incidentally between parties having conflicting claims, that section will not bar an appeal.

A suit in respect of the rent of a tank, where the lease is not only of the water but of the land underneath and of the fruits of trees on the banks of the tank and of the right to rear fish, is not one governed by the Bengal Tenancy Act, and the provisions of the S. 153 are not applicable to it so as to bar an appeal.

The right over fishery in S. 193 of the Bengal Tenancy Act is the right to rear and to catch fish, without any reference to or connection with the land underneath or bordering on the water.

Where, in an appeal from a decree of the first Court in a suit for arrears of rent in respect of a tank, the lower appellate Court passed a decree dismissing the appeal as not maintainable under S. 153 of the Bengal Tenancy Act, and a second appeal was preferred against that decree :

Held, that, although the appellant might have applied under S. 115, Civ. Pro. Code, 1908, there was nothing to prevent his coming in second appeal on the question of jurisdiction. **Gour Mohan Ghose v. Chandi Charan Ghose**, 5 Ind. Cas. 158.

CHATTERJEE, J.

(46-i) S. 155. See Nos. 9, 9-a and 35, *supra*.

(46-ii) S. 158-B, sub-S. 2. See No. 44-a, *supra*.

(46-iii) S. 159. See No. 15, *supra*.

(46-a) *Ss. 159, 160, 161—Distinct tenure—Share of tenu when considered as separate tenure—Burden of proof—Purchaser suing for annulment of incumbrance—Protected interest.*

A share in a tenure, which has been duly and effectively recognized by both the landlords and the tenants as a separated share, constitutes a distinct tenure; and when such a tenure is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser acquires the rights of a purchaser of an entire tenancy within the meaning of S. 159 of the Bengal Tenancy Act (a).

The burden is upon the purchaser to prove that the interest sought to be annulled is an

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

incumbrance within the meaning of cl. (a) of S. 161, and if he proves this, he starts his case sufficiently; the burden then shifts upon the tenant to prove that he has a protected interest within the meaning of S. 160 (b). **Somir Jama v. Mahabharat Bakta**, 7 Ind. Cas. 919.

MOOKERJEE and TEUNON, JJ.

References :—(a) 5 C.W.N. 1xxx, *Rel.* (b) 9 C.L.R. 449; 13 C. 1; 9 C.L.J. 490; 1 Ind. Cas. 596; 13 C.W.N. 720, *D.*

(46-b) S. 160—See No. 46-a, *supra*.

(46-c) S. 160 (c)—See No. 21-a, *supra*.

(47) S. 161—*Incumbrance*—*Absolute transfer of raiyati interest in portion of holding, whether encumbrance.*

Where an absolute transfer of the interest of *raiya*ti in a portion of the holding takes place, such transfer is not, within the definition of the word "encumbrance" in S. 161 of the Bengal Tenancy Act, a limitation of the tenant's interest, but a complete extinction of his interest in the portion transferred. **Bipin Behary Nandan v. Jadu Nath Chatterji**, 6 Ind. Cas. 451.

DASS, J.

References :—11 C.L.J. 16; 11 C.W.N. 229; 5 Ind. Cas. 116, *F.*

(47-a) S. 161. See Nos. 33 and 46-A, *supra*.

(48) S. 167—*Incumbrance*—*Tenure*—*Occupancy raiyat*—*Emblements, law of.*

Where land was let out to a tenant for purposes of reclamation at a progressive rate of rent, which, when maximum, was fixed in perpetuity, and it was further provided that the land was to be held by the tenant from generation to generation who might transfer the same and construct houses, &c.

Held, that the tenancy was in the nature of a tenure and therefore not a protected interest under S. 167 of the Bengal Tenancy Act.

Per Mitra, J. (on second appeal). There is no law of emblements in this country. On the termination of the tenancy, the right of the landlord to re-enter accruing, he is entitled not only to take possession of the land but also of the standing crops on it. **Akhil Chandra Mandal v. Surendra Nath Dutt**, 11 C.L.J. 87 = 5 Ind. Cas. 306.

MACLEAN, C.J., and PRATT, J.

(49) S. 167—*Incumbrances*—*Occupancy raiyat*—*Raiyat at fixed rates.*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Ctd.).

Where land was let out to a tenant for purposes of reclamation at a progressive rate of rent which, when maximum, was fixed in perpetuity, and it was further provided, that the land was to be held by the tenant from generation to generation, who might transfer the same and make gardens, houses and tanks:

Held, that the tenancy was in the nature of a tenure and therefore not a protected interest within the meaning of S. 167 of the Bengal Tenancy Act.

Per Mookerjee, J. (affirming *Dass, J.*)—A *raiya*ti at a fixed rate of rent, though he may hold his land for twelve years, does not become an occupancy *raiya*ti so as to make his holding a protected interest under S. 167 of the Bengal Tenancy Act. **Bhut Nath Naskar v. Manmatha Nath Mitra**, 11 C.L.J. 98 = 13 C.W.N. 1025 = 2 Ind. Cas. 675.

JENKINS, C.J., and MOOKERJEE, J.

(50) S. 167—"Encumbrancer" means whole body of encumbrancers—*Notice to am Muktear*—*When am muktear is husband of principal and conducted proceedings on her behalf, notice to him sufficient.*

S. 167, Bengal Tenancy Act, provides that an application to the Collector should be to serve notice on the encumbrancer:

Held, that this means on the whole body of the encumbrancers, and if the notice is not served within time, upon any of several encumbrances, jointly interested in the encumbrances, the notice is bad in respect of the others also, and the encumbrance will not stand annulled by reason of its service (a).

In an ordinary case, notice to an ordinary *am muktear* may not be a notice to his principal; but when the *am muktear* is the husband of the principal and conducted proceedings on her behalf, notice to him of an encumbrance will be considered notice to her. **Srimati Khyanta Kali Das v. Kedar Nath Kaji**, 5 Ind. Cas. 352.

CHATTERJEE, J.

Reference :—(a) 32 C. 710, *F.*

(50-a) S. 167. See No. 22, *supra*.

(51) Ch. XIV, *Sale under*—*Decree for entire rent by co-sharer landlord registered as sole proprietor and declared so by a competent Court for the time, effect of*—*Bengal Tenancy Act, S. 167—Incumbrance, annulment of a subordinate, without annulling a superior one, if valid.*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Old.).**

A sale in execution of a decree of the whole rent obtained by a landlord, who at the time of the suit is the sole registered proprietor and who has been placed and maintained in possession by a competent Court, operates as a sale under Ch. XIV of the Bengal Tenancy Act, even if it transpires ultimately, as the result of litigation in a title suit, that he is not the sole landlord and has co-sharers in the property.

It is not competent to a purchaser at a sale held in execution of a decree for arrears of rent to annul, under S. 167 of the Bengal Tenancy Act, an incumbrance upon the property, without annulling at the same time a superior incumbrance directly subordinate to the interest purchased. **Maffzuddin v. Asutosh Chakravarti**, 11 C.L.J. 141 = 14 C.W.N. 352.

MOOKERJEE and TEUNON, JJ.

(52) S. 170—Execution of rent decree—Tenure or holding—Claim—Jurisdiction to investigate claim. See CIV. PRO. CODE (1908), No. 123, 7 Ind. Cas. 490.

(52-a) S. 170. See No. 44-a, *supra*.

(53) S. 170, Cl. (3)—Sale of tenure for arrears of rent—Deposit after sale—By whom to be made—Acceptance of deposit on previous occasion—Ground for acceptance on subsequent occasion.

The purchaser of a share in tenure advertised for sale in execution of a decree for arrears of entire 16 annas rent against the recorded tenure-holder is entitled to make the deposit of the amount under S. 170, cl. (3) of the Bengal Tenancy Act to prevent the sale, because he has an interest in the tenure and the interest which he possesses is voidable upon the sale (a).

If, on a previous occasion, the transferee of a tenure had been allowed to make a deposit under S. 170, cl. (3) of the Bengal Tenancy Act, the Court ought to allow him to make a deposit on a subsequent occasion (b). **Jugal Mohini Das v. Srinath Chatterjee**, 7 Ind. Cas. 477.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 13 C.W.N. 1175 ; 3 Ind. Cas. 835 ; 10 C.L.J. 473, F. (b) 10 C.W.N. 438, F.

(54) S. 173, cl. (3)—Appeal, whether lies against order under—Test to be applied,

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Old.).**

what is—Application by unrecorded co-sharer in tenancy—Representative of judgment-debtor—C.P.C. (Act V of 1908), S. 47.

No inflexible rule can be formulated that an order under S. 173 is or is not appealable as a decree. The test to be applied in the circumstances of each case is, what is the true nature of the question raised, that is, whether the question relates to the execution of the decree, and who are the parties or their representatives.

An unrecorded co-sharer in a tenancy is not a representative-in-interest of the recorded tenant within the meaning of S. 47 of the C.P.C. (1908). Therefore, where an application was made by an un-recorded co-sharer for the setting aside of a sale on the ground that the judgment-debtor, the recorded tenant, had purchased the holding through another person, and the Court sets aside the sale, the order was not appealable (a). **Joytara v. Ram Krishna Seal**, 7 Ind. Cas. 769.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 21 C. 825, F. ; 24 C. 707 ; 1 C.W.N. 534, D. ; 3 C.W.N. 184, R.

(54-a) S. 173 (1) (c). See No. 9-a, *supra*.

(51-b) S. 180, sub-S. 1. See No. 13, *supra*.

(55) S. 183-B—Res judicata—Civ. Pro. Code (Act V of 1908), S. 12.

A record-of-rights was prepared and finally published on the 31st December, 1898. In a suit for rent which subsequently fell due, rent was claimed at the rate stated in the *khatian* ; the Court did not allow the plaintiff rent at the rate claimed, but at the rate admitted by the defendant. In a second suit of rent for a period subsequent to that for which the first suit was brought, plaintiff claimed rent again at the rate mentioned in the *khatian*.

Held—That inasmuch as the *khatian* was not considered in the earlier suit, the presumption under S. 103-B of the Bengal Tenancy Act in its favour continued, and the Court should consider the same as evidence in the case. **Sarifunessa Chowdhurani v. Sasadhar Moulik**, 14 C.W.N. 364 = 5 Ind. Cas. 781.

CASPERSZ and DOSS, JJ.

(55-a) S. 193. See No. 46, *supra*.

(56) Sch. III, Art. 1—Misjoinder—Causes of action—One suit for possession of lands in

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

tenant's holding and those obtained by encroachment on Khas land of landlord—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 1—Deposit by alleged transferee of tenant—Protest by landlord—Withdrawal of amount—Estoppel—Conduct of landlord.

Where the plaintiff sued to recover possession of certain lands as being lands part of which was in the possession of the defendants Nos. 3 and 4 as their holding, and the rest as obtained by them by encroachment on the khas lands of the landlord :

Held, that there was no possible objection to the joining of claims for these lands in one suit, and that the suit was not bad for misjoinder of causes of action.

Where the suit has been brought by the plaintiff to recover possession from defendant as a trespasser who is in possession of the lands in suit without any title, the provisions of the Bengal Tenancy Act have no application to the suit, and the suit is not barred by Art. 1 of Sch. III of the Bengal Tenancy Act.

The plaintiff-landlord had brought a suit for rent against his tenants, defendants Nos. 3 and 4, and got a decree in execution of which the holding was advertized for sale; defendant No. 1 appeared and asked for permission to deposit the decretal amount, stating that he was the representative of defendants Nos. 3 and 4. The plaintiff protested against the defendant No. 1 being allowed to make the deposit, and in spite of the protest he was allowed to put in the money. The plaintiff withdrew the amount :

Held, that it was impossible to hold that the conduct of the plaintiff in withdrawing the amount could be regarded as barring him in a suit for possession against defendant No. 1. **Prodyat Kumar Tagore v. Mahomed Hussain Khan**, 7 Ind. Cas. 86.

BRETT and VINCENT, JJ.

(57) *Sch. II, Art. 3—Limitation, special—Ouster—Settlement, colourable and sham.*

In order to bind the tenant by a short period of limitation of two years, under Art. 3 of Sch. II of the Bengal Tenancy Act, it must be strictly shown that the ouster is an ouster by the landlord and known to the tenant as such.

Therefore, where the ouster was by an alleged settlement from the landlord, which is

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Ctd.).**

found to be a colourable and sham transaction, the tenant suing for recovery of his holding will not be bound by the special limitation. **Arman Gazi v. Krishna Chandra Nandi**, 5 Ind. Cas. 383.

WOODROFFE, J.

Reference :—3 C.W.N. 215 (217), R.

(58) *Sch. III, Art. 6—Application for execution—Judgment-debtor discovered to have been dead on date of application—Application for substitution after expiry of period of limitation—Limitation.*

The decree-holder applied for execution of a decree for rent on the last day of the period of limitation allowed by Art. 6 of Sch. III of the Tenancy Act, and subsequently discovered that the judgment-debtor had died before the date of the application and, without unreasonable delay, got his legal representative substituted in his place, and proceeded with the execution as against the latter :

Held—That the proceeding against the legal representative of the judgment-debtor was in continuation of the proceeding started on the last day of limitation, and was not time-barred. **Kumar Kalanand Singh v. Chandra Kishore Jha**, 14 C.W.N. 971 : 12 C.L.J. 192 6 Ind. Cas. 971.

HOLMWOOD and SHARFUDDIN, JJ.

(59) Relationship of landlord and tenant found to be wanting—Applicability of. See RES JUDICATA, No. 16, 7 Ind. Cas. 15.

Act XII of 1887 (Bengal, N.W.P. and Assam Civil Courts).

(1) S. 19—Does not control S. 331, C.P.C. (1882). See CIV. PRO. CODE (1882), No. 21, 5 Ind. Cas. 573.

(2) S. 21—*Court Fees Act (VII of 1870), S. 11—Valuation of suit—Execution of decree—Deficiency made good—Appeal—Jurisdiction.*

So long as there has been no order accepted by the plaintiff to make good the deficiency, the original value placed by the plaintiff must be taken as the value of the suit, for the purpose of regulating the jurisdiction of the appellate Court; but when there has been such an order made and accepted by the plaintiff, from that moment the value of the suit must be taken as being in accordance with the fee actually paid by the plaintiff (a).

2. Bengal Acts—(Continued).

Act XII of 1887 (Bengal, N.W.P. and Assam Civil Courts)—(Concluded).

So, where a suit for sale on foot of a mortgage was valued at Rs. 1,915, but the plaintiff prayed for the redemption of prior mortgages and for a decree, for the consolidated amount, exceeding Rs. 15,000, and the Court granted him a decree in terms thereof in the event of the mortgagor's default, conditional upon his making good the deficiency in Court fees, and the deficiency was made up, *held*, that the proper appellate forum was the High Court, and not the District Judge. **Sriraman Lalji v. Desraj**, 7 A.L.J. 203 32 A. 222.

KNOX and RICHARDS, JJ.

References :—(a) 34 C. 954 (F.B.) F.; 16 A. 286, D.

(3) S. 21. See MESNE PROFITS, No. 2, 7 Ind. Cas. 778.

Act XV of 1891 (Murshidabad).

(1) S. 4—*Limitation Act (XV of 1877), Sch. II, Arts. 142, 144—Limitation applicable to suit for possession of scheduled land by Nawab Bahadur—Statute, interpretation of—Marginal notes—Thak map—Survey map—Evidence—Adverse possession, character of—Doctrine of constructive possession not to be extended in favour of wrong doer—Evidence of possession—Presumption that possession goes with title.*

S. 4 of the Murshidabad Act restricts the application of Art. 142 or 144 of the Limitation Act to a suit by the Nawab Bahadur for the recovery of any portion of the scheduled property; that is, the section embodies a rule of limitation applicable to suits for possession by the Nawab Bahadur in respect of the scheduled land.

Therefore, the Nawab Bahadur is entitled to sue for recovery of any portion of the scheduled property within 60 years from the date of adverse possession or assertion of title, unless the defendant had acquired statutory right before March 21, 1891, when the Act was passed.

There has been considerable divergence of judicial opinion upon the question whether marginal notes ought to be relied upon in the interpretation of a statute.

The *thak* and survey maps afford important evidence of possession at the time they were made. They also afford valuable evidence of title (a).

2.—Bengal Acts—(Continued).

Act XV of 1891 (Murshidabad)—(Concluded).

If the *thak* map is proved, on the face of it, to have been made in the presence of the parties or their agents, it may be treated as evidence binding upon them (b).

No hard and fast rule can be laid down that a survey map is more reliable than a *thak* map; the one that more clearly agrees with the local landmarks is the one which should be followed.

Adverse possession, in order that it may be effective to destroy the title of the true owner, must be possession adequate in continuity, in publicity and in extent of area (c).

Possession to be adverse must be actual, visible, exclusive and hostile (d).

The doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed only as regards the portion of the land in suit of which he proves actual possession for the statutory period (e).

When the evidence of possession comes to be tested, if it is found to be of equal weight on both sides, the presumption would be that possession went with the title (f). **Rehsud-Dowla Amir-ul-Umra Nawab Bahadur of Murshidabad v. Gopinath Mandal**, 6 Ind. Cas. 392.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 22 C. 252; 30 C. 291 (P.C.); 8 C.W.N. 809; 5 Bom. L.R. 1, R. (b) 25 W.R. 179, F. (c) 27 C. 943 (P.C.); 27 I.A. 136; 1 C.W.N. 597, P. (d) 31 C. 397; 35 C. 961; 6 C.L.J. 735; 12 C.W.N. 127, F. (e) 3 C.L.J. 316; 35 C. 961; 6 C.L.J. 735; 12 C.W.N. 127, F. (f) 20 W.R. (P.J.), 25, R.

Act I of 1895 (Public Demands Recovery).

(1) *Certificate, sale, setting aside of—No sum due—Certificate and sale without jurisdiction—Civil suit, competency of—Debt—Contract Act (IX of 1872), Ss. 59, 60.*

When a sale has taken place on the basis of a satisfied decree, the satisfaction of which has been certified to the Court, the sale is void and ineffective to pass any title: even to a *bona fide* purchaser for value without notice.

If circumstances are established which show that the sale has been held without jurisdiction, the sale cannot be rightly treated as one made

2.—Bengal Acts—(Continued).

Act I of 1895 (Public Demands Recovery) —(Continued).

under the provisions of the Act, and may consequently be challenged by a civil suit without recourse to the procedure provided by the Act; in other words, in a case of this description, as there is no foundation for the exercise of jurisdiction by the revenue authority, the person injuriously affected is not deprived of his remedy by recourse to the ordinary law.

A debt under the Public Demands Recovery Act is nothing but a debt, and the general law laid down in Ss. 59 and 60 of the Contract Act applies to it. Where, therefore, an amount was paid in the Collectorate for discharge of arrears of June, 1905, and the Collector appropriated part of it to the satisfaction of earlier arrears, and issued a certificate :

Held, the Collector had no jurisdiction so to do, and the sale held under such certificate was void. **Nandan Misser v. Harakh Narain**, 11 C.L.J. 266 = 5 Ind. Cas. 337 = 14 C.W.N. 607.

HOLMWOOD and CHATTERJEE, JJ.

Reference :—11 C.L.J. 254, *F*.

(2) Ss. 10, 12, 15, 17, 24, 26—*Certificate of sale—Suit to set aside, if lies—Amount of certificate paid after issue—Sale, if void—Sale in execution if decree after satisfaction certified—Right of innocent purchaser—Hardships—Speculative purchase.*

A certificate which has been properly made for arrears actually due cannot be cancelled or modified on the ground that the demand has been subsequently satisfied, either upon a petition of objection preferred under S. 12 of the Public Demands Recovery Act, or in an action under S. 15 of the same Act. A suit will lie to set aside a sale held in execution of such a certificate.

It cannot be broadly laid down that, in no case, is an innocent stranger, who has purchased immovable property sold in execution of a satisfied decree, to be deprived of the benefit of his purchase.

Held, on a review of the authorities, that, when a sale has taken place on the basis of a satisfied decree, the satisfaction of which has been certified to the Court, the sale is void and ineffective to pass any title even to a *bona fide* purchaser for value without notice.

The Public Demands Recovery Act, by Ss. 10, 24 and 26, casts upon the certificate officer, a duty to enter satisfaction, as soon as payment

2.—Bengal Acts—(Continued).

Act I of 1895 (Public Demands Recovery) —(Concluded).

has been made of the amount for which certificate has been issued, and authorises him to sell only so long as the certificate remains unpaid.

Where, therefore, the amount for which the certificate was issued was deposited two days later in the treasury, but this was overlooked, and notice under S. 10 of the Act was issued and served, and immoveable property belonging to the judgment-debtor sold and purchased by a stranger, *held*, that the sale must be set aside as made without jurisdiction (*a*).

A person, who, with his eyes open, makes a speculative purchase of a valuable estate for next to nothing, cannot complain of hardship when the sale is set aside. **Janukdhari Lal v. Possain Lal Baaya Gaywal**, 13 C.W.N. 710 — 1 Ind. Cas. 871 = 11 C.L.J. 254 = 37 C. 107.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 13 I.A. 106 = 14 G. 18, *Exp.*; 11 C.W.N. 756 = 34 C. 811 = 5 C.L.J. 96, *R.*; 20 I.A. 70 = 20 C. 826, *F*.

(3) S. 12. See No. 2, *supra*.

(4) S. 15. See No. 2, *supra*.

(5) S. 17. See No. 2, *supra*.

(6) S. 24. See No. 2, *supra*.

(7) S. 26. See No. 2, *supra*.

Act V of 1897 (Estates Partition).

(1) S. 7—*Partition—Previous partition—Time contemplated.*

S. 7 of the Estates Partition Act evidently contemplates a formal division of the lands of an estate, by metes and bounds, agreed to by all the co-owners, and a possessor of separate lands held in severalty by *each* such co-owner.

The Collector therefore is not precluded by that section from making a partition where there was not such a partition of the estate already subsisting.

Where the lands have been partitioned in such manner, and such division is subsisting at the time of the application to the Collector, in spite of any further sub-division of the parcels, no partition of the estate can be made under the Act, except on the joint application of all the proprietors or in pursuance of a decree or order of a Civil Court, and this too, even in the case where after such private division each of the separate parcels becomes or some of them

2.—Bengal Acts—(Continued).**Act V of 1897 (Estates Partition)—(Cld.).**

become, by reason of transfer or succession or otherwise, jointly vested in more proprietors than one. **Shah Tajammul Ali v. Mussod Ali**, 11 C.L.J. 291.

CASPERSZ and DOSS, JJ.

(2) Ss. 51, 52, 55, 58, 119—Partition by Revenue authorities—Jurisdiction to set aside. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 5, 5 Ind. Cas. 454.

(2-a) S. 52—See No. 2, *supra*.

(2-b) S. 55—See No. 2, *supra*.

(2-c) S. 58—See No. 2, *supra*.

(3) Ss. 64, 65—Principles to be used as guides to Civil Court—Garden in exclusive possession of one co-sharer falling into patti of another—Assessment of rent.

The principles laid down in the Estates Partition Act may, as far as they apply, be used as guides to the Civil Court in making a partition (a).

Therefore, where a garden, in the exclusive possession of defendants Nos. 3 and 4, fell to the share of defendant No. 1, the Civil Court may assess a fair rent upon the same, so that the defendants Nos. 3 and 4 may continue to possess it as before paying the rent fixed to defendant No. 1. **Gopal Roy v. Ram Krishen Thakur**, 6 Ind. Cas. 450.

CHATTERJEE and VINCENT, JJ.

Reference :—17 W.R. 137, F.

(3-a) S. 65—See No. 3, *supra*.

(4) S. 99—Usufructuary mortgagee, rights of.—Dispossession—Partition by mortgagor. See MORTGAGE (USUFRUCTUARY), No. 2, 11 C. L.J. 136.

(5) S. 119—See No. 2, *supra*.

Act III of 1899 (Calcutta Municipal).

(1) S. 151, cl. (b)—“Building”—Compound or boundary wall, whether a building.

A compound or boundary wall is not a building within the meaning of S. 151, cl. (b) of the Act and is not liable as such to assessment for Municipal rates. **Corporation of Calcutta v. Binoy Krishna Bose**, 7 Ind. Cas. 890.

MOOKERJEE and TEUNON, JJ.

References :—8 C.W.N. 487, Rel.; (1894) 1 Q.B. 812; 63 L.J.M.C. 117; 9 R. 292; 70 L.T. 440; 42 W.R. 370; 58 J.P. 606; (1895) 2 Q.B. 577; 64 L.J.M.C. 262; 14 R. 634; 73 L.T. 106; 43 W.R. 677; 59 J.P. 630, R.

2.—Bengal Acts—(Concluded).**Act VI of 1908 (Chota Nagpur Tenancy).**

(1) Ss. 46, 211—Act V of 1903, S. 10 (c)—Manbhum district—Transfer of holding before December 1909, validity of.

There is nothing in S. 46 of Act VI of 1908 (Chota Nagpur Tenancy Act) which would invalidate the transfer of a holding by a tenant in the District of Manbhum in August 1909, that is, before the Act was extended to the District. **Vesta Clifton Sebastian v. Kuloda Prosad Deogharin**, 7 Ind. Cas. 763.

CHATTERJEE and RICHARDSON, JJ.

(2) S. 211—See No. 1, *supra*.

3.—Bombay Acts.**Act XI of 1852 (Titles to rent free Estate).**

See SHETSANADI, No. 1, 12 Bom.L.R. 577.

Act V of 1862 (Bhagdari).

(1) A ryotwari village declared bhagdari village by Government for administrative purpose—Bholav village—The change of tenure not to affect the ordinary rules of Hindu Law applying to the parties—Special custom regulating succession of bhagdari lands not applicable to such change in tenure.

Prior to the year 1833 A.D., the village of Bholav in the Broach District was an ordinary *ryothia* village. It was declared a *bhagdari* village in 1833 for reasons of administrative convenience.

Held, that the change imposed on the village *ab extra* for mere administrative convenience did not carry with it the abrogation of the ordinary principles of Hindu Law by which the parties were governed before 1833; in other words, the change was never intended, and did not operate, to upset the existing law of succession, so as to confer on agnates thenceforth rights which they had never possessed, and to deprive daughters and their sons of rights which till then they had always enjoyed. **Lalu Dayal v. Lalu Gopal**, 12 Bom. L. R. 573.

SCOTT, C. J. and BATCHELOR, J.

(2) S. 3—Collector's declaration under—Suit against Collector—Notice necessary. See CIV. PRO. CODE (1882), No. 190, 12 Bom. L. R. 825.

Act II of 1864 (Aden).

(1) Ss. 8, 15—Resident's Court at Aden—Suit for declaration and injunction—Claim valued for Court-fee purposes at Rs. 130—

3.—Bombay Acts—(Continued).**Act II of 1864 (Aden)—(Continued).**

Court Fees Act (VII of 1870), S. 7, sub-Sec. 1, cls. (c) and (d)—Suits Valuation Act (VII of 1887), S. 8—Reference to the High Court by the Resident—Civ. Pro. Code (Act V of 1906), S. 115—High Court of Bombay—Revisionary powers.

The plaintiff sued for declaration and injunction with regard to certain property worth upwards of Rs. 50,000. The claim was valued at Rs. 130 and the plaint was engrossed on a stamp paper of Rs. 10 under the provisions of the Court Fees Act, S. 7, sub-sec (4), cls. (c) and (d). The first Court rejected the claim on the ground that the plaint was not properly stamped. The plaintiff appealed to the Court of the Political Resident at Aden; and shortly after this, the plaintiff applied, under S. 8 of the Aden Act, II of 1864, for reference of the following questions in the appeal, for decision of the High Court of Bombay, namely: "Is the plaint sufficiently stamped, and was the order of the Court rejecting the plaint under S. 54, cl. (b), of the Civ. Pro. Code, without making an order what the requisite stamp should be legal." The Resident, however, dismissed the appeal under S. 551, Civ. Pro. Code, 1882.

Held, that the Resident's Court was subordinate to the High Court of Bombay, which had therefore the power of revision, under S. 115 of the Code of 1908, with regard to questions that should be submitted by the Resident under S. 8 of the Aden Act, II of 1864.

Held, further, that, as, under S. 15 of the Aden Act, the Court of the Resident was to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Loyal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from these Courts, the provisions of the Suits Valuation Act, S. 8, are "the law for the time being in force for the valuation of claims," as required in S. 8 of the Aden Act, II of 1864.

Held, also, that, assuming that the plaintiff's claim had been correctly valued under the Court Fees Act, as appeared to be the case on a consideration of the reported decisions of this High Court, her claim estimated according to the law for the time being in force would be Rs. 130; and was, therefore, a claim which did not fulfil the requirements of S. 8 of the Aden

3.—Bombay Acts—(Continued).**Act II of 1864 (Aden)—(Concluded).**

Act, so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising, in her suit. **Rahimbal Jamalbhoj v. Mariam Abdul Rasool**, 12 Bom. L.R. 149=34 B. 267.

SCOTT, C.J. and BATCHELOR, J.

(2) S. 15. See No. 1, *supra*.

Act III of 1865 (Wagers)

(1) Scope of—Wagering contracts—Teji Mandi transactions. See CONTRACT ACT, No. 22, 12 Bom. L.R. 590.

Act XIV of 1869 (Bombay Civil Courts).

(1) Transfer of case—Powers of District Judge and of Assistant Judge. See CIV. PRO. CODE, (1908) No. 23, 12 Bom. L.R. 354.

Act III of 1874 (Hereditary Offices).

(1) Ss. 10, 13—Compensation for building and land of Maharki Vatan—Jurisdiction of Collector to issue certificate under S. 10—Power of Court. See ACT I OF 1894 (LAND ACQUISITION), No. 3, 12 Bom. L.R. 839.

(1-a) S. 13. See No. 1, *supra*.

(2) S. 36—*Suit for declaration—Declaration that the plaintiff is the eldest son of a deceased representative vatandar—Vatan—Civil Court—Jurisdiction.*

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative vatandar is maintainable in a Civil Court, although the declaration is sought for the purpose of establishing a fact, which will enable the plaintiff to have his name entered in the vatan register. **Rahimkhan Hyderkhan v. Dadaghiya Hyderkhan**, 11 Bom. L.R. 1339=34 B. 101=1 Ind. C.S. 833.

SCOTT, C.J.

Act V of 1879 (Land Revenue Code).

(1) Ss. 3 (11), 217—*Inamdar—Permanent tenant of the Inamdar—Survey settlement introduced into the village—Inamdar's name entered as Khatedar for lands in tenant's possession—Inamdar's right to enhance rent—Rent, enhancement of.*

The plaintiff (an Inamdar) was the grantee of the royal share of revenue of a certain village, in which the defendant was a permanent tenant of certain land. At the desire of the plaintiff, the survey settlement was introduced into the village, when the plaintiff's name was

3.—*Bombay Acts*—(Continued).

Act V of 1879 (Land Revenue Code)—(Ctd.).

entered as Khatedar or registered occupant of the land. The plaintiff next sought to recover enhanced rent from the defendant. The latter, in contesting the claim, relied on, among other things, S. 217 of the Bombay Land Revenue Code, 1879, and contended that he was liable to pay only the Government rate of assessment levied on the land. This contention was disallowed on the ground that the defendant was not a registered occupant of the land. On appeal :

Held, that, S. 217 of the Bombay Land Revenue Code, 1879, was not restricted in its application to registered occupants only ; it invested "the holders of all lands" in alienated villages with the same rights, and imposed upon them the same responsibilities, in respect of the lands in their occupation, that occupants in unalienated villages had. The term "holder" as defined in S. 3, cl. (11) of the Code, was wide enough to include even a tenant who had entered into possession under an occupant. **Nanabhai Bajibhai Patel v. The Collector of Kaira**, 12 Bom. L.R. 707 = 34 B. 686.

CHANDAVARKAR and HEATON, JJ.

- (2) S. 48 (b)—*Land appropriated for agricultural purposes—Special user of land by stacking timber in fair season—Additional assessment for special user—"Appropriated for any purpose"—Interpretation—Construction of statute.*

The plaintiff was the occupant of land used for agricultural purposes, and had been paying to Government assessment chargeable on land appropriated for those purposes under S. 48 (a) of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff used to let it out for stacking timber and thereby derived profit. With respect to this special user, Government levied an additional assessment under S. 48 (b) of the Code :

Held, that no additional assessment for the special user could be levied under cl. (b) to S. 48 of the Code.

The expression "appropriated for any purposes" in S. 48, cl. (b) of the Code means "set apart for that purpose in exclusion of all other uses."

The Bombay Land Revenue Code, 1879, is a taxing enactment, and must be construed

3.—*Bombay Acts*—(Continued).

Act V of 1879 (Land Revenue Code)—(Ctd.).

strictly in favour of the subject. **The Secretary of State v. Laldas Narandas**, 12 Bom. L.R. 16 = 34 B. 239 = 5 Ind. Cas. 610.

CHANDAVARKAR and HEATON, JJ.

- (3) S. 79 A—*Collector—Summary eviction—Persons in wrongful possession—Possession under decree of the Civil Court.*

The powers given to the Collector by S. 79-A of the Land Revenue Code, 1879, can be exercised only in cases of wrongful possession. It does not extend to cases where possession is obtained under the decree of a Civil Court. The Collector has, for the exercise of the power, to form his own opinion and decide whether in any particular case the possession is wrongful ; but there is no provision in the Code which gives finality to the Collector's order of eviction, so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation. **The Talukdar Settlement Officer v. Umiashankar Narsiram Pandya**, 12 Bom. L.R. 837.

CHANDAVARKAR and HEATON, JJ.

- (3-a) S. 117. See No. 1, *supra*.

- (4) *Wanted land—Alienated land.* See ACT VI OF 1888 (GUZERAT TALUKDARS), No. 1, 12 Bom. L.R. 903.

Act XVII of 1879 (Dekhan Agricultural Relief).

- (1) S. 2—*Trader failing in trade—Owning agricultural land—Income from land insufficient for maintenance—Suit for recovery of trade-debts—Whether exemption as "agriculturist" can be claimed.*

K, until shortly before suit, was carrying on an extensive business, buying and selling grain, and deriving an income stated to be between Rs. 1,000 and Rs. 3,000, a year. K, also possessed 13 or 14 acres of land, the income from which was not sufficient even for his maintenance. K stopped business, and a suit was brought against him to recover a trade-debt. K claimed exemption as an agriculturist within the meaning of the Dekhan Agriculturists Relief Act.

Held that he cannot do so. **Righumal Shivanandas v. Khilomal Mohansing**, 3 S.L.R. 218.

CROUCH, A.J.C.

- (2) Ss. 2 and 69—*Agriculturists—Definition—Interpretation.*

3.—Bombay Acts—(Continued).

Act XVII of 1879 (Dekhan Agricultural Relief)—(Continued).

S. 2 of the Dekhan Agriculturists' Relief Act, 1879, gives two definitions of the term "agriculturists"—one in cl. 1, and the other in cl. 2.

Where a party to a suit is an agriculturist at the time the suit is filed by or against him, cl. 1 applies.

The second clause gives a special definition of the term "agriculturist" for the purposes of Chs. II, III, IV and VI and S. 69 of the Act. The definition given in the second clause is not exhaustive, but is merely inclusive and is intended for a special purpose. **Damodar Nandram v. Manubai**, 11 Bom. L. R. 1148=34 B. 65=4 Ind. Cas. 264.

CHANDAVARKAR and HEATON, JJ.

Reference :—11 Bom. L.R. 721, *Expl.*

- (3) *S. 12—Mortgage—Mortgagor holding the property under a rent-note—Decree for arrears of rent due—Subsequent suit by mortgagor to redeem—Account under the Act—Mortgagee found to have over-paid himself—Rent decree is not effected by the accounts.*

Under a rent-note passed by a mortgagor to the mortgagee, the latter sued for and obtained a decree for rents that had already accrued due. At that date the Dekhan Agriculturists' Relief Act did not apply to the district. The decree remained unsatisfied. After the Act was extended to the district, the mortgagor sued to redeem the mortgage. In that suit, accounts were taken as provided for by the Act, which showed that the mortgagee had overpaid himself. The mortgage was, therefore, ordered to be redeemed. The mortgagee next applied to execute the decree for rent. The lower Courts holding that, as the mortgagee was found in the second suit to have overpaid himself, he could not execute his decree for rent :

Held, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekhan Agriculturists' Relief Act, 1879, did not apply to it, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose, that is, for enabling the mortgagor to redeem on favourable terms, not for entitling him to recover anything from the mortgagee.

3.—Bombay Acts—(Continued).

Act XVII of 1879 (Dekhan Agricultural Relief)—(Continued).

The Dekhan Agriculturists' Relief Act, 1879, nowhere provides that, where, upon an account taken under it, it is found that a mortgagee in receipt of rents and profits has overpaid himself, the overpaid amount becomes a debt due from him to the mortgagor and that the latter becomes entitled to recover it from the mortgagee. **Mugapa Chanbāsappa Sawadatti v. Mahamadsaheb Imamsaheb**, 12 Bom. L. R. 137=34 B. 260=5 Ind. Cas. 864.

CHANDAVARKAR and HEATON, JJ.

- (4) *S. 12—Compromise—Decree in terms of compromise—Civ. Pro. Code (Act V of 1908), O. XXIII. r. 3—Compromise entered into by a pleader without authority from his client—Party's right to apply to Court.*

There is nothing in the provisions of S. 12 or in any other section of the Dekhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under S. 375, C.P.C., 1882, or O. XXIII, r. 3 of the Code of 1908.

A compromise means the settlement of a disputed, not an admitted, claim.

Where a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court and ask the Court by independent proceedings to cancel all that has been done or to revive the suit. **Piraji Laxman Mali v. Ganpati Ramaji Mali**, 12 Bom. L. R. 378=6 Ind. Cas. 527=34 B. 502.

CHANDAVARKAR and HEATON, JJ.

Reference :—12 Bom. L.R. 223, *F.*

- (5) *S. 15-B, cl. 2—Compromise opposed to—Effect. See COMPROMISE, No. 5, 12 Bom. L. R. 1024.*

- (6) *S. 15-D—Agriculturists—Definition—“Then defined by law,” interpretation of—Incurring of liability.*

A person residing in the Ratnagiri District executed a mortgage in 1881. The Dekhan Agriculturists' Relief Act, 1879, was not made applicable to the District till 1905. The plaintiff, alleging that he was an agriculturist in 1881, i.e., when the liability was incurred, sued in 1907, for an account of the mortgage, under the provisions of S. 15-D of the Dekhan Agriculturists' Relief Act, 1879.

3.—*Bombay Acts*—(Continued).

Act XVII of 1879 (Dekhan Agricultural Relief)—(Concluded).

Held, that the plaintiff could not sue under S. 15-D, as he was not an agriculturist within the meaning of the Amending Act XXIII of 1881. The expression "then defined by law" in S. 2 of the Act relates to the time when any part of the liability is incurred. **Shankar Ramakrishna Cholkar v. Krishnaji Ganesh Bade**, 11 Bom. L.R. 1288 = 34 B. 161 = 4 Ind. Cas. 583.

SCOTT, C.J. and BATCHELOR, J.

(7) *S. 15-D, cl. (3)—Suit to mortgagor for account—Redemption decree—Appeal Court may pass the decree.*

In a suit for accounts brought by mortgagee under the Dekhan Agriculturists' Relief Act, 1879, the Court of first instance declared the amount found due on taking the accounts. The lower appellate Court on appeal passed a decree for redemption under S. 15-D, cl. (3) of the Act. *Held* that the order contemplated by S. 15-D, cl. (3), can be passed in the first Court as also in the Court of Appeal. **Nawlaaj Sardarmal v. Rama Dhondi Patil**, 11 Bom. L.R. 1285 = 4 Ind. Cas. 583 = 34 B. 158.

SCOTT, C.J. and BATCHELOR, J.

(8) *S. 53—Preliminary decree whether a party is agriculturist—Revision. See CIV. PRO. CODE (1908), No. 5, 12 Bom.L.R. 762.*

(8-a) *S. 69. See No. 2, supra.*

(9) *Conciliator's certificate when may be produced. See HINDU LAW (JOINT FAMILY), No. 10, 12 Bom. L. R. 801.*

Act III of 1888 (City of Bombay Municipal).

(1) *Ss. 33, 34—Indian Specific Relief Act (I of 1877), Sec. 45—Application to High Court to require a public officer to do a specific act—City of Bombay Municipal Act (Bombay Act, III of 1888, as amended by Bombay Act, V of 1905), Ss. 33, 34—Municipal election petition—Jurisdiction of Chief Judge of Small Causes Court at Bombay—Extent of discretion.*

At a general election for Municipal Councillorship for a ward in the City of Bombay, eight out of the fifteen candidates were declared duly elected. A petition was then presented to the Chief Judge of the Bombay Court of Small Causes, under S. 33 of the City of Bombay Municipal Act, 1888, praying that the election of the eight Councillors or of one or more

3.—*Bombay Acts*—(Continued).

Act III of 1888 (City of Bombay Municipal)—(Continued).

of them might be set aside and a scrutiny held. The inquiry was held and the election of two out of the eight successful candidates was set aside. The Chief Judge then came to the conclusion that under S. 33 he was only empowered to consider the claim of the ninth candidate, who obtained the next highest number of votes to the candidates returned as elected, but, as a valid cause of objection existed to his being declared elected, he declined to direct that that candidate should be deemed to be elected. He further held that as there was no other candidate who could be deemed to be elected, proceedings for filling up the two vacancies would have to be taken under S. 34 of the Act. The applicant, who stood tenth on the list of candidates, applied to the High Court, under S. 45 of the Specific Relief Act, 1877, asking for an order that the Chief Judge to proceed to direct, under S. 33 of the Bombay Municipal Act, that the applicant should be deemed to have been duly elected.

Held, that, as S. 33 had been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering him to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

Held, further, that the Chief Judge should, therefore, proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection can be found should be declared to be deemed to be elected. If only one is qualified, or none is qualified, then proceedings for filling up the vacancy or vacancies would have to be taken under S. 34 of the City of Bombay Municipal Act, 1888.

The High Court of Bombay may, under S. 45 of the Specific Relief Act of 1877, make an order requiring any specific act to be done or forborne within the local limits of its ordinary original civil jurisdiction, provided that (a) an application, for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of such specific act; and (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such Court in its public character.

3.—*Bombay Acts—(Continued).*

Act III of 1888 (City of Bombay Municipal) —(Continued).

An application under sub-sec. 1 of S. 33 of the City of Bombay Municipal Act, 1888, should name the persons whose election is objected to.

Sub-sec. 2 of S. 33 enacts what the Chief Judge is to do when an application is made under sub-sec. 1. He has to make such enquiry as he may deem necessary and—

(1) If he finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the result of the election.

(2) If the Chief Judge finds that the person whose election is objected to is qualified for being a Councillor, he shall declare such person's election null and void.

(3) If the Chief Judge finds that the election is not a valid election, he shall set it aside.

Under S. 33, sub-sec. (2), it is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected, but the candidate with the next highest number of valid votes and against whom election on cause of objection is found. The Chief Judge is entitled to presume that all the votes in favour of a candidate as declared by the Commissioner are valid, but if a vacancy has to be filled, all the unsuccessful candidates are open to attack, and the last on the list may prove to be the one with the next highest number of valid votes.

The change effected in sub-sec. 2 to S. 33, by Act V of 1905, enables an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected. *In re Sharafly Mamooji*, 12 Bom. L.R. 737—34 B. 659.

MACLEOD, J.

(1-a) S. 34. See No. 1, *supra*.

(2) S. 251-A (a)—*Water closets—Building—Construction*—“Directly over, under or directly below.”

The words “directly over or directly under,” in S. 251-A, clause (a), mean not only in a direct line vertically above or below, but also in contact with or directly adjacent to.

It is, therefore, permissible to erect a building, wherein a water closet is vertically above or below any residential quarter, provided that a bath-room intervenes between them. *Sir Currimbhoy Ebrahim v. The Municipal Commissioner of Bombay*, 11 Bom. L.R. 1167—34 B. 496.

SCOTT, C.J. and BATCHELOR, J.

3.—*Bombay Acts—(Continued).*

Act III of 1888 (City of Bombay Municipal) —(Continued).

(3) Ss. 349-A, 349-B—*Interpretation of the sections regarding the height up to which buildings could be constructed—Permission of the Municipal Commissioner when necessary—Powers of the Advocate-General to interfere in cases of public nuisance—Advocate-General has same powers as the Attorney-General in England—Civ. Pro. Code (Act V of 1908), S. 91—Powers of Advocate-General limited under this section—Mandatory injunction will be granted against a private individual public nuisance persisted in.*

Section 349-A of the City of Bombay Municipal Act governs and controls S. 349-B of the Act.

The words “except with the written permission of the Commissioner” in S. 349-A not only apply to the special case mentioned in that section, but also to each of the cases provided for in S. 349-B. Both the sections on combining would mean that

(a) no building shall exceed seventy feet in height ;

(b) in streets not exceeding twenty-six feet in width, no building shall exceed in height one and a half times the width of the street ;

(c) in streets exceeding twenty-six feet but not forty feet in width, no building shall exceed forty feet in height, and in all other cases no building shall exceed the width of the street in height, except with the written permission of the Commissioner.

If the permission is given to build, any person may, as a matter of right, build to the prescribed heights relatively to the streets on which the building faces, without having recourse to the Municipal Commissioner at all. If, in any case in which permission is granted, it is desired to exceed those prescribed heights or the general maximum height, the Municipal Commissioner's written permission must be obtained.

The opening words of S. 349-B suggest that the rules in that section are intended to be a guide to the Commissioner in the exercise of his discretion, rather than an imperative command. The intention of the legislature expressed in Ss. 349-A and 349-B was to confer upon the Commissioner a power to grant permission in writing in all exceptional and proper cases for

3.—Bombay Acts—(Continued).

Act III of 1888 (City of Bombay Municipal) —(Concluded).

the erection of buildings beyond the prescribed heights.

The Advocate-General represents in this Presidency the Attorney-General in England and has all his powers.

In case of constructive public nuisance or public nuisance in law—meaning that which is only wrong because it contravenes the provisions of an Act—the Attorney-General's special power extends in England. No such power can be derived from S. 91 of the Code of Civil Procedure, which is in terms restricted to public nuisances in fact.

No mandatory injunction against a private individual for what is a mere nuisance in law will be granted, except where it has been created and persisted in defiance of local authority and that local authority has not sufficient power to enforce compliance with the law. **The Advocate-General of Bombay v. Haji Ismail Hasham**, 12 Bom. L. R. 274 -5 Ind. Cas. 213.

BEAMAN, J.

(4) S. 319-B. See No. 3, *supra*.

Act VI of 1888 (Guzerat Talukdars).

(1) S. 29-E—*Civ. Pro. Code (Act XIV of 1882), S. 234—Execution of decree—Death of judgment-debtor pending execution—His legal representative can be brought on record—Fresh application not necessary—Guzerat Talukdars Act (Bom. Act VI of 1888), S. 29-E—Certificate of Managing Officer—Managing Officer, interpretation of.*

When execution proceedings are once commenced against the judgment-debtor, they can be continued after his death, by substitution of the name of the legal representative, in place of that of the judgment-debtor in the application for execution. It is not necessary to file a fresh application under S. 235, C.P.C., 1882 (a).

S. 29-E of the Guzerat Talukdars Act, 1888, means that, before execution of a decree can be proceeded with, the Court must be satisfied that the decree claim has been duly submitted.

If the officer certifies that it has been duly submitted, there is an end of the matter. If, however, he does not certify that it has been duly submitted, the Court must wait for one month from the date of the receipt by the

3.—Bombay Acts—(Continued).

Act VI of 1888 (Guzerat Talukdars)—(Ctd.).

officer of an application for a certificate, and, upon being satisfied that a claim has been duly submitted in accordance with the provisions of S. 29-B, it may then proceed with the execution.

The expression "Managing Officer" is merely a compendious term used in the Guzerat Talukdars Act, 1888, for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the talukdar's estate and keep the same in his management" referred to in S. 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the "Managing Officer" is merely a synonym for "Talukdari Settlement Officer."

Where an application relating to a claim is presented to the Subordinate Judge and it is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of S. 29-B of the Guzerat Talukdars Act, if the Talukdari Settlement Officer is also the Managing Officer. **Purushottam Hargovandas v. Rajbai Rajaji Hiraji**, 11 Bom. L.R. 1358 -34 B. 142 -4 Ind. Cas. 89.

SCOTT, C.J. and BATCHELOR, J.

Reference :—(a) 18 Bom. 224, *Expl.*

(2) S. 35—*Talukdar's estate—Estate held by talukdar on the talukdar's tenure.*

The expression "talukdar's estate" in S. 31 of the Guzerat Talukdars Act, 1888, means only the estate held by a talukdar on talukdari tenure and not property held on any ordinary tenure which is distinguishable from the former. **Bichuba Mansangji v. Yela Dhanj Patel**, 11 Bom. L. R. 736 -34 B. 55 -3 Ind. Cas. 773.

CHANDAVARKAR, A.C.J. and HEATON, J.

Reference :—9 Bom. L.R. 1122, *F.*

(3) S. 31—*Talukdari estate—Wanta lands—Bombay Land Revenue Code (Bom. Act V of 1879)—Alienated land—Sarsa Wanta.*

Wanta lands are lands held by Rajputs or the representatives of Rajputs, who after the Mahomedan conquest of Gujarat received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands are held either rent-free or at a small quit-rent.

Where Wanta land is entered as alienated land under the Land Revenue Code, 1879, it

3.—Bombay Acts—(Concluded).

Act VI of 1883 (Guzerat Talukdars)—(Old.).

cannot be regarded as land held upon Talukdari tenure in the strict sense of the word

The words "talukdari estate" in S. 31 of the Gujarat Talukdars' Act are used in a technical sense limited to the Talukdari interest in the estate held by a Talukdar by reason of his status as such (a). **The Talukdari Settlement Officer v. Chaganlal**, 12 Bom. L.R. 903.

SCOTT, C.J. and BATCHELOR, J.

References:—(a) 9 Bom. L.R. 1122; 11 Bom. L.R. 736, followed.

Act III of 1901 (Bombay District Municipal).

- (1) S. 54 (1) (c).—*Refuse cart—Provision of—Whether obligatory under S. 54 (1) (c)—Exercise of powers given by statute—Liability to be sued in tort.*

The provision of refuse carts is essential for the cleansing of public streets, and is therefore an obligatory duty necessarily deducible from the obligatory duty of cleansing the public streets laid upon a Municipality by S. 54 (1) (c) of the Bombay Act, III of 1901.

No action in tort will lie against the Municipality in respect of the exercise with judgment and caution of powers conferred by the Legislature. **Hasraj Hirji v. The Karachi Municipality**, 1 S.L.R. 65.

HAYWARD and LEGGATT, J.C.S.

4.—Burma Acts.

Act IV of 1893 (Lower Burma Town and Village lands).

- (1) S. 41, *whether ultra vires—Claim to right over land as against Government—Jurisdiction of Civil Court—S. 65, Government of India Act, 1858—S. 22, Indian Councils Act, 1868.*

Held by the Full Bench (Robinson, J., diss.) that the provision of S. 41 of the Lower Burma Town and Village Lands Act, 1893, that no Civil Court shall have jurisdiction to determine any claim to any right over land as against Government, was *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma, because it infringed the 65th section of the Government of India Act, 1858, and the 22nd section of the Indian Councils Act, 1861. **J. Moment v. The Secretary of State for India in Council**, 5 L.B.R. 163 (F.B.).

FOX, C.J., HARTNOLL, ROBINSON and PARLETT, JJ.

References:—3 L.B.R. 165, overruled; 4 C. 172, D.; 5 Bom.H.C.R. Appx. A.; 5 Bom.H.C.R. 1; 8 Bom.H.C.R. 195 and 8 B. 264, R.

4.—Burma Acts—(Concluded).

Act of 1900 (Lower Burma Courts).

- (1) S. 27—*Retrospective operation of acts—Matter relating to procedure only, giving of right of appeal, whether is—S. 27, Burma Act, VII of 1907, application of, to suits instituted before it came into force.*

The general rule is that statutes do not operate retrospectively, unless a clear intention to that effect is manifested in the section itself. But statutes dealing with procedure only apply to pending matters (a).

The giving of a right of appeal is not a matter of procedure (b).

So, a party to a suit instituted (in the Small Cause Court, Rangoon) before the Burma Act, VII of 1907, came into force would not be entitled to the right of appeal against the decree of Small Cause Court, given by S. 27 of the new Act even though the decree might be passed after the Act came into force. **Mashe-dee Khan v. B. Mahomed Azim**, 5 L.B.R. 148.

FOX, C.J. and PARLETT, J.

References:—(a) 1878 L.R. 3 A.C. 601, R. (b) 1905 L.R.A.C. 369 (P.C.).

Act IV of 1901 (Lower Burma Courts).

S. 8—Redemption suit—Valuation—Jurisdiction. See MORTGAGE (REDEMPTION), No. 19, 5 L.B.R. 205.

Act VII of 1907 (Burma).

S. 27—Application of, to suits instituted before the Act came into force. See ACT OF 1900 (LOWER BURMA COURTS), No. 1, 5 L.B.R. 148.

5.—Central Provinces Acts.

Act XVIII of 1831 (C. P. Land Revenue).

- (1) S. 4 (3)—*Suit for enforcement of begar—Relief valued at less than Rs. 500—Whether suit of Small Cause nature—Maintainability of second appeal—S. 102, C. P. C., 1908—Wajib-ul-arz, recognising begar—Whether begar becomes village cess, within S. 4 (3), Cent. Pro. Land Rev. Act, 1881—Begar whether 'rent.'*

Plaintiff, a zamindar, instituted several suits against different tenants, claiming that he was entitled to receive, as of right, gratuitous assistance or *begar* from each tenant in the cultivation of his land for each crop, and valued his relief in each suit at Rs. 18-12-0. It was contended that no second appeal would lie

5.—Central Provinces Acts—(Continued).**Act XVIII of 1881 (C. P. Land Revenue)**

--(Continued).

in such suits, because the claim was below Rs 500 in each case and of a nature cognizable by the Court of Small Causes.

Held, that a suit for arrears of *begar* due by a tenant, as such, on account of the use or occupation of land let to him, is not a suit of a nature cognizable by the Court of Small Causes for the purpose of S. 102, C.P.C., 1908, and that the second appeals were rightly admitted.

Where a *wajib-ul-arz*, made under the provisions of S. 79, Central Provinces Land Revenue Act, 1881, recognizes the existence of *begar* in the area to which it applies, and also specifies the terms of the *begar* and the persons by and from whom it may be levied, such *begar* becomes a "village cess" within the meaning of S. 4 (3), Central Provinces Land Revenue Act, 1881.

A claim for such a cess when disputed, raises a question of title in land, where it is imposed as an incident of land tenure.

Every cess which is paid, delivered or rendered, in money, kind or services by a tenant, on account of the use or occupation of the land let to him, is certainly "rent" within the meaning of the terms of the Central Provinces Land Revenue Tenancy and Acts. **Ramachandra v. Chindhoo**, 6 N.L.R. 117.

STANYON, A.J.C.

Reference :—(1) 9 A. 591, *Appl.*

(2) Ss. 4 (11), 134. See **LAMBARDAR AND CO-SHARER**, No. 1, 6 Ind. Cas. 389.

(3) Ss. 74, 132 and 152—*Civil Court—Jurisdiction to entertain claim by a proprietor to hold the land free from revenue—Payment of revenue—Payment under compulsion of law by a party interested in the payment—Right of reimbursement—Principle of S. 69 of the Contract Act—S. 9, C.P.C. (1908)—Jurisdiction of Civil Court to entertain the suit.*

A and B mortgaged their *malguzari* village with C, excluding some *sir* and *khudkasht* lands from the scope of this mortgage. In due course, C became the owner of the village, under a decree absolute for foreclosure, exclusive of the lands referred to above. But these lands in the possession of A and B were taken into account in the assessment of land revenue of the village, and this assessment C had to pay to the Government under the terms of the settlement engagement, and therefore C

5.—Central Provinces Acts—(Continued).**Act XVIII of 1881 (C. P. Land Revenue)**

--(Continued).

brought a suit to recover from A and B what he considered was the portion of the land revenue debitable against A's lands.

Held, that there is nothing in the Land Revenue Act taking away the ordinary jurisdiction of the Civil Court to try a suit of this nature, and that the suit is therefore cognizable by the Civil Court under S. 9, C.P.C., 1908.

Held, also, that, in view of the provisions of Ss. 74 and 132 read with S. 152 of the Land Revenue Act, a Civil Court is not competent to entertain a claim put forward by the proprietor of a land to hold it wholly or partially free from revenue as against the *malguzar*, whether such a claim be advanced by way of a suit or by way of defence to a suit to recover the revenue (a).

Held, further, according to S. 69 of the Contract Act, before liability to pay or the right to be reimbursed can accrue, it is not necessary that there should be any contract or privity between the obligor and the obligee, nor need there be circumstances, from which a contract can be implied between the two, that, if the one paid what the other was bound to pay, the latter would indemnify the former. It is enough if the two conditions, namely, an original liability to pay, and its discharge by a person interested to pay, are fulfilled.

Held, where there has been a payment under compulsion of law, by a person interested in the said payment, under circumstances which make it necessary that it should be paid to save the whole estate, in which is included the land of the person from whom the reimbursement is demanded, there is a right of reimbursement under S. 69 of the Contract Act (b). **Chaturbhuj v. Chandirmool**, 6 N.L.R. 27=5 Ind. Cas. 705.

BIPIN KRISHNA BOSE, A.J.C.

References :—(a) 1 N.L.R. 140 and 9 C.L.J. 850, R. (b) 8 C.P.L.R. 106 (107) and 14 C.P.L.R. 107 (108), R.

(4) Ss. 78, 82, 83, 120 (b) 152, sub-sec. (b), cl. 12—S. 69, sub-sec. (4), contrasted—*Record-of-rights, entry in—Suit to correct, as provided in S. 83, not instituted—Entry if becomes final and conclusive—Title-suit by party affected if maintainable—"Presumption of correctness until the contrary is shown."*

5.—Central Provinces Acts—(Continued).**Act XVIII of 1881 (C. P. Land Revenue)**
—(Concluded).

When an entry has been made in the record-of-rights as to any matter referred to in S. 78 of the Central Provinces Land Revenue Act (XVIII of 1881), such entry is presumed under S. 82 to be correct until the contrary is shown; and under S. 83, a person aggrieved by the entry may institute a suit in the Civil Court to have such entry cancelled or amended, but it does not follow that the "contrary" referred to in S. 82 can be proved in such a suit only and not otherwise. Cl. (12) of sub-sec. (b) of S. 152 of the Act means only that the entry cannot be corrected except by the Revenue authorities, but it does not preclude a suit by the person affected by the entry to establish his title in Civil Court.

The remedy provided by S. 83 of the Act is cumulative and not exclusive.

Held, that the present suit by the plaintiff, in which he sought relief, *inter alia*, on the basis of his alleged title as occupancy-tenant, was maintainable, although the defendant's name had been entered as the occupancy tenant in the record-of-rights, and the plaintiff had not instituted a suit under S. 83 for the cancellation or amendment of the entry. **Dibakar Bisi v. Chatto Bag**, 14 C.W.N. 686=6 Ind. Cas. 672.

DOSS, J.

(5) S. 82. See No. 4, *supra*.

(6) S. 83. See No. 4, *supra*.

(7) S. 120 (b). See No. 1, *supra*.

(8) S. 132. See No. 3, *supra*.

(9) S. 138. See No. 2, *supra*.

(10) S. 152. See No. 3, *supra*.

(11) S. 152, sub-sec. (b), cl. (12). See No. 4, *supra*.

Act IX of 1883 (C.P. Tenancy).

(1) Ss. (3), 43 (2)—*Landlord—Lessee—Consent of lessee to mortgage by tenant, whether binding upon the original landlord—Second appeal—Question of the law arising upon facts found.*

The consent of the lessee of landlord, to a mortgage by an occupancy tenant of his holding, is binding, so long as the interest of the consenter lasted, and this includes the interest of those claiming under or through him, and is not binding on the original landlord after the termination of the interest of the lessee.

5.—Central Provinces Acts—(Continued).**Act IX of 1883 (C.P. Tenancy)—(Continued).**

If the right view of the law can be argued upon the facts found, the High Court can decide the question of law in second appeal. **Lukra Das v. Madhab Parhi**, 6 Ind. Cas. 75.

CHATTERJEE, J.

(2) S. 41 (2)—Notice, whether necessary in case of simultaneous mortgage and lease to one and the same person. See TRANSFER OF PROPERTY ACT, No. 74, 6 N.L.R. 65.

(3) S. 41 (5)—*Application of section—Landlord's right of pre-emption—Sale of right of absolute occupancy tenant—Execution of mortgage decree—Mortgage effected with notice to landlord—Statute—Rule of construction—Words of old statute made part of new statute—Object.*

S. 41 (5) of the Tenancy Act applies to the foreclosure of such a mortgage only as might be made without notice to the landlord.

So, where the right of an absolute occupancy tenant in his holding is sold or is foreclosed by order of a Civil Court, in execution of a decree other than a decree obtained by his landlord, *held*, the landlord will have a right of pre-emption, only if the mortgage, in respect of which a decree has been obtained against the tenant, has been effected without notice to the landlord but not where the landlord has actually interviewed the mortgagee and expressly authorised him to make an advance, being unable to find the requisite money himself (a).

Held also, where words of an old statute are either transcribed into or by reference made part of the new statute, it is always done with the object and intent of giving to those words any legal interpretation which has been put upon them by Courts of law (b). **Than Singh v. Chandu Lal**, 6 N.L.R. 69.

DRAKE-BROCKMAN, J.C.

References:—(a) 5 C.P.L.R. 65 (68); 6 C.P.L.R. 131 (132); 7 C.P.L.R. 89 (91), R. and F.; 3 N.L.R. 40 and 6 N.L.R. 6, R.; 10 C.P.L.R. 42 and 10 C.P.L.R. 76, R. (b) (1862) W.R. 66 (67); 25 B. 151 (157); 6 C.W.N. 556 (569) and Dale's case, 50 L. J. Q. B. 234 (262) and Maxwell on the Interpretation of Statutes, p. 462, 4th Ed., R.

(3-a) S. 43 (2). See No. 1, *supra*.

(4) S. 61 (2). See LAMBARDAR AND CO-SHARER, No. 1, 6 Ind. Cas. 389.

5.—Central Provinces Acts—(Concluded).**Act IX of 1883 (C.P. Tenancy)—(Concluded).**

- (5) *S. 91 (1)—Applicability of section—“Ejected,” meaning of—Tenant holding over, position of—S. 116, Transfer of Property Act, applicability of.*

In order that the special period of limitation prescribed by S. 91 (1) of the Tenancy Act may be applicable, the tenant must have been “ejected” from the land of which he seeks to recover possession.

Even a wrongful withholding of possession may be treated as an ejection (a) under S. 116, Transfer of Property Act, which may reasonably be regarded as *prima facie* applicable even in cases not coming under the Act. Where a lessee holds over and the lessor assents to the tenant continuing in possession, the lease is, in the absence of a contract to the contrary, renewed. The lessor has thus an option of treating the lessee as still a tenant or as a trespasser (b). **Sheoram v. Abdul Wahid-khan**, 6 N.L.R. 95.

Drake-Brockman, J.C.

References :—(a) 5 N.L.R. 97. (b) 22 B. 893 and 24 B. 504 and 29 B. 213 (216), R.

- (6)—applicability of to absolute occupancy tenants—Difference between the rights of ordinary tenants and those of absolute occupancy tenants. See OCCUPANCY HOLDING, No. 1, 6 N.L.R. 6.

Act XVI of 1903 (Central Provinces Municipal).

- (1) Ss. 66, 67, 66 (5), 153 (3)—Power of Committee, President, Vice-President—Power to impose conditions on owners of lands to ensure safety—“Projection lawfully in existence,” meaning of—Power to remove buildings—Compensation—Notice under Ss. 66 (5) and 153 (3). See MUNICIPALITIES, No. 1, 6 N.L.R. 53.

- (2) S. 66 (5). See No. 1 *supra*.

- (3) S. 67. See No. 1, *supra*.

- (4) S. 153 (3). See No. 1, *supra*.

6.—Madras Acts.**Act II of 1864 (Revenue Recovery).**

- (1) *Arrears of revenue, sale for—Dismissal of application to set aside sale, by Collector—Review by Collector of his own order.*

A Collector, when he has once declined to set aside a sale for arrears of revenue, has no power to review his own order.

6.—Madras Acts—(Continued).**Act II of 1864 (Revenue Recovery)—(Ctd.).**

Even assuming he had such a power under Regulation VII of 1823, it cannot be said that he can exercise such a power without any limit of time. **David Nadar v. Pandara Sannadhi**, 6 M.L.T. 177 = 3 Ind. Cas. 463 = 33 M. 65 = 19 M.L.J. 725.

MUNRO and ABDUR RAHIM, JJ.

Reference :—19 B. 113 and 116, Dist.

- (2) *S. 1—Cess—Imposition upon land—Zamindari tenant—Whether a landholder—Liability to pay cess for user of water of Government stream—Madras Act, VII of 1865.*

By S. 1 of Act VII of 1865, the cess is imposed upon the land, and public revenue due on land shall be taken to include cesses payable to Government for water supplied for irrigation; and a Zamindari tenant, who uses the water of a Government stream, for which his holding becomes liable to pay a cess to Government, is a landholder for the purpose of Act II of 1864 (1). **Nynappan Servai v. The Secretary of State for India in Council**, 8 M.L.T. 186 = 7 Ind. Cas. 403.

BENSON and KRISHNASWAMI Aiyar, JJ.

Reference :—(1) 33 M. 41, Dist.

- (3) *Ss. 1, 35—Mulgar—Mulganedar Who is ‘landholder’—Enhanced assessment by Government—Absence of contract as to payment of—Who is liable to pay.*

The plaintiff Mulgar, who is the holder under Government of an estate or *warg*, granted to the defendant Mulgenidar a portion of the estate on a perpetual lease (*mulgeni chit*), which did not make any reference to the Government assessment or as to who is to pay it. In resettlement of the district, the Government imposed an enhanced assessment on the estate.

Held, that, where there was no contract, express or implied, between the plaintiff and the defendant, as to how the increased assessment should be borne, though it would be equitable to hold that it ought to be shared between them in proportion to the benefit derived by each, yet, having regard to the terms of S. 35, Madras Revenue Recovery Act, 1864, the registered proprietor must pay all sums liable to be paid for the land.

The plaintiff mulgar is the puttadhar, and therefore a “landholder,” within the meaning of S. 1 of Act II 1864.

6.—Madras Acts—(Continued).**Act II of 1864 (Revenue Recovery)—(Old.).**

Per Wallis, J.—The Government cannot by an executive act convert mulgani tenants into landholders.

Per Krishnaswamy Aiyer, J.—*Quære*—Whether it is competent to the Government to give a ryotwari pattah to any one other than the proprietor of the land having only a subordinate interest? **Vidyapurna Thirthaswami v. Uggannu**, 8 M.L.T. 173 : 20 M.L.J. 610 = 7 Ind. Cas. 321.

BENSON, WALLIS and KRISHNASWAMI AIYAR, JJ.

References :—(1) 33 M. 41 ; 3 B. 154 ; 4 B. 473 ; 36 C. 1003 (1015) ; 13 M. 89 ; 30 M. 375 ; 12 C.W.N. 154 and (1908) 1 K.B. 71, R.

(4) *Ss. 3, 35—Defaulter, who is the—Regulation XXVI of 1802, S. 3—Contract Act, S. 69.*

Where the mortgagee of the shares of all the defendants except the appellant paid the revenue on the whole estate, and sued to recover the same,

held, that, reading Act II of 1864 with S. 3, Regulation XXVI of 1802, it must be held that the word “defaulter” within the meaning of the Act II of 1864, applies only to the registered pattadar.

The effect of S. 3, Reg. XXVI of 1802, is, that unregistered transfers are invalid against Government, though valid as between private parties.

S. 69 of the Contract Act is not applicable, as the appellant is not bound by law to pay the revenue, which the plaintiff has paid, since the former is not the registered holder. **Subramania Chetty v. Mahalingaswamy Sivan**, 6 M.L.T. 198 = 19 M.L.J. 627 : 33 M. 41 = 3 Ind. Cas. 624.

WALLIS, MILLER and SANKARAN NAIR, JJ.

(5) *Ss. 5, 42—Effect of revenue sale—Encumbrances.*

S. 42 of Act II of 1864 provides that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. From this it is clear that land may be sold for arrears of revenue, notwithstanding the fact that the defaulter has created an encumbrance upon it, and as under S. 5 it is only land belonging to the defaulter that can be sold for an arrear due by him, it follows that, under the Act, land which a defaulter has encumbered is considered to be none the less his property.

6.—Madras Acts—(Continued).**Act II of 1864 (Revenue Recovery)—(Old.).**

The Secretary of State for India in Council v. Pisipati Sankarayya, 8 M.L.T. 323.

MILLER and MUNRO, JJ.

References :—8 M. 130 ; 7 M. 434 ; 26 M. 521, D.

(5-a) S. 35. See Nos. 3 and 4, *supra*.

(5-b) S. 42. See No. 5, *supra*.

(6) *S. 59—Suit to recover assessment levied by Government—Reliefs by way of declaration and injunction prayed for in the same suit—Limitation.*

A suit to recover assessment levied by the Government must be brought within the period of six months provided by S. 59.

Where reliefs by way of declaration and injunction were also prayed for in a suit to recover assessment under S. 59, and it was contended that the suit, though brought after six months, was not barred so far as the declaration and injunction prayed for were concerned, *held*, “the necessity for asking for these reliefs all arises out of the action of Government in levying the assessment and is part of the grievance for which under S. 59 the plaintiff may apply to the Civil Court for redress. **Sankarappa Naicker v. The Secretary of State for India in Council**, 8 M.L.T. 201.

BENSON and MUNRO, JJ.

(7) *Enhancement of Government assessment—Liability of tenant.* See MULGENTI TENURE, No. 2, 8 Ind. Cas. 428.

Act IV of 1864 (Cess in lieu of village fees).

(1) *Applicability to suits respecting office of Karnam in Agraharam village.* See JURISDICTION OF CIVIL COURTS, No. 1, 20 M.L.J. 281.

Act VII of 1865 (Madras Irrigation Cess).

(1) *Landlord and tenant—Water-cess levied by Government from Zemindar for irrigation of tenant's land—Contribution—Right of landlord to recover from tenant—Sanction of Collector—Madras Rent Recovery Act (Mad. VIII of 1865), S. 11.*

Where the Government collects from the zemindar water-cess for irrigation of the tenant's *jiroyati* lands situate within the *zemindari*, with the aid of Government water, the *zemindar* is entitled to recover the amount thus paid from the tenant.

Such right is not subject to the provisions of S. 11 of the Madras Rent Recovery Act, 1865,

6.—Madras Acts—(Continued).

Act VII of 1865 (Madras Irrigation Cess) —(Continued).

and does not require the previous sanction of the Collector. **Surya Row v. Seetharamayya**, 8 M.L.T. 363.

ABDUR RAHIM and AYLING, JJ.

References:—30 M. 277; 17 M.L.J. 145, R.

(1-a) *Water-cess—Fasli jasti—Irrigation with water from Government stream—Implied engagement exempting water-cess, tests for determining.*

The essential conditions for the levy of water-cess under the provisions of Madras Act VII of 1865 are:

(1) The irrigation must be effected by means of the water of a river, stream, channel or work belonging to or constructed by Government.

(2) If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir, the irrigation must, in the opinion of the Collector (subject to the control of the Board of Revenue and Government), be beneficial to, and sufficient for, the requirements of the crops.

(3) The charge must not be contrary to any engagement between the landholder and Government, whereby the former is entitled to irrigation free of charge.

Where the source of irrigation is a stream, which is itself formed by the junction of two streams, one of which rises in Government hills, the Government is entitled to levy water-cess for the land so irrigated, *fasli jasti*, i.e., water rate for a second crop cultivated on wet lands.

The mere fact that the waters of the Government stream, before use, were mingled with those of another stream, or that they passed through a river bed or channel of joint or doubtful or even alien ownership is immaterial (a).

As to condition (2), the questions as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court, but for the Collector to determine, subject to the control of the Board of Revenue and of the Government (b).

Where an implied undertaking as to exemption from water-cess is deducible from any *sauval* or grant by Government, the undertaking must be limited, as regards double crop cultivation, to the extent actually under double crop cultivation.

6.—Madras Acts—(Continued).

Act VII of 1865 (Madras Irrigation Cess) —(Continued).

Ordinarily, the implied right to free irrigation, deducible from the grant, should be measured by the area irrigated (c).

A land-holder is not precluded from showing that the excess of wet cultivation, first or second crop as the case may be, irrigated with the aid of Government water, over that existing at the time of the grant, is due to thrifty use of water or careful maintenance of his channels and tanks to prevent wastage, and not to the use of an increased quantity of water; in which case water-cess on the increased area would not be leviable. But in all such cases, rigid proof should be required, the natural presumption being that the quantity of water used varies in proportion to the extent under irrigation. **Secretary of State for India v. Ambalavana**, 8 Ind. Cas. 357.

WHITE, C.J. and AYLING, J.

References:—(a) App. No. 64 of 1907; S.A. 1019 of 1907, F. (b) S.A. 1019 of 1907, F. (c) 26 M. 66; 32 M. 457; 6 M.L.T. 242; 3 Ind.Cas. 456, R.; 24 M. 279; 11 M.L.J. 117; 14 M.L.J. 350; 2 M. 46; 7 M.H.C.R. 60; 16 M. 333, D.

(2) *S. 1—Irrigation—Use of water from Government source—User of other water also—Liability to pay cess.*

All that S. 1, Madras Act VII of 1865, requires is, that water from Government source should irrigate the land in question. That other water has also been used is no ground for getting rid of the liability.

A question was raised as to the meaning of the word "irrigation," but on the facts of the present case it was found that the water did irrigate the suit lands (a). **The Secretary of State for India in Council v. Swami Nana-theeswarer**, 7 M.L.T. 407.

BENSON and KRISHNASWAMI Aiyer, JJ.

References:—(a) 24 M. 279; 14 M.L.J. 350 not appl.; 12 M. 407, R.

(3) *S. 1—Statutory powers—Power to levy separate cess—Delegation—Validity.*

Where a statute (S. 1 of Act VII of 1865) empowers Government to levy a separate cess for water supplied for irrigation, and enables them to prescribe rules under which and the rates at which such water-cess shall be levied, the Government have no right to delegate to

6.—*Madras Acts*—(Continued).

Act VII of 1865 (Madras Irrigation Cess) —(Continued).

the Collector the statutory authority conferred upon them to prescribe the rules and the rates. **Kamulammal v. The Secretary of State for India in Council**, 8 M.L.T. 171 = 7 Ind. Cas. 402.

BENSON and KRISHNASWAMY AIYER, JJ.

(3-a) *S. 1—Water-cess—Lands irrigated by Government water—Bed of river, ownership of—Property in river, whether vests in Government—‘Natural stream,’ meaning of—Act III of 1905. S. 2, effect of—Grant of land by Government—Whether implies grant of free right of irrigation—Abstention by Government from levying water-cess—Presumption—Burden of proof—Artificial channel fed by a river or Government channel—Voluntary payment of water-cess—Demand of water-cess—Compliance with demand, whether voluntary payment.*

Under Madras Act, VII of 1865, Government is entitled to charge water-cess, if the water with which lands are irrigated is supplied from a river or channel belonging to, or a work constructed by, Government, and if there is no engagement between the person using the water and Government by which the irrigation is to be free of separate charge.

A grant of land does not necessarily carry with it a right to free irrigation.

S. 2 of Act III of 1905 is declaratory of the right to property in rivers and all flowing waters.

The provisions of the said section amount to a declaration that, subject to easements and natural rights of other land-holders, all standing and flowing waters, which are not the property of any one else, are the property of Government.

A river is the property of Government within the meaning of Act VII of 1865, even though the property in bed may be vested in the owners of land along the banks, so as to give them the right to accretions or ‘lankas’ forming therein (a).

Artificial channels constructed by a *zemindar* which, however, are fed by a river, cannot be regarded as sources of supply to the lands which owe their immediate source of irrigation to such channels, and do not on that account create an exemption from water-cess.

6.—*Madras Acts*—(Continued).

Act VII of 1865 (Madras Irrigation Cess) —(Continued).

The abstention of Government from charging the *zemindar* with water-cess for a long time does not amount to evidence of an agreement with the *zemindar* exempting him from such charge. When the origin of title is not known, as in the case of some *inams* granted before the Permanent Settlement, the fact that irrigation was permitted, free of charge for a series of years may be evidence of a lost grant, but does not afford room for presuming another grant of irrigation rights.

In all cases the burden is on the person claiming exemption from the charge (b).

Payment of water-cess, found to have been illegally levied by Government, entitles the person who paid it to claim its refund. Such payment is not *voluntary* and, therefore, irrecoverable, though it was made without any actual attachment or distraint of property.

A demand by Government, under the powers given to it by Madras Act, II of 1864, amounts to a threat of distraint if the money demanded is not paid; and if payment is made to prevent the execution of that threat, it cannot be regarded as a voluntary payment (c).

Cl. (a) of S. 1 of Act VII of 1865 applies when the water irrigating the land is taken from a river belonging to Government. **Kundukuri v. The Secretary of State for India**, 8 M.L.T. 399.

MILLER and MUNRO, JJ.

References:—(a) (1897) App. Cas. 129; 66 L.J.P.C. 27; 75 L.T. 666; 61 J.P. 468, R. (b) 14 M.L.J. 354, R. (c) 22 M. 100; 25 M. 548; 32 M. 456; 6 M.L.T. 242; 3 Ind. Cas. 456, R.

(4) *S. 1, Proviso—Inamdar entitled to one-fifth of tank water—Mere extension of cultivation—Liability to pay water-cess.*

Where an Inamdar is, by engagement with Government, entitled to one-fifth of the water of the tank, he is not, under the proviso to S. 1 of Act VII of 1865, liable to any water-cess, merely because he extends his wet cultivation or raises double crops on single crop lands, provided he does not exceed his one-fifth share of water.

Quare.—Whether the Inamdar will be entitled to claim one-fifth where Government improves the tank and its capacity? **Appasami Iyer v. The Secretary of State for India in Council**, 7 M.L.T. 349 = 6 Ind. Cas. 265.

BENSON and KRISHNASAMI IYER, JJ.

6.—Madras Acts—(Continued).**Act VII of 1865 (Madras Irrigation Cess)**
—(Concluded).

(5) S. 7—Suit by landlord for recovery of moiety of cess paid to Government—Dismissal by lower Courts as being in contravention of S. 7—Whether second appeal lies. See APPEAL (SECOND APPEAL), No. 2, 7 M.L.T. 362.

(6) Ss. 7 and 13.

Where the defendants bought the right to cultivate, at auction, upon certain terms embodied in the sale lists and the documents, they are bound to abide by those terms, apart from the question whether S. 13 of the Act applies are not. S. 7 applies to such a case. **Alapati Ammanna v. Narayanasami Naidu Garu**, 7 M.L.T. 385.

ABDUR RAHIM, J.

Reference :—2 M. 67, App.

(7) S. 13. See No. 6, *supra*.

Act VIII of 1865 (Madras Rent Recovery).

(1) *Landlord and tenant—Rokka patta—Validity of term fixing rent, at landlord's discretion, according to yield and of term fixing half the Ayen rent for second crop—Validity of term fixing rent according to a classification of lands and of agreement to accept patta according to Adangal chitta.*

A clause in a Rokka patta (i.e., cash patta) that, "after the termination of the patta, tenant shall be liable to agree (sic) to the theerva that may be fixed by the landlord for the said patta lands with reference to the yield" is not a proper term, and ought to be expunged.

But a term in such patta that in case you (tenant) raise second crop in the lands specified according to numbers in the *adangal*, you shall pay one half of the Ayen rent on the said land, is a valid and proper term.

A clause in an agreement executed by tenants that "we shall from the current fasli forward accept patta for ever in accordance with the *adangal* chitta prepared by you according to the aforesaid classification" was held to be not illegal. **Subbaraya Mudaliar v. Krishnamachariar**, 7 M.L.T. 105=5 Ind. Cas. 811.

BENSON, O.C.J. and MILLER, J.

(2) *Landlord and tenant—Transfer of tenant's holding—Distrain of transferor's goods after transfer—Absence of notice of transfer to the landlord—Legality of distrain—English and Indian Law—Liability of tenant entitled to the holding at the commencement of the Fasli.*

6.—Madras Acts—(Continued).**Act VIII of 1865 (Madras Rent Recovery)**
—(Continued).

A valid transfer of his holding by a tenant, in the absence of circumstances creating an estoppel against him, puts an end to the tenancy without notice to the landlord, and the tenant does not, after the transfer, continue to be liable for future rent. But if the transferor tenant was entitled to the holding at the commencement of the Fasli, he is bound to pay the rent for the Fasli, and proceedings may be instituted against him under the Rent Recovery Act, notwithstanding that he transferred the holding later in the Fasli and that the payments were to be made on different dates subsequently. A distraint of the transferor's cattle for rent due for that Fasli is legal.

The English common law as to distraint is not applicable to proceedings under the Rent Recovery Act, 1865. In India there is no right to distrain under the Transfer of Property Act, and, where it exists under the Rent Law, there is no limitation as to the situation of the goods (a). **Ramasawmy Iyengar v. Shanmoogam Pillay**, 7 Ind. Cas. 210.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) 9 Q.B.D. 14 ; 15 L.J.Q.B. 321 ; 10 Jur. 801 ; 16 Q.B.D. 636 ; 20 L.J.Q.B. 320 ; 15 Jur. 628, R.

(3) *Purchaser of portion of land—Recognition as tenant—Patta standing in the name of another—Arrears of rent due by the latter—Sale of purchaser's land—Void.*

Where a Zamindar recognized the plaintiff, who was the purchaser of a portion of the land as tenant, and accepted rent from him for several years, though the patta stood in the name of another, and where, in proceedings taken under the Rent Recovery Act for recovery of arrears of rent against the pattadar, he sold the portion of land purchased by the plaintiff, without giving notice of the attachment or the arrear.

Held that the sale was void as against the plaintiff (a). **Peram Narasigadu v. Matchireddi, Buchireddi**, 8 M.L.T. 284.

BENSON and KRISHNASWAMI AIYAR, JJ.

Reference :—(a) 29 M. 83, D.

(3-a) *Madras Estate Land Act (I of 1908)—Landlord and tenant—Right of tenant to improvements—Suit under old Act—Applicability of new Act.*

6.—*Madras Acts*—(Continued).

Act VIII of 1865 (Madras Rent Recovery) —(Continued).

A tenant brought a suit under Act VIII of 1865 to restrain the landlord from interfering with his cultivating betel on his patta land. The first Court dismissed the suit, but the Sub-Judge on appeal decreed it. The *Zemindar* appealed: *held* that the new Act applied to the improvements of the tenant, and that the second appeal should be dismissed. **Senuga Pandia v. Veerabadra Moopan**, 8 Ind. Cas. 434.

ABDUR RAHIM and AIYLING, JJ.

- (4) *Ss. 9, 11—Tender of pattas on the asara or produce-sharing system—Setting up of express contract, to pay money rent—Absence of such contract, express or implied—Proper course, to determine rent under S. 11, cl. 3—Prevalence of money rent for a number of years—Inference of implied contract, not proper—Element in the consideration of the existence of usage.*

P, a zemindar, brought a suit against the tenants of his village C, under S. 9, Madras Rent Recovery Act, 1865, to enforce the acceptance of pattas tendered by him and the execution of muchilikas corresponding thereto. The pattas tendered required the tenants to deliver to P, by way of rent, a specific share of rent, on the ground that the *asara* or sharing system was the *manool* or customary mode of payment in the village of C. The tenants denied that the *asara* system was in force in their village, and alleged that money rates had prevailed there for a considerable number of years, and that, by a specific arrangement entered into in Fasli 1299 (1899), an uniform rate of Rs. 5 per acre had been settled in perpetuity for the lands held by them, and that leases were exchanged on that basis for a term of 5 years. It was found that in Fasli 1299 different rates of money rent prevailed. The Courts in India, while disbelieving the story of an express agreement to the settlement of an uniform rate at Rs. 5 per acre, inferred, however, an implied contract from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299. *Held*, by the Judicial Committee, that their Lordships were unable to concur in the view, or to hold that, alongside of the express contract embodied in the leases exchanged between the parties, there was a collateral implied contract

6.—*Madras Acts*—(Continued).

Act VIII of 1865 (Madras Rent Recovery) —(Continued).

relating to fixity of rent. *Held*, also, that, it having been found that there was no express or implied contract, the question must be decided in accordance with the rules contained in S. 11, cl. 3 of the Act.

While agreeing with the High Court in the view that it is not open to Courts to imply, from the mere circumstance that the rent has been paid in money for a series of years, an agreement to pay money rent, their Lordships of the Judicial Committee saw no reason why the fact that money rent has prevailed in a particular locality for a considerable number of years may not form an element in the consideration of the question of usage. **Parthasarathi Appa Row v. Chevandra Venkata Narasayya**, 33 M. 177 (P.C.) = 14 C.W. N. 938 = 20 M.L.J. 596 = 78 M.L.T. 141 = 12 Bom. L.R. 648 = 12 C.L.J. 233.

LORD MACNAGHTEN, LORD COLLINS,
SIR ARTHUR WILSON, and MR. AMEER
ALI.

- (5) *S. 11—Lands cultivated with wet crops, rent payable on—No contract as to rate of rent payable—Landlord entitled to claim varam rates—Enhancement of rent.*

Till Fasli 1283 the *asara* system was in force. In Fasli 1284 money rents were introduced and the rates of such rents were permanently fixed in Fasli 1292. At the time, all the lands were dry; wet cultivation began in Fasli 1314 and the pattas now on dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for lands as dry. *Held*, that, inasmuch as there was no contract as to the rate payable on lands cultivated with wet crops, and the rates to be charged for wet cultivation were left undetermined, under S. 11, Act VIII of 1865, the landlord is entitled to claim *varam* rates. So the fact that the landlord gets an enhanced rent is immaterial. **Yenkata Narasimha Naidu v. Kesara Neni Chinna Bappaya**, 5 M. L.T. 87 = 38 M. 12.

MUNRO and PINHEY, JJ.

References:—30 M. 510; 31 M. 19, F.

- (6) *S. 11—Collector's sanction not required to the charge of water tax.*

The Collector's sanction is not required to the charge of water-tax by a zemindar against

6.—Madras Acts—(Continued).**Act VIII of 1865 (Madras Rent Recovery)—(Concluded).**

an Inamdar, when the latter has used the former's water. **Zemindar of Venkatagiri v. Suryaprakasam**, 20 M.L.J. 120.

BENSON and MILLER, JJ.

- (7) S. 11—*Usage of enhancing rent for dry land converted into wet at the tenant's expense—Legality.*

A landlord is entitled to raise the rent, only if the improvement is effected at his own expense, or at the expense of the Government, and in either case only with the sanction of the Collector. A usage to charge assessment at the wet rate, on account of the tenant's converting land from dry to wet or any other improvements effected at the tenant's expense, is illegal (a). Where the rent payable is in fact higher, the case falls within S. 11, Rent Recovery Act. **Paramasawmy Iyengar v. Pusala Thevan**, 20 M.L.J. 142=5 Ind. Cas. 911.

BENSON, O.C.J. and SANKARAN NAIR, J.

Reference :—(a) 21 M. 136, R.

(8) S. 11. See ACT VII OF 1865 (MADRAS IRRIGATION CESS), No. 1, 8 M.L.T. 363.

(8-a) S. 11. See No. 4, *supra*.

(8-b) S. 11 (2)—Absence of contract for rent—Claim for varam. See RENT, No. 4, 8 Ind. Cas. 156.

(8-b) S. 11 (3)—Tenant raising garden crop on dry land by means of well sunk by him—Enhancement of rent. See LANDLORD AND TENANT, No. 53, 8 Ind. Cas. 330.

(9) S. 14—Arrears of rent when become due. See LANDLORD AND TENANT, No. 40, 8 M.L.T. 345.

Act III of 1873.

(1) S. 16—Law determining marital obligations where parties are Hindus. See RESTITUTION OF CONJUGAL RIGHTS, No. 1, 8 M.L.T. 314.

Act I of 1876 (Separate Assessment).

(1) Refusal to consent to separate registry—Effect. See CONTRACT ACT, No. 42, 7 M.L.T. 249.

Act V of 1882 (Madras Forest).

- (1) Ss. 6, 17, 25—*Applicability of S. 25—Forest Committee appointed prior to act—Claim not made before them—Right whether extinguished by Ss. 6, 17—Adverse possession—Long enjoyment and possession by plaintiff—Burden of proof.*

6.—Madras Acts—(Continued).**Act V of 1882 (Madras Forest)—(Concluded).**

S. 25, Madras Act, 1882, refers only to questions which have been decided, orders which have been issued, or records which have been prepared, and has no application to a claim which has never been made.

Ss. 6 and 17 of the Act are not applicable so as to extinguish a right, merely because it was not claimed at an enquiry by the Forest Committee appointed prior to the Act.

Where it is proved that the *tope* and *nandavanam* have been attached to the temple, and tended by the temple authorities from a long time since, it would be on the Government (who is the defendant) to show that the temple had not acquired the ownership of the *tope* and *nandavanam* by actual possession for sixty years, or that the possession is by license or other permission of the Government. **Sri Perarula Remanuja Jeer Swami v. The Secretary of State for India in Council through the Collector of Tinnevely**, 7 M.L.T. 241.

MILLER and MUNRO, JJ.

(2) S. 10, appeals under—Computation of time—Time requisite for obtaining copy—Whether deducted. See LIMITATION ACT (1877), No. 13, 7 M.L.T. 132 (F.B.).

(3) S. 17. See No. 1, *supra*.

(4) S. 25. See No. 1, *supra*.

Act IV of 1884 (Madras Dt. Municipalities).

- (1) S. 19, sub-S. 1, cl. iv, *Municipal Councillor—Continuance in office likely to bring administration into contempt—Power of Governor-in-Council to remove.*

S. 19, sub-sec. 1, cl. iv, Madras District Municipalities Act, 1884, gives the Governor-in-Council, power to remove a Councillor, if his continuance in office is likely to bring the Municipal administration into contempt, provided that the Government shall not pass any orders under this clause without giving an opportunity of explanation to the Councillor concerned. **Chelva Perumal Chettiar v. The Secretary of State for India in Council represented by the Collector of North Arcot**, 7 M.L.T. 245=6 Ind. Cas. 604.

BENSON and ABDUR RAHIM, JJ.

- (2) S. 168—*Easement overriding statute—Validity.*

There can be no easement which overrides the provisions of S. 168 of the Act. **Latchmi**

6.—Madras Acts—(Continued).**Act IV of 1884 (Madras Dt. Municipalities)**
—(Concluded).**Narayana Iyer v. The Municipal Council of Trichinopoly**, 7 M.L.T. 154 = 5 Ind. Cas. 916.

BENSON and KRISHNASWAMI IYER, JJ.

Reference :—19 M.L.J. 757, F.

(3) *S. 168, Sub-Ss. (1) and (3)—Pandal in front of a building in public street—Whether a projection within the meaning of the section—Suit to restrain Municipality from removing pandal—Maintainability—Proper remedy—Compensation—“Lawfully made,” meaning of—Object of Sub-S. 3.*

Held that a Pandal erected in front of a building in a public street is a “projection” within the meaning of S. 168 (1) of the Act, and that the Municipal Council has power to cause it to be removed.

The object of Sub-S. 3 was to give a right to compensation, in cases where the making of the projection did not contravene any provision of law

The words “lawfully made” do not mean “made under the license of the Council since the Act came into operation.”

Sub-S. 3 of S. 168, Act IV of 1884, also applies to cases in which the obstruction or projection was lawfully made before the Act.

The plaintiff's remedy, in cases where the Municipality directs the removal of such a projection, is to recover compensation, and a suit for an injunction will not lie. **Mothe Achayya Garu v. The Municipal Council of Ellore**, 7 M.L.T. 66 = 19 M.L.J. 757 = 4 Ind. Cas. 828.

WHITE, C.J., and KRISHNASWAMI IYER, J.

Act V of 1884 (Local Boards).(1) *S. 51—Dedication of property to charity—Board of Revenue handing over management to Taluk Board—Powers of Board of Revenue and Taluk Board—Rights of public—Madras Reg. VII of 1871, Ss. 2, 7, 8, 13.*

By the will of the plaintiff's deceased husband, certain charities were created and trustees appointed. The plaintiff was one of them. In consequence of alleged mismanagement the Board of Revenue intervened. The possession of the endowment property passed to the Taluk Board in due course. The plaintiff ceased to be a trustee of the endowment and claimed the right to inspect the accounts of the charity under a special clause in the will which provided that “the trustees shall maintain correct accounts accessible to all the persons.” *Held* that there would be no duty to allow inspection

6.—Madras Acts—(Continued).**Act V of 1884 (Local Boards)—(Concluded).**

to any member of the public, when there is no averment of mismanagement on the part of the Taluk Board. In the absence of a charge of mismanagement, the direction contained in the will as to the maintenance of accounts accessible to the public will not *ipso facto* impose the obligation upon a statutory body which enters upon management under statutory powers.

Under Reg. VII of 1871, the Board of Revenue has merely the powers of superintendence and not the right of actual management.

But where under S. 51, Act V of 1884, an institution is transferred to the control of a Taluk Board, both powers of superintendence and of management are made over.

The Taluk Board has not the power to appoint independent trustees for the management of institutions taken over by it under S. 51 of the Act. **Nelayathakshi Ammal v. The Taluk Board, Mayaveram**, 8 M.L.T. 341.

BENSON and KRISHNASWAMI IYER, JJ.

References :—7 M.H.C.R. 77 ; 12 M. 366 ; 31 M. 111, R.

(2) *S. 76—Wrongful collection of cess by Collector—Suit against District Board for its recovery, maintainability of—Collector acting in excess of statutory authority—Liability in damages—Tort.*

Where a Collector wrongfully collected cess under S. 76, and paid it over to the credit of the District Board, *held*: a suit does not lie as against the District Board for the recovery of the sum so illegally collected (a).

Held also, where a Collector, while levying cess from the plaintiff, acted in excess of his statutory authority, he is liable to the plaintiff in damages, and the liability is one which sounds in tort. **Chinnasami Chettiar v. The Collector of Salem**, 8 M.L.T. 201.

BENSON and KRISHNASWAMI IYER, JJ.

Reference :—(a) 24 M. 114, F.

(3) *Madras Act VI of 1900—Public road, what is—User by public—Passage of cattle of adjoining owners whether confers a right of way on the public.*

All streets over which the public have a right of way are public streets under Madras Act V of 1894. The mere passage of cattle of the adjoining owners does not necessarily confer a right of way on the public. **Zemindar of Kottam v. President, Taluk Board, Cocanada**, 8 Ind. Cas. 682.

BENSON and KRISHNASWAMI IYER, JJ.

6.—Madras Acts—(Continued).**Act I of 1886 (Abkari).**

S. 13—Partnership between licensed and unlicensed persons—Legality.

Held, that S. 13, Madras Abkari Act, does not prohibit a person, who has no license, from holding an interest in the manufacture or vend of liquor jointly with a licensed manufacturer or vendor. **Natla Bapiraju v. Param Achuta Rajajee**, 7 M.J.T. 176 = 5 Ind. Cas. 456 = 20 M.L.J. 337.

MILLER and KRISHNASWAMI AYYAR, JJ.
Reference :—24 M. 401, Diss.

Act I of 1887 (Malabar Compensation for Tenant's Improvements).

S. 7—Operation of the Act—Effect of stipulation in lease—Rate of compensation payable.

In a lease executed before the passing of Madras Act I of 1887, the terms on which the tenants held were "when the fruit trees begin to bear fruit we shall receive their kuikanam which you will cause to be paid at the ordinary rate, and surrender the paramba." Act I of 1887 was passed before the surrender and provided a rate of compensation for fruit trees. In a suit to recover compensation under the lease, *held* that the tenant was entitled to compensation in accordance with the provisions of the Act, and that there was no special contract such as was contemplated in S. 7 of that Act which would exempt the agreement from the operation of the Act. **Kerala Yarmah Yali Rajah Avargal of Cherakkal Kovilagam v. Ondan Ramunni, Karnavan and Manager of his Tarwad Affairs**, 33 M. 218 (F.B.).

COLLINS, C.J., MUTHUSAMI AYYAR,
PARKER and WILKINSON, JJ.

Act III of 1895 (Madras Hereditary Village Offices).

(1) *S. 3, cls. 3 and 4—Office of carpenter in Zemindari and Inam villages—Suit relating to lands forming part of the emoluments of—Jurisdiction of Civil Courts—Applicability of the Act.*

The Madras Hereditary Village Offices Act, 1895, applies to the hereditary offices of village artisans such as carpenter, etc., only in villages other than proprietary estates.

The jurisdiction of Civil Courts is not ousted in respect of suits relating to the emoluments of the village office of carpenter in the Zamin-dari villages.

6.—Madras Acts - (Continued).**Act III of 1895 (Madras Hereditary Village Offices)—(Continued).**

As the office of village carpenter is not one of the offices to which either the Madras Village Cess Act, 1893, or the Madras Proprietary Estates Village Service Act, 1894, is applicable, and as it is not an office in a village other than a proprietary estate, cl. 4, S. 3 of Act III of 1895 (Madras Hereditary Village Offices) is not applicable to the office in an Inam village, and the jurisdiction of Civil Courts is not ousted (a). **Veerabhadra Achari and another v. Suppliah Achari and another**, 7 M.L.T. 198 = 5 Ind. Cas. 477.

SIR ARNOLD WHITE, C.J., and KRISHNASWAMY IYER, J.

References :—(a) 21 M. 134; 17 M. 302; 26 M. 490, D.

(2) *Ss. 3, 5—Blacksmith's inam in a proprietary estate, whether liable to be attached in execution of a decree.*

An inam land in a proprietary estate attached to the office of a village blacksmith's is liable to be attached and sold in execution of a decree.

By S. 3 of the Hereditary Village Offices Act, the village offices mentioned in cl. 4 of that section, if they are offices in proprietary estate, are excluded from the operation of the Act as provided for in cl. 3 of S. 3. **K. Chinnaya Asari v. Annayappa Mooniappa Mudali**, 5 Ind. Cas. 41 = 7 M.L.T. 264.

MUNRO and ABDUR RAHIM, JJ.

Reference :—28 M. 84, D.

(3) *S. 5—'Transferred or encumbered' meaning of—Permanent lease is not transfer.*

The grant of a permanent lease is not prohibited by S. 5 of Madras Act III of 1895, as the grant of a permanent lease is not a transfer within the meaning of "transferred," and as the 'transfer' referred to is a transfer of ownership (a). **Kahetrabars Bissoyl of Naman-garam v. Subhanapuram Hari Krishna Rao**, 7 M.L.T. 94 = 5 Ind. Cas. 125.

MILLER and MUNRO, JJ.

(3-a) *S. 5—See No. 2, supra.*

(4) *Ss. 13, 21—Jurisdiction of Civil Courts—Lease of Inam by the inam holder—Suit to eject tenant on the expiry of lease.*

A suit for possession of Village Officer's inam land, on the expiry of a lease by the inam holder to a tenant, is cognisable by the Civil Courts.

5.—*Madras Acts*—(Continued).

Act III of 1895 (Madras Hereditary Village offices)—(Concluded).

Ss. 13 and 21 of the Madras Act III of 1895 should be read together, and a suit for possession from a tenant on the expiry of his lease does not fall within the terms of S. 13 (a).

In such a case plaintiff will not be entitled to base his suit on his title to the inam. **Mavoulu Seetharam Naidu v. Doddi Rami Naidu**, 5 Ind. Cas. 137 = 7 M.L.T. 181 = 20 M.L.J. 91.

BENSON, O.C.J., and KRISHNASWAMI AIYAR, J.

References :—30 M. 126, *Expl.* ; 16 M.L.J. 333 (336) ; 1 M.L.T. 102 and C.R.P. No. 3 of 1903, R. (b) 4 M.H.C.R. 70, D.

(Ss. 13, 21—*Suit for possession of land—Jurisdiction of Civil Courts.*

Where a suit is for land and is not based on the ground that the land constitutes part of the emoluments of the office, nor pertains to any right to succeed to any of the offices mentioned in S. 13 of the Hereditary Village Offices Act, nor raises a question as to the rate or amount of the emoluments of such office, Civil Courts have jurisdiction to entertain it.

S. 13 of the Madras Act III of 1895 is an enabling section conferring jurisdiction on Revenue Courts, and by itself cannot oust the jurisdiction of Civil Courts which would otherwise exist. **Gavura Ramanna v. Adabala Rattayya**, 5 Ind. Cas. 136 = 7 M.L.T. 136 = 20 M.L.J. 94.

WHITE, C.J., and KRISHNASWAMI AIYAR, J.

Reference :— 30 M. 126, R.

(5-a) S. 21—See Nos. 4 and 5, *supra*.

(6) Cls. 1, 2, 3—Applicability to suits respecting office of Karnam. See JURISDICTION OF CIVIL COURTS, No. 1, 20 M.L.J. 281.

Act IV of 1897 (Madras Survey and Boundaries).

Ss. 11, 12, 21—*Survey officer's decision—When decision said to be passed—Limitation—Starting point—What is the date of the decision.*

The date of a decision is the date of its communication to the parties. A decision cannot properly be said to be passed until it is in some way pronounced or published, under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then, though it may

6.—*Madras Acts*—(Continued).

Act IV of 1897 (Madras Survey and Boundaries)—(Concluded).

be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else. **Secretary of State for India in Council v. Narayanaswamy Naidu**, 8 M.L.T. 310.

MILLER and MUNRO, JJ.

References :— 6 M. 189 ; 12 M. 1, F.

(2) S. 12—See No 1, *supra*.

(3) S. 21—See No. 1, *supra*.

Act I of 1900 (Malabar Compensation for Tenants Improvements).

(1) *Landlord and tenant—Suit for redemption of Kanom—Mode of calculating improvements—Disparity in rent.*

In calculating the value of improvements, made by a tenant, in an action for redemption of a *Kanom*, the disparity in the rent paid by the tenant at different times, should not be made the sole basis for working up the value of improvements. It is only a circumstance to be taken into account in weighing the evidence as to improvements (a). **Damodaram Numbudri v. Gopalan Nair**, 4 Ind. Cas. 504.

BENSON and KRISHNASWAMI AIYAR, JJ.

Reference :— (a) 16 M. 350, R.

(1-a) Ss. 5, 6—*Kanom mortgage—Suit for redemption—Right of mortgagee to possession till ousted by execution—Claim for mesne profits from date of suit.*

In a suit for redemption of a *Kanom*, where the tenant is entitled to the value of improvements, though the mortgage has been discharged, the mortgagee is entitled to be in possession till ousted in execution of a decree against him, and the plaintiff is not entitled to claim mesne profits from the date of suit. **Palakal Raman v. Yalla Chemblashith**, 6 Ind. Cas. 889 = 7 M.L.T. 245.

BENSON and KRISHNASWAMI AIYER, JJ.

(2) Ss. 5, 6, 9 to 18—*Compensation for improvements—Stipulation in the Kanom deed for improvements according to local custom—Right of tenant to claim compensation under the Act—Contracts for improvements made before Act I of 1900, effect of.*

A more provision in a *Kanom* deed for customary compensation is not a special

6.—*Madras Acts*—(Continued).

Act I of 1900 (Malabar Compensation for Tenants Improvements)—(Concluded).

contract, such as is contemplated in S. 7 of Madras Act I of 1887, which corresponds to S. 19 of Act I of 1900.

Where a *Kanom* deed stipulated that the tenant was to accept the value of improvements according to local custom :

Held, that there was no express contract for particular rates of compensation to be enforced, and that the tenant was entitled to claim compensation under S. 5 of Madras Act I of 1900 (a).

Even where there is a contract, before Madras Act I of 1900, prescribing lessor rates, a tenant is not precluded from claiming compensation under the Act. If a contract as to the rate of compensation is unfavourable to the tenant, even though it has been entered into before 1886, he is entitled to claim compensation under S. 5, and the rates prescribed in Ss. 9 to 18 must then prevail (b). **Cheriya Rajaha Avergal v. Chunayil Madattul**, 6 Ind. Cas. 887.

BENSON and KRISHNASWAMY AIYER, JJ.

References:—(a) 3 M.L.J. 51; 16 M. 452, R. (b) 32 M. 1; 5 M.L.T. 277; 1 Ind. Cas. 307, explained.

- (3) S. 6—See Nos. 1 and 2, *supra*.
- (4) S. 9—See No. 2, *supra*.
- (5) S. 10—See No. 2, *supra*.
- (6) S. 11—See No. 2, *supra*.
- (7) S. 12—See No. 2, *supra*.
- (8) S. 13—See No. 2, *supra*.
- (9) S. 14—See No. 2, *supra*.
- (10) S. 15—See No. 2, *supra*.
- (11) S. 16—See No. 2, *supra*.
- (12) S. 17—See No. 2, *supra*.
- (13) S. 18—See No. 2, *supra*.

Act I of 1902 (Court of Wards).

- (1) Ss. 3, 23, 48—*Specific Relief Act, 1877*, S. 45—*Arrangement by Court of Wards for performance of marriage of a Ward*—*Power of High Court to interfere*—*Power of High Court to order removal of Ward from the custody of Court of Wards*.

On a petition praying the High Court to make an order that the Court of Wards should detain in Madras the person of its ward and prevent his being married to a certain lady as previously arranged by it.

6.—*Madras Acts*—(Continued).

Act I of 1902 (Court of Wards)—(Concluded).

Held, (Per White, C.J.) that the High Court cannot make an order under S. 45, Specific Relief Act, in the nature of any mandamus, because it is impossible to allege that the Court of Wards has committed a breach of duty by making the order which it has made.

S. 23 of the Court of Wards Act empowers it to make such arrangements as to it may seem fit in respect of the marriage, among other things, of a ward, whose person is under its superintendence for the time being.

Held, also, that the High Court has no jurisdiction to interfere under S. 3 of the Court of Wards Act, because the ward is legally a ward of the Court of Wards, and an order is made in pursuance of the express provisions of the Act by the Court of Wards.

Quere:—Whether the High Court has power under S. 3 of the Court of Wards Act?

Per Krishnasami Aiyar, J.—S. 45 of the Specific Relief Act, 1877, has no application to the present case, there being no specific act within the meaning of that section which the Court of Wards is required to do under S. 23 of the Act.

Whatever the powers of the High Court under S. 3 of the Court of Wards Act may be, they do not justify the making of an order, directing the marriage to be postponed of a ward who is legally under the custody of Court of Wards. **Ranee Yellai Nachiar v. The Court of Wards, Madras**, 7 M.L.T. 73 5 Ind. Cas. 740.

WHITE, C.J., and KRISHNASWAMI AIYAR, J.

(1-a) S. 23—See No. 1, *supra*.

(2) S. 49—*Suit under*—*Absence of previous notice*—*Effect*.

S. 49 of this Act prohibits the institution, without the prescribed notice, of any suit relating to the person or property of a ward, and such a suit brought without the notice is liable to be dismissed. **Sri Raja Venkata Narasimha Appa Row, Bahadur Zemindar Garu v. Sree Raja Venkata Rangayya Appa Row, Bahadur Zemindar Garu**, 8 M.L.T. 418.

MILLER and KRISHNASWAMI IYER, JJ.

Act III of 1904 (Madras City Municipality).

- (1) S. 120—*Trader buying goods through servant at Madras*—*Shop in Tinnevely*—*Whether carries on business at Madras*—*Profession tax*—*Liability to be taxed under S. 120*.

6.—Madras Acts—(Continued).

Act III of 1904 (Madras City Municipality)—(Concluded).

Held that, a person, who is a trader in piece goods and has a shop in Tinnevely where he sells the goods and earns his profit, cannot be said to carry on business at Madras, merely because he buys his goods at Madras (where he has no office) through a servant, who, acting under his orders, buys and forwards them to Tinnevely (a), and that he is not liable to be taxed under S. 120 of the Act. **P.S.K. Hajee Sheik Meera Rowther v. The President of the Corporation of Madras**, 7 M.L.T. 80—33 M. 82—5 Ind. Cas. 744.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 5 H. and N. 711, (1895), 1 Q.B. 580 and (1908) A. C. 46, *Applied*.

Act I of 1908 (Madras Estates Land).

(1) *Tenancy—Questions necessary to determine terms of patta—Revenue Courts Jurisdiction.*

Where tenancy is established, all questions that may arise on the footing of such tenancy may be dealt with by the Revenue Courts, so far as they may be necessary to determine the terms of the patta. **Polemera Thammudu v. Sri Maharani Lady Godey Chitti Janakiyamma Gajapathi Row Garu**, 8 M.L.T. 287.

BENSON and KRISHNASWAMI Aiyar, JJ.

(2) *Ss. 3 (2), 8, 189—Jurisdiction of Civil Court.*

The receiver of the Tanjore Palace Estate sued the defendant in the Subordinate Judge's Court, Tanjore. Defendant pleaded that, under S. 189 of the Act, the Civil Court had no jurisdiction to try the suit.

Held that, as the Ranees have been admittedly enjoying both the *varams* for a long time, it has to be presumed that they have acquired the *kudivaram* interest also. In that case, the land in question, by virtue of exception to S. 8 of the Act, ceases to be part of the Estate, and the jurisdiction of Civil Courts to try the suit is not barred by the said Act. **Rajaram Rao v. Sundaram Aiyar**, 8 M.L.T. 350.

SANKARAN NAIR, J.

(2-a) *S. 3, cl. 2 (d)—Estate—Jurisdiction of Civil Court—Presumption as regards inam—Burden of Proof—Person not owning kudivaram.*

The onus of proving that an inam village comes within the definition of cl. 2 (d) of S. 3

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

of the Act and that the jurisdiction of the Civil Court is ousted is on the defendant.

Whatever may be said as to there being a presumption that the inam is only a grant of land Revenue, there can be no presumption that an inam was granted to a person not owning the *Kudivaram*. **Indety China v. Potu Konchi**, 8 M.L.T. 376.

WALLIS and KRISHNASWAMI IYER, JJ.

(2-b) *S. 3 (7)—See No. 4, infra.*

(2-c) *Ss. 3 (7), 6 (1), 23—“Now, in possession,” meaning of—Decree for ejectment of ryot before passing of Act—Passing of Act pending appeal—Right of tenant to plead occupancy rights in the appellate Court—Powers of appellate Court—“Final decree,” in S. 3 (7)—Old waste.*

Held by the Full Bench (**White, C.J. dubitante**).—

Where an appeal from a decree in ejectment passed under the old law is heard after the date of the commencement of Madras Act I of 1908, the defendant, a ryot in possession of *ryoti* land on such date, is entitled to claim a right of occupancy under S. 6, cl. 1 of the Act, notwithstanding the original decree.

The word ‘now’ in the said section refers to the date of the commencement of the Act.

The word ‘final’ in S. 3, cl. 7 of the Act, does not mean final as distinguished from a preliminary or interlocutory decree of the Court, in the sense in which these decrees are provided for in the Code of Civil Procedure, but means a decree not under appeal or liable to be set aside on appeal, that is, a decree obtained in a proceeding independent of that in which the question of occupancy right is dealt with under S. 6, cl. (1) or the presumption under S. 23 of the Act is made (a).

The powers of a Court of appeal in India discussed by the Division Court. **Gorakala Kanakajya v. Janardha Padhai**, 8 Ind. Cas. 736.

WHITE, C.J., and KRISHNASWAMI IYER and AYLING, JJ.

References:—(a) 1 M.W.N. 369; 8 M.L.T. 258; 7 Ind. Cas. 202 *over.*, 5 M.H.C.R. 215, R.

(3) *S. 6—Possession at the time when Act came into force, sole question for consideration—Decree for possession prior to Act Effect—Second appeal—Powers of Appellate Court—O. 41, R. 33, C.P.C., 1908.*

6.—*Madras Acts*—(Concluded).

Act I of 1908 (*Madras Estates Land*)—(Cld.).

The only question to be considered under S. 6, *Madras Estates Land Act*, is whether the ryot was in possession of the land when the Act came into force, i.e., on the 1st July, 1908. It is immaterial that a decree for possession had already been passed in favour of the landlord prior to 1st July, 1908. O 41, R. 33, C.P.C., 1908, enables the appellate Court to enforce, in second appeal, the claim of defendants who are entitled to rights of permanent occupancy, and retain them in possession without referring them to a fresh suit. **Govinda Parama Guruvu v. Bothasi Dandasi Pradhanu**, 20 M.L.J. 528.

BENSON and SANKARAN NAIR, JJ.

- (1) Ss. 6, 3 (7)—S. 6 whether retrospective—meaning of “final decree” in S. 3 (7).

Quere:—Whether S. 6 of the *Madras Estates Land Act*, 1908, is in terms retrospective? Assuming it is, the retrospective rights created are cut down in a case to which the last paragraph of S. 3 (7) applies. The words ‘final decree’ occurring in this paragraph mean final with reference to the Court which passes the decree, and they are none the less final, for the purpose of the section, because an appeal was pending when the Act came into operation. **Raja of Venkatagiri v. Mukku Narasayya**, 8 M.L.T. 258.

WHITE, C.J., and ABDUR RAHIM, J.

- (5) S. 8—See No. 2, *supra*.
(6) S. 189—See No. 2, *supra*.

7.—*N. W. P. Acts*.

Act I of 1900 (*U. P. Municipalities*)

S. 147—*Prosecution under*—*Decision of Civil Court in favour of the accused*.

In accordance with a decree of the Civil Court passed in favour of B against the Municipal Board of Etawah, B erected certain buildings. The Board objected and the Civil Court ordered demolition of some of the buildings and allowed others to remain. During the pendency of the proceedings in the Civil Court, the Board instituted proceedings against B in the Criminal Court. *Held* that it was not open to the Board to prosecute B in respect of the buildings, pending the decision of the Civil Court, and to continue the prosecution after its decision.

The provisions of the *Municipalities Act* were not intended to enable Municipal authorities to override the decision of a Civil Court where that Court had jurisdiction. **Baldeo Prasad v. King-Emperor**, 7 A.L.J. 735.

KARAMAT HUSAIN and CHAMIER, JJ.

7.—*N. W. P. Acts*—(Continued).

Act II of 1901 (*Agra Tenancy*).

- (1) Ss. 5, 18, 20, 57. See MORTGAGE (REDEMPTION), No. 16, 7 A.L.J. 1011.

- (2) Ss. 10, 20—*Usufructuary mortgage of sir lands—Possession not delivered to mortgagee—Suit to recover possession, not maintainable*—*In pari delicto potior est conditio defendentis—Indian Contract Act (IX of 1872) S. 65*.

A usufructuary mortgage of *sir* lands was made to the plaintiff. Possession was not delivered to him. In a suit by him either to recover possession or to recover the mortgage-money and damages by sale of the property,

held that the plaintiff was not entitled either to recover physical possession of the property or to get a refund of the money he had paid, but that he could get rent assessed on the expropriatory tenure. **Depan Rai v. Ram Khelwan Rai**, 7 A.L.J. 330=5 Ind. Cas. 557.

TUDBALL and PIGGOTT, JJ.

References:—22 A. 205, F.; 11 Bom. L.R. 693, D.

- (3) Ss. 11, 18, 20—Application to case of fixed date tenant. See TRANSFER OF PROPERTY ACT, No. 40, 6 Ind. Cas. 707.

- (3-a) S. 18—See Nos. 1, 3, *supra*.

- (4) S. 20—*Occupancy holding—Usufructuary mortgage prior to the passing of the Act, mortgagee not getting possession—Suit for possession after passing of the Act—Retrospective effect of the Act*.

B executed a deed of usufructuary mortgage for a term of twenty years, in respect of his occupancy holding in 1896, in favour of O. O sued for recovery of possession as usufructuary mortgagee after the passing of the *Agra Tenancy Act*, 1901: *held*, that O's claim should succeed; that Act II of 1901 did not affect retrospectively; that if what the tenant did was valid under the law in force at the time when the mortgage was made, and that, if the mortgagee was entitled to enforce his mortgage before the passing of the new Act, he would be equally entitled to do so after the passing of that Act. **Bhikha v. Umrao Singh**, 5 Ind. Cas. 82.

KNOX and KARAMAT HUSAIN, JJ.

References:—3 A.L.J. 40; A.W.N. (1906) 28; 15 A. 219; 26 A 78, F.

- (4-a) S. 20—See Nos. 1 to 3, *supra*.

- (5) S. 22—*Right of succession to occupancy holding—Right of succession opening ou*

7.—*N. W. P. Acts*—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

before the Tenancy Act—Indigent daughter—Right of affluent daughter postponed—Hindu Law.

Where an occupancy tenant died before the coming into operation of the Tenancy Act leaving two daughters, one indigent and the other rich, and was succeeded by the former, held that the rich daughter was entitled to inherit the holding upon the death of the indigent daughter, in preference to the latter's son; the right, having been acquired on the death of father, was merely postponed during the lifetime of the poor daughter. **Dulari v. Mul Chand**, 7 A.L.J. 293 = 5 Ind. Cas. 381.

RICHARDS and TUDBALL, JJ.

- (6) *S. 22—Pleadings—Sufficient findings—Remission of issues unnecessary—Agra Tenancy Act (II of 1901), S. 22—Succession of collaterals—Joint cultivation—Burden of proof on collaterals.*

Where a man sets up his succession to occupancy or non-occupancy holdings, recorded in the name of his deceased relative, he is bound to show that he shared in the cultivation of the holdings at the time of his death.

Where the findings of the Court below are sufficient to dispose of the case, it is unnecessary to remit issues to the lower Court. **Sarwan Singh v. Ramsarup Singh**, 6 Ind. Cas. 499.

STANLEY, C.J., and GRIFFIN, J.

- (6-a) *S. 22 - Male lineal descendant—Adopted son—Hindu Law.*

A son duly adopted according to the Hindu Law must be treated as a male lineal descendant within the meaning of S. 22 of the Agra Tenancy Act, 1901. **Kallian v. Cheedu Singh**, 8 Ind. Cas. 228.

CHAMIER, J.

References:—S.D. No. 5 of 1904, approved *cf.* 5 A.L.J. 77; A.W.N. (1908) 37; 30 A. 128, R.; 40 P.R. 1894; 43 P.R. 1895, D.

- (7) *S. 32—Fixed rate tenancy—Division among co-tenants—Landlord.*

The tenants of a fixed rate tenancy are entitled, as between themselves, to divide the holding; such division cannot bind or anywise prejudice the landlord, but as between the tenants themselves it is perfectly legitimate. **Sheobalak Kalwar v. Kalka Singh**, 5 Ind. Cas. 317.

RICHARDS, J.

7.—*N. W. P. Acts*—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

(8) *S. 32—Suit to enforce an agreement to divide a holding—Maintainability—Jurisdiction. See RES JUDICATA, No. 9, 6 Ind. Cas. 98.*

(8-a) *S. 57—See No. 1, supra.*

(9) *S. 76 (1)—Crops or other products—Jasmine and Bela plants—Whether included in section.*

Jasmine and bela plants come within the category of standing crop or other ungathered product within the meaning of S. 76 of the Agra Tenancy Act. **Ram Prasad Bhagat v. Suba Rai**, 7 A.L.J. 397 = 6 Ind. Cas. 74.

GRIFFIN and TUDBALL, JJ.

- (10) *S. 79 - Landlord and tenant—Dispossession of tenant—Landlord letting out land in occupation of tenant to a third person—Tenant's remedy in Revenue Court not Civil—Jurisdiction.*

When a landholder lets out land in the occupation of tenant to a third party, and he, acting under the landholder's authority, takes possession of the land, then the tenant must be deemed to have been ousted by the landholder, and his remedy is by a suit under S. 79 of Act II of 1901 (a). **Sokhai v. Ram Pershad**, 7 Ind. Cas. 486.

CHAMIER, J.

References:—(a) 2 A.L.J. 69; 27 A. 372, followed.

- (11) *S. 83 (3)—Surrender of a holding by oral agreement—No notice necessary.*

Under S. 83 (3), it is open to the landlord and the tenant to agree orally to a surrender of the whole or any portion of a holding at any time of the year. When such an arrangement has been made, it is not necessary for the tenant to give the landlord notice as contemplated by cl. 2 of S. 83. **Kalayan Singh v. Man Singh**, 7 Ind. Cas. 637.

TUDBALL, J.

References:—A.W.N. (1898) 31; A.W.N. (1902) 201; A.W.N. (1905), 201; 2 A.L.J. 665, D.

- (12) *S. 95—Fixed rate tenancy recorded in the name of predeceased son's widow and her father-in-law—Application of—Jurisdiction of Civil Court to declare title—Hindu law—Widowed daughter-in-law.*

S. 95 of the Tenancy Act applies only to suits between landlords and tenants. Where a father-

7.—N. W. P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

in-law, by an application to the Revenue Court, got his predeceased son's widow's name recorded along with his own as a fixed rate tenant, and died intestate, *held* that the Civil Court could entertain a suit by the reversioners for possession of the fixed rate tenancy. *Held* further that, under the Hindu law, a widowed daughter-in-law was only entitled to maintenance. **Kali Charan v. Musammatt Utmi**, 7 A.L.J. 658=6 Ind. Cas. 581.

RICHARDS and TUDBALL, JJ.

- (13) Ss. 150, 158, 167—*Rent-free grant—Proprietary title—Res judicata—Jurisdiction of Civil or Revenue Court*,

The plaintiff sued in the Civil Court for a declaration that he was the proprietor of a certain plot of land which he had been holding as a rent free grantee for over fifty years. In a former suit instituted in the Revenue Court, the defendant had obtained a decree for resumption of the same plot under S. 150 of the Agra Tenancy Act, 1901, against the plaintiff: *Held*, that the present suit was barred on account of the former suit between the parties:

Held, further, that the question of proprietary title based on what was originally at least a rent-free grant was exclusively triable by Revenue Court. The Civil Court had no jurisdiction to try such case. **Baldeo Singh v. Mardan Singh**, 6 Ind. Cas. 425.

RICHARDS and TUDBALL, JJ.

- (13-a) S. 153—See No. 13, *supra*.

(14) S. 159—See LAMBARDAR AND CO-SHARER, No. 3, 7 Ind. Cas. 617.

(15) Ss. 164, 165—First suit for settlement of accounts and profits against co-sharer—Second suit for profit against the same defendant as lambardar—S. 13, C.P.C. (1882). See CIV. PRO. CODE (1882), No. 44, 7 A.L.J. 526.

- (15-a) S. 165—See No. 15, *supra*.

- (16) 167—*Suit for ejectment—Class of tenancy determined—Subsequent suit in Civil Court—Not maintainable*.

In a suit for ejectment of the defendant on the ground that he was a tenant-at-will, the Revenue Court decided that he was a tenant at fixed rate. The present suit was brought in the Civil Court for ejectment of the defendant on the ground that he was a trespasser. *Held* that, the Revenue Court having determined the nature of the defendant's tenancy and the class to which he belonged, a suit in the Civil Court

7.—N. W. P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

could not be maintained. **Maharaja of Vizianagram v. Chango Kurmi**, 7 A.L.J. 555.

STANLEY, C.J., and BANERJI, J.

- (16-a) S. 167—See No. 13, *supra*.

- (17) Ss. 176, 177—*Dismissal of suit for default by Rent Court—Decree or order—Not appealable—Code of Civil Procedure (XIV of 1882)*, S. 2.

The Tenancy Act confers no right of appeal from an order. Hence, where, in a suit for profits in the Rent Court, the suit was struck off the file for default of appearance, *held* that the order was not appealable. **Karnapal Singh v. Bhimma Mal**, 7 A.L.J. 246=5 Ind. Cas. 123.

KNOX and KARAMAT HUSAIN, JJ.

- (18) S. 177—"Decree," meaning of, in S. 177—Civ. Pro. Code (Act XIV of 1882), S. 51 (d)—*Order of Assistant Collector rejecting plaint—Appeal*.

An order passed by an Assistant Collector of the first class, rejecting a plaint under S. 54 (d) of the Civ. Pro. Code, 1882, not being a decree within the meaning of S. 177 of the Agra Tenancy Act, is not appealable to the District Judge. **Moulvi Mohamed Abdul Aziz v. Moulvi Mohammad Abdul Jalil**, 5 Ind. Cas. 371.

KARAMAT HUSAIN, J.

References:—28 A. 753; A.W.N. (1906) 223; 3 A.L.J. 569 (F.B.), F.; (1901) A.C. 495 (506); 70 L.J.P.C. 76; 65 J.P. 708; 17 T.L.R. 749; 50 W.R. 139; 85 L.T. 289; 27 A. 31, R.

- (19) S. 177—*Subject-matter of suit exceeding Rs. 5,000—Appeal to High Court—Jurisdiction*.

The subject-matter of a suit decided by an Assistant Collector of first class being above Rs. 5,000, an appeal lies to the High Court, and not to the District Judge. **Moulvi Abdul Majid v. Moulvi Abdul Ghani**, 6 Ind. Cas. 219.

RICHARDS and TUDBALL, JJ.

- (20) S. 177—*Proprietary title—Defendant pleading to hold the land as khudkasht and not as shikmi—Appeal to District Judge—Jurisdiction*.

In a suit for ejectment, the defendant pleaded that he held the land as *Khudkasht* and not as *Shikmi* from the plaintiff. The claim was decreed against him. He appealed and

7.—N. W. P. Acts—(Continued).**Act II of 1901 (Agra Tenancy)—(Continued).**

raised the same question as in the Court of first instance: *Held*, that the question was one of proprietary title, and an appeal lay to the District Judge. **Partap Singh v. Kewal Ram**, 7 Ind. Cas. 737.

KARAMAT HUSAIN, J.

References:—2 A.L.J. 176; A.W.N. (1905) 46, F.

(20-i) S. 177. See No. 17, *supra*.

(20-a) S. 182—*Second appeal—Revision—Delay of five and half months in filing revision.*

Where a District Judge gives a judgment in his appellate jurisdiction in an ejectment suit, a second appeal lies to the High Court under S. 182 of the Agra Tenancy Act.

After a delay of five and half months, a revision cannot be entertained. **Manturna Kuari v. Bani Singh**, 9 Ind. Cas. 529.

GRIFFIN, J.

(21) S. 198—*Application of—Arrears of rents admitted—Tenancy not denied—Payment not made to any one.*

S. 198 of the Tenancy Act applies to a case where a tenant, who has been impleaded by a landlord and who has actually and in good faith paid the rent of his holding to some third person, pleads such payment. But it does not apply to the case of a person who does not deny the relationship of landlord and tenant between the plaintiff and himself and has not paid the rent to any one on the ground that he has been prevented from doing so by a third person who claims it as purchaser of the share in dispute. **Sheodihal Singh v. Badri Narain**, 7 A.L.J. 1198.

STANLEY, C.J., and BURKITT, J.

(22) S. 199—*Judgment of Assistant Collector second class—Res judicata.*

In answer to a suit for arrears of rent in the Court of an Assistant Collector, second class, the defendant pleaded that he was the proprietor of the land and not a tenant. The Revenue Court proceeded under S. 199 of the Tenancy Act and held that the defendant was not the proprietor but a tenant, and decreed the suit. The defendant then filed a suit in the Civil Court, for declaration of his proprietary right to the land and valued the suit at Rs. 250. *Held*, that, although an Assistant Collector of the second class had jurisdiction to try suits only up to the value of Rs. 100, his decision on

7.—N. W. P. Acts—(Continued).**Act II of 1901 (Agra Tenancy)—(Concluded).**

the question of proprietary title barred the subsequent suit brought in the Civil Court to try that question. **Shahzade Singh v. Mohamad Ahmed Ali Khan**, 6 A.L.J. 917=32 A. 8=3 Ind. Cas. 954.

KNOX, A.C.J., and RICHARDS, J.

(23) S. 201—*“Shall presume”—Recorded co-sharer—Presumption rebuttable—Revenue Court—Question of title—Jurisdiction.*

The fact that the plaintiff is a recorded co-sharer does not itself preclude the Revenue Court from trying the question of title. The presumption which arises from the plaintiff's being a recorded proprietor is a rebuttable presumption. **Ali Ahmad v. Said-Un-Nisa Bibi**, 6 Ind. Cas. 703.

STANLEY, C.J., and GRIFFIN, J.

References:—30 A. 447; A.W.N. (1908) 186; 5 A.L.J. 495, overruled.

(24) S. 201 (3)—*“Shall presume”—Presumption—Whether rebuttable.*

Held per Stanley, C.J., and Griffin, J., (Tudball, J., dissenting) that a presumption is a logical assumption that a thing is true until disproved. The expression “shall presume” in S. 201 (3) does not make the presumption conclusive and irrebuttable. The Revenue Court therefore are competent to go behind the entry in the record-of-rights (a).

Held, per Tudball, J., that the presumption mentioned in cl. 3, S. 201 of the Agra Tenancy Act, is one which is rebuttable only in a Civil Court, not in a Revenue Court. The Revenue Court cannot, therefore, go behind the entries in the Khewat. **Waris Ali Khan v. Parshotam Narain**, 7 A.L.J. 682.

STANLEY, C.J., GRIFFIN, and TUDBALL, JJ.

References:—(a) 29 A. 148; 30 A. 447; (1907) A.W.N. 43; 29 A. 158; 31 A. 257; 31 A. 253, J.

Act III of 1901 (Land Revenue).

(1) *Crim. Pro. Code, S. 476—Judicial proceedings—Proceedings by a Revenue Officer as distinguished from a Revenue Court—Land Revenue Act (III of 1901), Ss. 4 (9) 46.*

Where, under orders of the Deputy Commissioner, a Deputy Collector made inquiries, which resulted in the finding that the applicant was in the habit of giving no receipts for rents received and did not record the correct

7.—N. W. P. Acts—(Continued).

Act III of 1901 (Land Revenue)—(Continued).

realizations in the Patwari's papers, and the Deputy Collector thereupon passed an order under S. 476, Crim. Pro. Code, directing that proceedings under S. 177, Indian Penal Code, should be instituted against the applicant, *held*, that the inquiry was one under S. 46 of the Land Revenue Act, and the Deputy Collector in making the inquiry was acting merely as a Revenue officer as defined in S. 4 (9) of U.P. Act III of 1901, and not as a Revenue Court, nor were his proceedings judicial proceedings within the meaning of S. 476, Crim. Pro. Code. The order passed by the Deputy Collector was therefore without jurisdiction and must be set aside. **Prag Tewrai v. King-Emperor**, 13 O.C. 198.

EVANS, J.

- (2) S. 34 (5)—*Lease coming into operation before passing of the Act—Lessee's name not recorded—Suit by lessee, whether maintainable.*

A lease of a fixed rate holding came into operation in 1900. After the enforcement of Act III of 1901, the lessee instituted a suit for the recovery of rent from a sub-tenant: *held* that S. 31 (5) of Act III of 1901 did not apply to the case. The lessee could maintain the suit, although he had not previously got his name recorded in the Revenue papers as the lessee. **Thakur Dayal Rai v. Bhagwat Rai**, 7 Ind. Cas. 540.

BANERJI, J.

References:—3 A.L.J. 625; A.W.N. (1906) 254, *followed*.

- (3) S. 36. See EX-PROPRIETARY TENANT, No. 1, 13 O.C. 70.

- (4) Ss. 56, 86—*Cesses—Market dues, levying of.*

Taking of market dues and customs in a private market is perfectly legal.

Cesses mentioned in Ss. 56 and 86 of the Agra Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages. Moneys paid by frequenters of markets are voluntary payments made by persons, who are under no obligation to use the market, unless they please and cannot be called cesses at all. **Sadanand Pande v. Ali Jan**, 7 A.L.J. 176 = 5 Ind. Cas. 288 = 32 A. 193.

RICHARDS and TUDHALL, JJ.

- (4-a) S. 86. See No. 4, *supra*.

7.—N. W. P. Acts—(Continued).

Act III of 1901 (Land Revenue)—(Continued).

- (5) Ss. 107, 110 (1), 111, 112—*Partition proceedings—Time fixed for objection can be extended—Objection fixed beyond time—Extension of time—Fresh notice—Mortgagee in possession—Proprietary title—Appeal.*

The issue of a fresh notice in respect of an application, filed under S. 110 (2) of the Land Revenue Act, is not expressly provided for in the Act itself, but an Assistant Collector is competent to issue a fresh notice, or to extend the period within which objections may be filed, if he sees fit to do so. If an Assistant Collector does in fact entertain an objection filed by a recorded co sharer after the period for the presentation of such objection has expired, this will not of itself render proceedings taken by him under S. 111 of the Act void or without jurisdiction (a).

A finding by an Assistant Collector that a person, claiming to be usufructuary mortgagee of a particular share, either is or is not in possession of the same, is one which does not determine a question of "proprietary title" within the meaning of S. 111 of the Act, and is not appealable to the District Judge as such. **Jagdish Prashad v. Chimman Lal**, 5 Ind. Cas. 107.

KNOX and PIGOTT, JJ.

Reference:—18 A. 210, P.

- (5-a) S. 110 (2)—See No. 5, *supra*.

- (5-b) S. 111—See No. 5, *supra*.

- (5-c) S. 112—See No. 5, *supra*.

- (6) Ss. 117, 125—*Lands held under a private partition claimed by defendant—No question of proprietary title—Appeal to District Judge—Duty of Court making partition.*

In a suit for partition of revenue-paying lands, the defendant alleged that, under a private partition, he was in possession of certain lands, and claimed those lands for himself. The Collector in appeal ordered those lands to be given to him. *Held* that no question of proprietary title was raised, and no appeal lay to the District Judge against the order of the Collector.

Semle.—In making partition of property, it is the duty of a Revenue Court, as far as possible, to allot lands held in severalty to the persons so holding them, and any deficiency

7.—N. W. P. Acts—(Continued).

Act III of 1901 (Land Revenue)—(Continued).

should be made good out of the common land. **Muhammad Nasir-ullah Khan v. Muhammad Ishaq Khan**, 7 A.L.J. 553 = 6 Ind. Cas. 833.

RICHARDS and TUDBALL, JJ.

References:—A.W.N. (1904) 225, F.; 28 A. 394, D.

(7) S. 118—See PARTITION, No. 7, 5 Ind. Cas. 664.

(7-a) S. 125—See No. 6, *supra*.

(8) Ss. 142, 143, 146—*Penal Code (Act XI, V of 1860). S. 235-B—Escape from custody—Defaulter for payment of Government revenue—Rules of Board of Revenue, r. 9, cl. (2).*

The use of the word "ordinarily" in r. 9, cl. 2, Rules of the Board of Revenue, relating to the recovery of arrears of revenue, shows that the intention of the Board was that in every case process should issue against the *lambardar* in the first instance, but that occasion may arise when it is found expedient to issue process in the first instance against the defaulter. Under S. 142, Land Revenue Act, all the proprietors are jointly and severally responsible to Government for revenue, and the arrears may be realised, under S. 146, by the arrest and detention of the defaulter as defined in S. 143.

The writ of demand and the writ of arrest and detention may issue simultaneously against the defaulter; the words of S. 146, Land Revenue Act, are wide, and there is nothing to limit the order in which they should issue.

Hence, where a co-sharer had made default in the payment of Government revenue and under a writ of detention was confined in the lock-up wherefrom he escaped, *held*, that he was guilty of an offence under S. 225-B, Penal Code. **King-Emperor v. Gulab Singh**, 7 A.L.J. 21 = 5 Ind. Cas. 449 = 11 Cr. L.J. 137.

KNOX and KARAMAT HUSAIN, JJ.

(8-a) S. 143—See No. 8, *supra*.

(9) S. 144—*Lambardar—Haq Lambardari, right to—Lambardar assignee of Government Revenue, effect of.*

A *lambardar* is entitled to his *lambardari* dues fixed under S. 144 of Act III of 1901, for the trouble which he takes in collecting the revenue payable by the co-sharers. The fact that he is assignee of the Government revenue, besides being the *lambardar*, makes no difference. **Mahant Puran Atal v. Hazari Lal**, 5 Ind. Cas. 536.

KARAMAT HUSAIN, J.

7.—N. W. P. Acts—(Continued).

Act III of 1901 (Land Revenue)—(Continued).

(10) Ss. 144, 234—See LAMBARDAR AND CO-SHARER, No. 3, 7 I.C. 647.

(10-a) S. 146—See No. 8 *supra*.

(11) S. 233 (k)—*Act XIX of 1873, S. 241—Partition proceedings completed—Maintainability of Civil suit to disturb decision in those proceedings—Jurisdiction of Civil Court.*

After the completion of partition proceedings in a Revenue Court, the parties to the proceedings cannot bring a separate suit in a Civil Court to disturb the partition, and for allotment of shares which the Revenue Court had refused to give. **Salig Ram v. Duni Chand**, 6 Ind. Cas. 668.

BANERJEE, J.

References:—23 A. 291; A.W.N. (1901) 86 (F.B.), F.; 28 A. 132; A.W.N. (1906) 79, D.

(12) S. 233 (k)—*Partition proceedings, completion of—Jurisdiction of Civil Court.*

After the completion of a partition in the Revenue Court, the jurisdiction of the Civil Court is ousted by S. 233 (k) of Act III of 1901. **Musammat Nathia v. Kewal Ram**, 6 Ind. Cas. 697.

KARAMAT HUSAIN, J.

(13) S. 233 (k)—*Jurisdiction—Revenue Court irregularly entertaining an application—Suit in Civil Court—Res judicata.*

B, a co-sharer in a village, applied for partition. Usual proclamation was issued and H put in a petition within time fixed, praying that his share may also be divided and made into a separate *mahal*. After lots were prepared, one L put in a petition to the effect that he was a co-sharer in Khata 34. The application was filed beyond time and no notice was given to H to whom the Khata was allotted. The Court passed an order allowing a share in Khata 34 to L, who was only entitled to two specified plots. H brought this suit for declaration of his right. *Held* that the suit was barred by the provisions of S. 233 (k) of the Land Revenue Act, and the mere fact that no notice was given to H would not take the case out of that section. Any exercise of jurisdiction of a Civil Court, which would disturb or in any way affect the distribution of land made by partition, is barred by S. 233 (k), no matter whether a question of title or any other question is raised in the

7.—N. W. P. Acts—(Concluded).**Act III of 1901 (Land Revenue)—(Concluded).**

suit. **Lachman Das v. Hanuman Prasad**, 7 A.L.J. 1156.

KNOX and GRIFFIN, J.J.

References:—23 All. 291, *F.*; 28 All. 432; 28 All. 394, *D.*

(14) *S. 233 (k)—Minor defendant—Guardian appointed beyond time—Objections accepted by Court—Subsequent suit by minor—Maintainability of.*

One of the defendants to a partition proceeding died leaving a minor son who was impleaded in his father's place. The mother of the minor son was appointed his guardian after the time for filing objections had expired. She put in objections along with other objections. The other objectors were referred to the Civil Court. The mother of the minor was ordered to produce some papers, but instead of doing that she instituted the present suit. *Held* that S. 233 (k) of the Land Revenue Act barred the suit.

Abhai Singh v. Inderjit Singh, 7 A.L.J. 1169.

KNOX, KARAMAT HUSSAIN, J.J.

References:—28 A. 432; 27 A.W.N. 172, *D.*

(15) *S. 234—See No. 10. supra.*

Act I of 1903 (Bundelkand Encumbered Estates).

S. 10 (b)—Mortgage-debt—Decision of Special Judge—Fresh suit, maintainability of—Civil Court—Jurisdiction.

A mortgage-debt, which has been the subject of enquiry and adjudication by the special Judge under the Bundelkand Encumbered Estates Act I of 1903, cannot be a subject of fresh suit in a Civil Court. **Sheoram Apadeo v. Seth Phul Chand**, 6 Ind. Cas. 164.

STANLEY, C.J., and BANERJI, J.

Act I of 1904 (General clauses).

(1) *S. 6—See OCCUPANCY HOLDING, No. 6, 7 A.L.J. 755.*

8.—Oudh Acts.**Act XXVI of 1866 (Sub-settlement).**

(1) *R. 10—Provisions not exhaustive. See UNDER-PROPRIETARY RIGHT, No. 1, 8 L.C. 407.*

Act I of 1869 (Oudh Estates).

(1) *S. 8, Lists I and V, and S. 22 (11)—Succession—Lineal, primogeniture—Sanad conditions in, how far operative—Statute if supersedes terms in sanad.*

The Estates of the Talukdars of Oudh must, for the purposes of intestate succession, be treated as impartible (a).

8.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Continued).**

When the sanad granted to an Oudh talukdar, whose name was duly entered in Lists 1 and 5 mentioned in S. 8 of the Oudh Estates Act, provided that, in case of a holder dying intestate, the estate would "descend to the nearest male heir according to the rule of primogeniture."

Held—That this declaration and condition in the sanad, being part of the original title to the property, was an essential part of the ordinary law of the talukdar's religion and tribe, which under cl. 11 of S. 22 of the Act is to govern where the rules of descent specially laid down in the previous portion of that section do not apply.

There is thus no inconsistency between the sanad and the Statute.

The contest in this case being between two collaterals of the deceased Talukdar, related to each other as uncle and nephew.

Held—That the nephew who according to the rule of lineal primogeniture would be entitled to succeed was the heir (b).

The word "primogeniture" occurring in the sanad emanating from British authority conveys the ordinary meaning of the word "primogeniture" in the law of England. **Debi Bakh Singh v. Chandrabhan Singh**, 14 C. W.N. 1010 (P.C.)—12 C.L.J. 303—8 M.L.T. 273.

LORDS ATKINSON, SHAW, SIR ARTHUR WILSON and MR. AMER ALI.

References:—(a) 17 I.A. 173 (1890); L.R. 2 I.A. 100; s.c. 5 C.W.N. 602 (1901), *F.* (b) L.R. 5 I.A. 1 (1877). *R.*

(1-a) *Ss. 8, 22, cl. 11—Primogeniture, rule of—Lineal primogeniture, rule of succession by—Gaddi nashini, meaning of—Succession in the case of impartible estates.*

The word "gaddi nashini" means, as a rule, succession by a single heir.

The rule of primogeniture in S. 9 of Act I of 1869 means lineal primogeniture which implies the succession of the senior line in preference to the junior line, and consequently in cases of estates entered in Lists Nos. 3 and 5 of the said Act, the line prevails over the degree.

Where an estate is governed by the provisions of the Oudh Estates Act, the limitations in the sanad are superseded by the Act. **Chandrabhan Singh v. Debi Bakhsh Singh**, 8 Ind. Cas. 422.

CHAMIER, J.C., and SANDERS, A.J.C.

8.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Continued).**

- (2) *Ss. 13, 16 and 17—Immoveable property—Gift inter vivos—Ambiguous instrument—Construction.*

Held, that immoveable property in Oudh is not transferable by gift *inter vivos* otherwise than by a registered deed; that there is no contradiction in *Ss. 16 and 13* of the Oudh Estates Act (I of 1869); that a gift in contravention of *S. 16* is not valid in case the object of the gift is exempt from the operation of *S. 13*, and the gift, therefore, is subject to the additional fetter imposed by that section and that a deed of gift must be registered as required by *S. 17* of that Act.

In ascertaining the meaning and effect of an instrument, dated the 5th of May, 1887, which was neither very clear nor altogether intelligible, their Lordships looked at the matter broadly and agreed with the lower appellate Court in holding that it was testamentary and could not be construed as a deed of gift *inter vivos*. **Udai Raj Singh v. Raja Bhagwan Bakhsh Singh**, 7 A.L.J. 274 (P.C.) = 14 C.W.N. 641 = 11 C.L.J. 387 = 7 M.L.T. 410 = (1910) M.W. N. 110 = 6 Ind. Cas. 279 = 12 Bom. L.R. 409.

MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON and MR. AMEER ALI, JJ.

(2-a) *S. 16*—See No. 2, *supra*.

(2-b) *S. 17*—See No. 2, *supra*.

(2-c) *S. 22 (a)*—See Nos. 1 and 1a, *supra*.

- (3) *S. 23, List IV—Ordinary Law—Family custom—Exclusion of daughters—Impartible and partible estates—Evidence—Admissibility—Declarations of Kanungos—Wajib-ul-arz—Answers given to official inquiries—Weight of such evidence. Concurrent finding—Privy Council practice.*

The "ordinary law" mentioned in *S. 23* of the Oudh Estates Act (I of 1869) embraces any family custom (a).

There is nothing in the mere fact of partibility to make evidence of a family custom excluding or postponing daughters to collaterals in impartible estates necessarily inapplicable to partible estates.

Declaration such as those of *Kanungos*, entries made in the village records (*Wajib-ul-arzes*) by the officer charged by Government with that duty and answers given to official inquiries made under Government directions as to the rules of succession prevailing in particular families, are *prima facie* admissible in evidence as purporting to be made by the proper

8.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Concluded).**

officer in performance of a special duty, and presumably, with due regard to the rules laid down for his guidance. Technical objections to them are material rather to the weight than to the admissibility of the particular evidence.

A concurrent finding of the lower Courts that there is a custom in the family of the parties to the suit, that a daughter is excluded by the collaterals of the deceased from inheritance is, in so far as it is a conclusion of fact though not absolutely binding on the Judicial Committee, entitled to the greatest weight. **Mussammat Parbati Kunwar v. Rani Chandarpal Kunwar**, 10 C.L.J. 216 (P.C.) = 6 A.L.J. 767 = 13 C.W.N. 1073 = 11 Bom. L.R. 890 = 12 O.C. 304 = 31 A. 457 = 19 M.L.J. 605.

LORDS ATKINSON, COLLINS, GORELL and SIR ARTHUR WILSON, JJ.

References : (a) 20 L. A. 77 at p. 79.

Act XVIII of 1876 (Oudh Laws).

- (1) *Application of — Marriage contract entered at Lucknow—Suit for dower filed in Meerut.*

The plaintiff was married at Lucknow and the dower fixed was over a lac of rupees. After her husband's death she filed the suit at Meerut for a portion of her dower. *Held* that the Judge had no jurisdiction to administer the provisions of the Oudh Laws Act and to reduce the amount of dower fixed on the occasion of marriage. **Rukia Begum v. Muhammad Kazim**, 7 A.L.J. 388 = 6 Ind. Cas. 568.

STANLEY, C.J., and BANERJI, J.

Reference : 19 C. 689, F.

- (2) *Ss. 6, 9, 10, 11, 12, 13—Notice issued under S. 10—Right to sue for pre-emption when arises. See PRE-EMPTION, No. 35, 13 O.C. 219*

- (3) *S. 9—Pre-emption—"Mahal," meaning of—Co-sharers of the mahal, who are—Co-sharers of sub-division of a tenure—Interpretation of statute—Land Revenue enactments, passed on the same day—Interpreting the terms of one Act by reference to the other.*

Semble.—The term "mahal" is not defined in the Oudh Laws Act. It however occurs in the Oudh Land Revenue Act passed on the same day, and both Acts being concerned with the Revenue Law of Oudh, the provisions of the latter Act were properly referred to in interpreting the term as used, in the former Act.

8.—Oudh Acts—(Continued).**Act XVIII of 1876 (Oudh Laws)—(Continued).**

Held—That the term "mahal" as used in the Oudh Laws Act means any parcel or parcels of land which have been separately assessed to, or are held under a separate engagement for, the revenue, and for which a separate record-of-rights has been prepared.

That the arrangement, under which the Plaintiff and the Defendant's vendor held the under-proprietary interest in the villages in suit under the Defendant as talukdar, and under which a half of the taluk was assigned to their predecessors, in under-proprietary right, on their agreeing to pay the Government revenue *plus malikana* to the talukdar, did not constitute them co-sharers in the mahal within the meaning of S. 9 of the Oudh Laws Act; nor were they at the date of the sale co-sharers of any sub-division of the tenure in which the property in question was comprised, there having been already a partition of the villages between them. **Thakurain Sheoraj Kunwar v. Thakur Harihar Baksh Singh**, 11 C.W.N. 817 (P.C.) 12 C.L.J. 40—12 Bom. L.R. 508—8 M.L.T. 89—13 O.C. 165—7 Ind. Cas. 196.

LORD MACNAGHTEN, LORD COLLINS,
SIR ARTHUR WILSON and AMIR ALI, JJ.

(4) S. 9—Position of grove holder. See PRE-EMPTION, No. 32, 13 O.C. 202.

(5) S. 9—See PRE-EMPTION, No. 41, 13 O.C. 260.

(5-a) S. 9—See No. 2, *supra*.

(6) S. 9, cls. (1) and (2)—*Meaning of the term "mahal"*—*Inferior mahal*—*Pre-emption, right of*.

The word "mahal" in the Oudh Laws Act means any parcel or parcels of land, which have been separately assessed to or are held under a separate engagement for the payment of revenue and for which a separate record of rights has been prepared. Each mauza or village is, as a general rule, a separate mahal, but a mahal may consist of two or more mauzas or parts of mauzas or only a portion of one mauza. Where each village in a taluqa is separately assessed to revenue, and the taluqdar enters into one engagement for the payment of the revenue on all the villages, the whole taluqa is a taluqdari mahal consisting of a number of villages, each of which is separately assessed to revenue, and may be regarded as an inferior mahal.

There is no right of pre-emption under S. 9, cls. (1) and (2) of the Oudh Laws

8.—Oudh Acts—(Continued).**Act XVIII of 1876 (Oudh Laws)—(Concluded).**

Act, unless, at the date of the sale of the property in respect of which the right of pre-emption is claimed, the claimant of such a right and the vendor of the property are co-sharers in any sub-division of the tenure in which the property in question is comprised or in the whole mahal, though the claimant and the vendor may have been jointly liable to the taluqdar for the Government revenue *plus malikana* as the rent of the property sold. **Sheoraj Kunwar v. Harihar Baksh Singh**, 7 A.L.J. 709 (P.C.)=20 M.L.J. 609=32 A. 351.

LORD MACNAGHTEN, LORD COLLINS,
SIR ARTHUR WILSON, AMIR ALI, JJ.

(7) S. 10—See No. 2, *supra*.

(8) S. 11—See No. 2, *supra*.

(9) S. 12—See No. 2, *supra*.

(10) S. 13—See No. 2, *supra*.

Act XXII of 1886 (Oudh Rent).

(1) *Rent Act (Oudh)*, S. 145, *application under—Extension of period of limitation where it expires on a Sunday—Limitation Act*, S. 5, *application of, to proceedings under the Oudh Rent Act*.

Where the last day of limitation prescribed for an application for execution under S. 145 of the Oudh Rent Act expired on a Sunday and the application was presented on the day following, *held*, that S. 5 of the Limitation Act did not apply to the case and the application was barred by time. **Ikbāl Narain Pandit v. Babu Singh**, 13 O.C. 103.

EVANS and PIGGOT, O.J.CS.

References :—4 O.C. 182; 18 C. 631; 21 A. 22; 23 A. 277; 18 C. 231; 22 M. 179; 23 M. 389, R.

(2) Ss. 7-A and 126. See EX—PROPRIETARY TENANT, No. 1, 13 O.C. 70.

(3) S. 19—Suspension of rent on account of scarcity. See LEASE, No. 17, 13 O.C. 146.

(4) S. 108 (8), (10)—*Jurisdiction of Civil and Revenue Courts—Under-proprietors, ejectment of, by Revenue Courts—Illegal ejectment under provisions of the Rent Act*.

Held, that the application of S. 108, cl. (10) of the Oudh Rent Act is not confined to under-proprietors whose rights as such have been declared by a competent Court.

8.—Oudh Acts—(Concluded).**Act XXII of 1886 (Oudh Rent)—(Concluded).**

Held, further, that the ejectment of an under-proprietor may be an illegal ejectment within the meaning of S. 108, cl. (10) of the Oudh Rent Act, although it was carried out under the provisions of the Rent Act.

Where a person claiming to be an under-proprietor brought a suit to contest a notice of ejectment issued against him under S. 108, cl. (8) of the Oudh Rent Act and the suit was dismissed, *held*, that he could not come straight to the Civil Court, but must first sue in the Revenue Court under S. 108, cl. (10) of the Oudh Rent Act (*a*). **Khadim Husain v. Musammat Jamil Bibi**, 13 O.C. 188.

CHAMIER and PIGOTT, JJ.

References:—(*a*) 12 O.C. 90; 2 O.C. 83; and 9 O.C. 37, *Diss. from*.

(5) S. 108, cl. (10)—Suit for establishment of under-proprietory rights—Jurisdiction. See **MERGER**, No. 1, 13 O.C. 35.

(6) S. 108, cl. 15, *Estate, meaning of—Suits for profits between under-proprietors—Jurisdiction of Rent Courts*.

Held, that the term "Estate" as used in S. 108, cl. (15) of the Oudh Rent Act, is wide enough to include an under-proprietory tenure, and consequently suits for profits between under-proprietors do lie in the Rent Courts under the provisions of this section. **Maharaji Mussamat v. Daryal Mussamat**, 13 O.C. 251.

EVANS and LINDSAY, J.CS.

(6-a) S. 126—See No. 2, *supra*.

(7) S. 136—*Summons posted at the house of a person known to have gone to a particular place, validity of—Civ. Pro. Code (XIV of 1882), S. 80—Civ. Pro. Code (Act V of 1908), Order V, Rule 17*.

Held that, under S. 136 of the Oudh Rent Act which corresponds to S. 80 of Act XIV of 1882, and Order V, Rule 17 of the new Code of 1908, a process-server is not entitled to post a summons at the house of the person to be served, when he knows or has reason to believe that that person has gone to a particular place and will return to his house. **Pir Bakhsh Khan v. Deputy Commissioner**, 13 O.C. 54=5 Ind. Cas. 804.

CHAMIER, J.

9.—Punjab Acts.**Act IV of 1872 (Punjab Laws).**

(1) S. 25—Not affected by S. 43, Provincial Insolvency Act. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 11, P.R. 1910.

(2) S. 27. See **INSOLVENT**, No. 2, 14 C.W.N. 569.

(3) S. 28, not affected by S. 27, Provincial Insolvency Act, 1907. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 9, 12 P.R. 1910.

Act XVII of 1884 (Punjab Courts).

(1) S. 70 (*a*) (*as amended by Act XXV of 1899*)—*Revision—Suit by a co-sharer for possession of shamilat—Dismissal on the ground that remedy lay in suit for partition—Material irregularity—Party entitled to bring possessory suit under S. 9, Specific Relief Act, I of 1877—Failure to do so—Effect*.

Plaintiff, who was in possession of a plot of *shamilat abdi*, continued to hold possession thereof under an agreement executed by him, in consequence of a dispute between him and an outsider, whereby he admitted that the *shamilat* belonged to the community and that he held it during their pleasure. In 1908, four out of several hundreds of proprietors dispossessed him and he brought a suit for recovery of possession. The lower Court held that the proper remedy was by way of a suit for partition against all the members of the community and dismissed the suit.

Held, by the Chief Court, that, because the plaintiff's peaceful possession under the agreement of 1883 was a substantive right, the infringement of which gave right to a cause of action, it was not necessary for the plaintiff to bring a suit for partition, and that he can rightly ask the Court simply to restore his possession as he has done in this suit.

A party who might have sued under S. 9 of the Specific Relief Act, 1877, is not bound to do so.

Held, also, that, by taking a wholly erroneous view of the frame of the suit and by wholly misunderstanding the plaintiff's real claim and its foundation, the lower Court committed 'material irregularity' and that the Chief Court will interfere and set aside the order in revision. **Jhangli v. Ramzan and others**, 13 P.R. 1910=20 P.W.R. 1910=5 Ind. Cas. 808.

JOHNSTONE, J.

9.—Punjab Acts—(Continued).**Act XVIII of 1884 (Punjab Courts)—(Ctd.).**

(2) S. 70 (a)—Substantial justice done to parties—Error in law—Revision. See GUARDIAN AND MINOR, No. 2, 5 P.W.R. 1910.

(3) S. 70 (a)—Finding a fact *prima facie* against the record—Material irregularity. See VENDOR AND PURCHASER, No. 1, 40 P.W.R. 1910.

(4) S. 70 (a) and (b)—Throwing out case upon a mistaken view of rule of *res judicata*. See RES JUDICATA, No. 4, 42 P.W.R. 1910.

(5) S. 70 (a) and (b)—Preliminary finding of Court as to valuation for purposes of Court-fee and jurisdiction—Interlocutory order—Revision. See INTERLOCUTORY ORDER, No. 1, 43 P.W.R. 1910.

(6) S. 70 (a) (b)—Irregular remand—Revision. See CIV. PRO. CODE (1908), No. 95, 17 P.L.R. 1910

(7) S. 70 (a) and (b)—Questions of fact and law—Revision. See LIMITATION ACT (1908), No. 23, 93 P.W.R. 1910.

(8) S. 70 (1) (a)—Appellate Court deciding on point not raised in pleadings—Material irregularity. See LANDLORD AND TENANT, No. 28, 80 P.W.R. 1910.

(9) S. 70, cl. (1) (b)—Findings of fact—Further appeal. See MORTGAGE (GENERAL), No. 10, 32 P.R. 1910.

(10) S. 70 (1) (b)—Question whether building is Serai Appeal. See PRE-EMPTION, No. 47-a, 96 P.R. 1910.

(11) S. 70 (1) (b)—Order in case *sub-judice*—Interference in revision. See CIV. PRO. CODE (1908), No. 160-h, 101 P.R. 1910.

Act XVI of 1887 (Punjab Tenancy).

(1) Ss. 5 and 100. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 2, 103 P.W.R. 1910.

(2) S. 38—Occupancy rights—Non-cultivations by a minor-tenant, whether extinguishes his rights.

Held that the Legislature did not intend that non-cultivation of his land by a minor occupancy tenant should operate to extinguish his rights under S. 38 of the Act. **Jivan v. Diwan Singh**, 3 P.R. 1910=9 P.W.R. 1910=5 Ind. Cas. 235.

JOHNSTONE and SCOTT-SMITH, JJ.

References:—2 P.R. 1901, *F.*; 5 P.R. 1872; 12 P.R. 1879, *D.*

(2-a) Ss. 50, 77 (3) (g) and (i). See LANDLORD AND TENANT, No. 53-a, 8 Ind. Cas. 733.

9.—Punjab Acts—(Continued).**Act XVI of 1887 (Punjab Tenancy)—(Ctd.).**

(3) S. 59 (c). See CUSTOM (PUNJAB—INHERITANCE AND SUCCESSION), No. 12, 60 P.W.R. 1910.

(4) Ss. 59 (4), 100—Death of occupancy tenant without heirs—Suit by landlord for possession against tenant's mortgagee. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 1, 9 P.R. 1910.

(5) S. 77 (3)—*Suit for dispossession of vendee of a right of occupancy—Sale without consent of landlord—Period of limitation—Applicability of Art. 144, Limitation Act—Suit for dispossession, whether different from suit for possession—Suit by landlord to enforce his rights under S. 77 (3)—Whether reversioner can be added as plaintiff—Parties, addition of.*

The period of limitation applicable to a suit for dispossession of a vendee of a right of occupancy under S. 77 (3), Tenancy Act when the sale is made without the written consent of the landlord, is twelve years, and Art. 144 of the Limitation Act applies to such a suit, though the word "possession" may be found in that article.

The suit for dispossession is not quite different from a suit for possession, for, in case of a suit for dispossession, the decree, as in the present case, if the suit succeeds, must be one for possession as against the vendee.

Where the landlord enforces his right in the Revenue Court by bringing a suit under S. 77 (3) (h) of the Tenancy Act, a reversioner cannot be added as a plaintiff, for he is not a landlord, and only landlords can bring suits under S. 77 (3) (h) (a). **Har Lal v. Mussamat Gohri and Sochetu**, 3 P.R. 1910 (Rev.).

DOUIE, FINANCIAL COMMISSIONER.

References:—(a) 4 P.R. 1910 (Rev.), overruled and 39 P.R. 1998, *R.*

(6) S. 77, cl. (3)—*Jurisdiction of Civil and Revenue Courts—Plea cognisable by Revenue Court only—If can be taken in Civil Court.*

T, an occupancy tenant, mortgaged his occupancy right to M, one of the landlords. Subsequently he sold his occupancy rights to one B, another landlord. B sued M for possession by redemption of M's mortgage. M pleaded that the sale to B was invalid under the Punjab Tenancy Act. The Civil Court, on the ground that it could not take cognizance

9.—Punjab Acts—(Continued).**Act XVI of 1887 (Punjab Tenancy)—(Cld.).**

of the plea, decreed for plaintiff. Prior to the decree, M brought a suit in the Revenue Court and got a decree setting aside the sale in favour of B.

B got possession of the land in pursuance of the decree of the Civil Court, M's objection being overruled. Then M sued B for possession of the land, on the ground that, the sale having been set aside, he was not entitled to be ousted. On objection being taken that the suit was not cognizable by a Civil Court.

Held, that the suit was not maintainable in the Civil Court as the defendant's plea was one not cognizable by the Civil Court; and by the Full Bench (*Robertson J. dissenting*); that, under S. 77, cl. (3), Civil Courts cannot take cognizance of any plea which relates to matters on which the Revenue Court alone can come to a final determination (a).

Per Robertson, J.—It is competent to a Civil Court to decide, solely for the purpose of that suit and with no binding force beyond the purview of that suit, any issue which is necessary to the disposal of the suit itself, and the words of S. 77, cl. (3) of the Tenancy Act, are not sufficient to justify that denial of justice which the narrower interpretation requires. **Muhammad Baksh v. Bhagwan Das**, 76 P.R. 1909 (F.B.) = 66 P.L.R. 1910.

REID, C.J., ROBERTSON, KENSINGTON, JOHNSTONE, RATTIGAN and SHAH DIN, JJ.

References:—(a) 11 P.R. 1895 (F.B.); 24 P.R. (1907), F.; 31 C. 1001 (F.B.); 43 P.R. (1002); 96 P.R. 1894, R.

(6-a) S. 77 (3) (h)—Suit for possession by landlord against transferee from occupancy tenant. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 2, 8 Ind. Cas. 666.

(7) S. 77 (3) (k)—Suit against co-sharer for share of sale proceeds of trees growing in joint holding—Jurisdiction. See JURISDICTION OF REVENUE COURTS, No. 1, 52 P.R. 1910.

(8) S. 77 (3) (k)—Claim for share of profits of agricultural land—Jurisdiction. See PARTNERSHIP, No. 8, 142 P.W.R. 1910.

(9) S. 100. See Nos. 1 and 4, *supra*.

Act XVII of 1887 (Punjab Land Rev.).

(1) S. 3 (1) and (2). See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 4, 7 Ind. Cas. 213.

9.—Punjab Acts—(Continued).**Act XVII of 1887 (Punjab Land Rev.)—(Cld.).**

(2) S. 44—Effect of mutation—Person in possession. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 3, 120 P.W.R. 1909.

(3) S. 45. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 2, 103 P.W.R. 1910.

(4) S. 117—Partition of *shamilat* land—Jurisdiction of Civil and Revenue Courts. See SHAMILAT, No. 3, 3 P.L.R. 1910.

(5) S. 158 (1)—Partition proceedings—Jurisdiction of Civil and Revenue Courts. See CIV. PRO. CODE (1882), No. 38, 8 P.R. 1910.

Act XX of 1891 (Municipal).

(1) Ss. 42 (1), (A) (a) (i) and 42 (2)—“Gross annual rent or value,” whether includes Municipal tax paid by tenant to landlord.

When Municipal taxes are paid by the tenant to the landlord (of a house at Simla), they should be considered as forming part of the gross annual rent or annual value, on which the Municipal Committee is entitled to levy a house-tax under S. 42 (1) (A) (a) (i) (a). **Mr. W.E. Fleming v. The Municipal Committee of Simla**, 46 P.R. 1910–76 P.W.R. 1910 = 6 Ind. Cas. 725.

ARTHUR REID, C.J. and CHEVIS, J.

Reference:—*Pullen v. St. Xavier's Union*, 1900 L.R. 1, a B. 138, R.

(2) S. 42 (2). See No. 1, *supra*.

Act I of 1900 (Punjab Limitation).

(1) Custom—Alienation by last male owner—Suit for possession by collaterals after death of his widow but more than twelve years after the alienation—Limitation.

Suit for possession of land gifted to defendants in 1881 by B, whose collaterals the plaintiffs were. B died in 1886, leaving a widow R who died seven months before suit. The gift related only to a part of B's land, and on B's death, his widow R succeeded on the usual life-estate to the rest of his property. R mortgaged a portion of the land in her possession to a third party, but the present plaintiffs contested the validity of the mortgage and obtained a declaratory decree protective of their rights of reversion. Since B was succeeded by R, admittedly the plaintiffs could not, during R's lifetime, bring a suit for possession of the gifted land. *Held*, therefore, that the present suit, brought after her death on the ground that B, contrary to custom, had no power to

9.—Punjab Acts—(Continued).

Act I of 1900 (Punjab Limitation)—(Cld.).

make the gift in derogation of the reversionary rights of plaintiffs, is not governed by Punjab Act I of 1900, and is not barred by efflux of time, though mutation in favour of defendants took place, in 1883, on the basis of the gift in question. **Sohnu and others v. Labha and others**, 62 P.R. 1910.

SHAH DIN and WILLIAMS, JJ.

References:—115 P.R. 1907, F.; 70 P.W.R. 1909, D.; 71 P.R. 1898, R.

Act XIII of 1900 (Punjab Alienation of Land).

- (1) *Ss. 6 and 9—Mortgage by way of conditional sale—Civil Courts, jurisdiction of, to convert such a mortgage into one under S. 6 (1) (a).*

M mortgaged his land to G in 1896, with the conditions that he should pay interest annually, that, in default, compound interest should be paid, that he should redeem within six years; else, the land was to be deemed to have been sold. As M did not pay anything, G applied in 1903 to the Collector for substitution of a mortgage of the kind recognized by S. 6 (1) (a) of the Act. The Collector recorded the fact that the mortgagor refused to give a mortgage of the kind required and allowed matters to stand as before. In 1904, G applied to the District Judge, for issue of a notice of foreclosure, who, after consulting the Collector's proceedings decided that a further reference to the Collector under S. 9 (3) of the Act was unnecessary, and issued a notice. The notice was served on the 23rd June, 1904. After the year of grace prescribed by Reg. XVII of 1806 elapsed, he instituted a suit for possession as vendee. The first Court gave the plaintiff a decree for possession as mortgagee for twenty years, under S. 6 (1) (a), on the ground that the plaintiff was not entitled to possession as full owner, as the District Judge did not on the former occasion make a reference to the Collector under S. 9 (3) of the Act.

Held, that, the requirements of Reg. XVII of 1806 having been satisfied, the plaintiff's right matured into ownership, and, his suit not being on a mortgage but on a title *aliunde*, there was no mortgage "current" within the meaning of S. 9 (2) of the Act, so as to render a reference to the Collector necessary.

The Civil Courts have no authority to usurp the powers given by the Legislature to Revenue authorities, and to convert a mortgage by

9.—Punjab Acts—(Continued).

Act XIII of 1900 (Punjab Alienation of Land)—(Concluded).

conditional sale into one of the kind mentioned in S. 6 (1) (a) of the Act.

The act of the Collector, in simply recording the refusal of the mortgagor to consent to a conversion of the mortgage into one of the kind specified in S. 6 (1) (a) and in not taking any further action, is equivalent to his sanction to the retention of the conditional sale cl. (a). **Gopal Das v. Hari Singh**, 89 P.R. 1909 = 67 P.L.R. 1910.

RATIGAN, J.

Reference:—(a) 93 P.R. 1907, R.

(1-a) S. 9. See No. 1, *supra*.

(2) S. 9 (2)—Sole remedy of mortgagee by conditional sale extinguished—Legislative remedy provided by—Refusal to accept—Right to a money decree. See MORTGAGE (BY CONDITIONAL SALE), No. 1, 22 P.R. 1910.

(3) S. 9 (3)—Appellate Court when bound to proceed under. See MORTGAGE (FORECLOSURE), No. 2, 6 Ind. Cas. 657.

Act II of 1903 (Court of Wards).

- (1) *Ss. 9, 11, 12, 20, 26 to 29, 31 (2), 34—Court of Wards—Notice of claim against ward—Certificate—Revision—Material irregularity—S. 70 (a), Act XVIII of 1884 as amended.*

Held, that, the provision of Ss. 26, 27 and 31 (2) of the Punjab Court of Wards Act II of 1903 are imperative and must be strictly complied with by the claimant and by the Civil Court (taking cognizance of his claim), as the case may be; and that, unless a certificate mentioned in S. 31 (2) is produced by him, the suit cannot be proceeded with, and the consequences specified in S. 29 of the Act will follow.

The Civil Court is not only justified but is bound to stay the proceedings until the said certificate is produced, and it cannot be dispensed with merely on the ground that the Deputy Commissioner concerned has otherwise acquired a knowledge of the nature and the particulars of the claim.

Held, also, that the said S. 31 (2) equally applies whether the suit has been instituted while the Deputy Commissioner concerned is making enquiry under S. 11 and has taken temporary charge of the property of the future ward under S. 12, or after the same has actually come under the superintendence of the Court of Wards according to the provisions of S. 9 of Act II of 1903.

9.—Punjab Acts—(Continued).**Act II of 1903 (Court of Wards)—(Concluded).**

Held, further, that an order of a Deputy Commissioner refusing to grant the certificate of the description referred to in S. 31 (3) of the said Act cannot be questioned on the revision side by the Chief Court, but can only be dealt with by the Financial Commissioner as the Court of Wards under S. 34 of the Act. **Kanda Ram v. Khan Muhammad Nawaz Khan**, 142 P.W.R. 1909=6 P.R. 1910.

ROBERTSON, C.J. and SHAH DIN, J.

(1-a) S. 11. See No. 1, *supra*.

(1-b) S. 12. See No. 1, *supra*.

(1-c) S. 20. See No. 1, *supra*.

(1-d) S. 26. See No. 1, *supra*.

(2) Ss. 26, 27, 28, 31 (2)—Non-production of the certificate under S. 31 (2) bars suit—Waiver of notice of the claim.

Suit upon a mortgage by the mortgagee against the mortgagor, whose estate was in the management of the Court of Wards under Act II of 1903. The plaintiff having failed to produce the certificate required under S. 31 (2), such non-production was pleaded in bar of the suit.

Held that the terms of S. 31 (2) were imperative, and the Court had no power under the Act to proceed with the suit, until the production of such certificate, and if he had so proceeded, his proceedings would have been *ultra vires*.

Held also that, under the provisions of Ss. 26, 27, notice of a claim has to be given by the claimant concerned within a specified period and in a specified manner, and thereupon the Deputy Commissioner has to take definite action under S. 28. If these provisions are not complied with, the mere fact that the Deputy Commissioner concerned has otherwise acquired a knowledge of the nature and the particulars of the claim in question will not suffice, and the Court, before which a suit based on that claim is pending, is bound, as a matter of law, to require the production of a certificate under S. 31 (2). **Kanda Ram v. Khan Muhammad and others**, 6 P.R. 1910 = 142 P.W.R. 1909.

ROBERTSON, O.C.J. and SHAH DIN, J.

(3) S. 27. See Nos. 1 and 2, *supra*.

(4) S. 28. See Nos. 1 and 2, *supra*.

(5) S. 29. See No. 1, *supra*.

(6) S. 31 (2). See Nos. 1 and 2, *supra*.

(7) S. 34. See No. 1, *supra*.

9.—Punjab Acts—(Continued).**Act I of 1904 (Punjab Loans Limitation).**

(1) Arts. 57, 59, 61—Transfer of liability for debt—Limitation—Test whether there is a deposit.

On 31st March 1902, M, guardian of certain minors, sold property to G, deceased husband of defendant, for Rs. 363-8-0, part of minor's debt to plaintiff, and the purchaser undertook to pay off that debt, and plaintiff agreed to look to him for it. On 18th February, 1908, plaintiff sued the defendant for the amount. The deed of sale was deposited with plaintiff. *Held*, that Art. 57 of the Limitation Schedule applied, as G stepped into the shoes of the minors to whom money had been "lent," and thus the Rs. 363-8-0 was "money payable for money lent."

The test whether there was a "deposit" with G of Rs. 363-8-0 is, whether the minors remained liable to plaintiff, and so retained some sort of dominion over the purchase-money in the purchaser's hands. As they did not so remain, and as they had no further concern with the vendee and the purchase-money, the case is one of merely transfer from one person to another of liability for debt, and not a case of a deposit. **Musammam Umda v. Delbagh Rai**, 59 P.R. 1910=101 P.W.R. 1910 7 Ind. Cas. 467.

JOHNSTONE, J.

(2) S. 59. See No. 1, *supra*.

(3) S. 61. See No. 1, *supra*.

Act II of 1905 (Punjab Pre-emption).

(1) S. 3, sub-S. 3—'Village immovable property'—Meaning—Extensions to existing *abadi deh* of village—Whether village immovable property—'Village' and 'village site' whether synonymous.

Where, around the vicinity of a *purao*, or halting ground in *Mauza D*, a number of bazaars and houses came into existence, and the land occupied by them was partly in *Mauza D* and partly in the village of *S*, and where a suit for pre-emption in respect of a house situate on such land was brought.

Held, that the house was situate upon 'village immovable property' within the terms S. 3 (2), Punjab Pre-emption Act (II of 1905).

Held, also, that, if extensions are made to the existing *abadi deh* of a village, or if a hitherto unoccupied site within the boundaries

9.—*Punjab Acts*—(Continued).

Act II of 1905 (*Punjab Pre-emption*)—(Ctd.).

of a village is built over and settled on, the new buildings would become 'village immoveable property' and has such would come within the operation of sub-S. 2 (a).

The definition in sub-S. (2) applies to all immoveable property within the limits of a village, and it is not confined to immoveable property actually within the existing *abadi* of a village (*Per Ryves, J.*) (*Scott. Smith, J.*) diss.

The word 'village' does not mean merely a collection of houses, but the whole estate or *mauza*, and includes everything within village area (*Per Ryves, J.*).

The expression 'village site' cannot be considered to be synonymous with 'village' and it means the 'inhabited part of the village' or *abadi deh* (*Per Scott Smith, J.*) **Devi Dial v. Muhammad Amin**, 89 P.R. 1910 (Civ.).

RYVES and SCOTT-SMITH, JJ.

References:—(a) 21 P.R. 1906; 90 P.R. 1907, D.

(2) S. 11, proviso—Aroras—Khatris—Whether members of the same tribe—Burden of proof.

Where a plaintiff, an *Arora*, sued the defendant a *Khatri*, for pre-emption, the parties being natives of Shujabad, in Multan District, and claimed that both the defendant and himself belonged to the same tribe within the meaning of the proviso to S. 11, Punjab Pre-emption Act, 1905, held that the onus lay on the plaintiff to prove that he was of the same tribe as the vendor and that he failed so to prove. **Chaudhuri Khushi Ram v. Asu Ram**, 97 P.R. 1910 (Civ.).

REID, C.J. and SCOTT-SMITH, J.

(3) Ss. 12 (a), (b), 14 (a), (b)—Custom—Pre-emption—Rival claimants—Claimant improving his position by obtaining consent decree in respect of another sale and becoming co-sharer.

Two sales took place on the same date and two rival pre-emptors instituted suits claiming by right of pre-emption the land transferred by one of the sales. It appeared that one of the rival claimants had obtained a consent decree in respect of the other sale of the same date during the intervening period between the dates of sale in dispute and the suit filed by the other claimant, and became a co-sharer in the holding.

Held, that his obtaining the decree gave him superior right over his rival and the case fell under Ss. 12 (b) (secondly) and 14 (a) of the

9.—*Punjab Acts*—(Concluded).

Act II of 1905 (*Punjab Pre-emption*)—(Ctd.).

Pre-emption Act. **Khera v. Ralla alias Rulla**, 201 P.L.R. 1910.

REID, C.J., and KENSINGTON, J.

(3-a) Ss. 12, cls. (a) and (b); Secondly, 14 cls. (a) and (b)—Rival pre-emptors—One of several equal pre-emptors can improve his position before suit—Two sales by the same vendor—One of several heirs becoming co-sharer by pre-empting one sale—Preferential right of such heir against other co-heirs in regard to the second sale.

A vendor sold some land on 17th July 1907. He also sold some other land to another vendee, on 17th August 1907. S, one of the vendor's heirs, sued to pre-empt the first sale on 16th June 1908 and obtained a consent decree on the 23rd *idem*. On the 25th *idem*, S sued to pre-empt the second sale. On 2nd July 1908, the other heirs of the vendor, who as co-heirs stood on an equal footing with S, instituted suits to pre-empt both sales as heirs of the vendor:

Held that the case fell under S. 12 (b) *secondly* rather than under S. 12 (a), and again under cl. (a) rather than cl. (b) of S. 14, and that S, having got a decree in respect of the first sale, had become a co-sharer and as such he took precedence of the other co-heirs:

Held, further, on the analogy of *Dhanna Singh v. Gurbakhsh Singh*, (a) that a pre-emptor, like a vendee, can improve his position by the date on which he sues for pre-emption. **Khera v. Ralla**, 8 Ind. Cas. 486.

REID, C.J. and KENSINGTON, J.

References:—(a) 91 P.R. 1909 = 148 P.L.R. 1909 = 161 P.W.R. 1909 = 4 Ind. Cas. 337 (F.B.), R.

(4) S. 12 (c), *thirdly*—"Owner of the estate," meaning of—Owner of a share in well—Punjab Land Revenue Act (XVII of 1887), S. 3 (1) and (2).

A person, who only owns a share in a well situated within the boundary of an estate, but pays no portion of the revenue, is not an 'owner of the estate' within the meaning of S. 12 (c), *thirdly*, of the Punjab Pre-emption Act.

The term "owner of the estate" is not synonymous with 'land-owner'; as commonly understood; it is equivalent to *khewatdar*; the Legislature used the term in this sense. **Mahli v. Charat Singh**, 7 Ind. Cas. 213.

ROBERTSON and KENSINGTON, JJ.

(5) S. 14 (a) (b). See Nos. 3 and 3 (a), *supra*.

Aden Courts Act.

See Act II of 1864 (BOMBAY).

Adimayayana tenure.

See LANDLORD AND TENANT, No. 11, 4 Ind. Cas. 875.

Adjournment.

(1) Illness of applicant—Refusal to grant—Remand. See CIV. PRO. CODE (1882), No. 156, 14 C.W.N. 573.

(2)—of suit—Absence of plaintiff or his pleader on adjourned date—Dismissal for default. See CIV. PRO. CODE (1882), No. 15, 6 Ind. Cas. 233.

Administration.

(1) Order for, when relates back. See CIV. PRO. CODE (1908), No. 99, 12 C.L.J. 537.

Administration bond.

(1) *Breach of the conditions of the bond—Liability of sureties—Administrator dealing with trust money qua administrator or trustee.*

Where S obtained letters of administration to the estate of his father, including trust-money in his possession, on condition that S should transfer the trust money to a duly appointed trustee, but subsequently appropriated the sum to himself, and the question was as to the liability of the sureties under the bond,

held that, if the trust had been declared, and S had duly appropriated the trust fund for purposes of the trust, but subsequently misapplied it, then the sureties would not be liable for any misfeasance of S as a trustee. But as S merely undertook to transfer the trust fund to a properly constituted trustee, if he dealt with it in any other manner, whether by purporting to act as trustee or appropriating the money to himself, the condition of the bond is broken, and the sureties are liable. **Seshachallam Chetty v. Swami Chetty**, 7 M.L.T. 90=5 Ind. Cas. 761.

WALLIS, J.

(2) —under the Succession Act—Application to vacate—Legality. See Act X OF 1865 (SUCCESSION), No. 12, 7 M.L.T. 160.

Administration suit.

(1) *Costs of plaintiff—Creditors—Costs of creditor.*

In a creditor's action for administration, where the assets prove to be sufficient for the payment of the debts in full, the costs of the plaintiff is to be paid out of the estate as between party and party only (a).

Administration suit—(Concluded).

The Court may, in a proper case, make an order that the difference between the plaintiff's costs as between attorney and client and the costs allowed him out of the estate as between party and party, may be borne rateably by the whole body of creditors who have profited by his exertions. **Iswaradas v. Chandik**, 7 M.L.T. 400=6 Ind. Cas. 267.

WALLIS, J.

Reference :—(1886) 32 Ch. 357, F.

(2) *Administration suit—Suit for account against administrator—Prayer for his removal—Jurisdiction—Ordinary Civil Court.*

In an administration suit against an administrator for the purpose of compelling him to account for the assets of the estate of the deceased and to carry out the duties of his office, a prayer was joined for the removal of the administrator :

Held, that the suit was cognizable by the ordinary Civil Court, that the prayer for the removal of the administrator might be treated as surplusage, or it might form the basis for the grant of such relief as the appointment of a Receiver against the administrator, and that it was not a prayer for the revocation of the letters of administration. **Gajendra Nath Nandi v. Ganendra Kumar Nandi**, 7 Ind. Cas. 801.

CHATTERJEE and RICHARDSON, JJ.

Administrator.

(1) *Hstopfel—Indian Trusts Act (II of 1882), Ss. 3, 5, 23—Cestui que trust concurring in a breach of trust.*

S made an entry in his account books in favour of his wife V to show that he had made a *bakshis* (gift) of Rs. 75,000 to her on account of his joy at her recovery from an illness. S informed all his sons and daughters of the fact when he made the entry. The amount was entered into account books as a debt due to V. S died intestate, and some of his sons took out letters of administration of his estate and, with the consent of all sons and daughters, they paid Rs. 75,000 to their mother V. After seven years, M, a son of S, brought a suit against the administrators, questioning the validity of the payment, on the ground that it had been made without his knowledge, and claimed that the administrators be ordered to make good the amount to the estate of S.

Administrator—(Concluded).

The administrators (defendants) contended that the amount was given as gift to V or that a trust was created in V's favour, and that they had paid the amount to V with the consent of all parties in administering the estate.

The lower Court held that neither a valid gift was made nor a valid trust was created; that the administrators were guilty of a breach of trust; and that the amount should be made good to the estate of S.

Held, on appeal, reversing the decree of the lower Court, that, as M had consented to the payment of the amount to V by the administrators, he was estopped by his conduct and could not question the validity of the payment.

Per Chandavarkar, J.—If the next of kin of an intestate, with full knowledge of the facts but under a mistake as to their legal rights, authorise his administrator to pay a certain amount to a third person who is not in law entitled to it, and the administrator pays accordingly, he cannot be held to have acted otherwise than in due course of administration.

Per Batchelor, J.—S. 23 of the Indian Trusts Act is limited to trustees as defined in S. 3 of the Act, and administrators do not necessarily fall within that definition. **Arde-shir Shapurji Narielwala v. Manchershaw Shapurji Narielwala**, 12 Bom. L.R. 53 5 Ind. Cas. 63.

CHANDAVARKAR and BATCHELOR, J.

(2) —agreeing to execute lease for which sanction afterwards refused by Court—Effect—Administrator, if trustee. See COMPROMISE DECREE, No. 1, 11 C.W.N. 451.

(3) —whether a trustee for specific purposes within the meaning of Limitation Act. See LIMITATION ACT (1908), No. 4, 7 M.L.T. 123.

(4) Vesting of property of deceased in—Right of heirs to deal with the property—Application of S. 191 of the Succession Act. See LETTERS OF ADMINISTRATION, No. 1, 8 M.L.T. 77.

Administrator-General Act.

See ACT II OF 1874.

Admission.

(1)—of, and decree against, father binding on son. See PRE-EMPTION, No. 1, 157 P.W.R. 1909.

Admission—(Concluded).

(2) —When not binding—Statement made by several persons representing all the proprietors—Effect. See SHAMILAT, No. 5, 94 P.L.R. 1910.

Adoption.

(1) *Burden of proof—Non-examination of parties in a suit, result of—English and Indian practice—Account books, non-production of.*

The plaintiff brought a suit for the recovery of certain properties, alleging that he was adopted twenty years before the date of the suit. *Held*, the burden of proving that the alleged adoption took place twenty years before the trial rested upon the plaintiff. The presumption that would be drawn in England will be to the detriment of a plaintiff who fails to enter the witness-box and face the ordeal of cross examination.

But in cases between natives tried in India, a species of advocacy is tolerated by the Courts of law here, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client, in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all these tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end.

It is a vicious practice, unworthy of a high-toned or reputable system of advocacy, tending to embarrass and perplex judicial investigation, and too often enabling fraud, falsehood or chicane to baffle justice.

Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the matter in question is entered, by the party in whose possession it is, covers the parties' case with suspicion. **Mussamat Lal Kunvar v. Chiranji Lal**, 7 M.L.T. 57 = 14 C.W.N. 285 = 11 C.L.J. 172 = 12 Bom. L.R. 244 = 32 A. 140 = 20 M.L.J. 182 = 5 Ind. Cas. 549.

LORD MACNAGHTEN, LORD ATKINSON,
LORD COLLINS, LORD SHAW, and SIR
ARTHUR WILSON.

Adoption—(Concluded).

- (2) —*Right of—Special grant—Custom—Pattidari Jagirs in the Cis-Sutlej districts.*

The right of adoption has not been recognised in the case of pattidari jagirs in the Cis-Sutlej districts. Even in the case of major jagirdars, the right of adoption only exists by special grant, made in certain cases by the Government of India under rules, approved by His Majesty's Secretary of State in 1902. **Affar Singh v. Sant Singh and Lachman Singh**, 1 P.R. 1910 (Rev.).

DOUIE, F.C.

- (3) Presumption of knowledge of, when arises. See LIMITATION ACT (1877), No. 70, 49 P.W.R. 1909.

- (4) Suit to set aside—Valuation—Jurisdiction. See VALUATION OF SUIT, No. 2, 6 Ind. Cas. 636.

Adverse possession.

- (1) *Adverse possession—Real owner minor—Completion of title by adverse possession—True owner recovering possession by inducing trespasser's tenant to attorn to him—Landlord and tenant—Estoppel—Hindu Law—Inheritance—Sudras—Illegitimate son—Marriage—Custom.*

Title by adverse possession cannot be completed against a minor before the end of three years after the minor comes of age.

A true owner of property is not estopped from recovering possession of his property by inducing the trespasser's tenant in possession to attorn to him, nor is such tenant, who had not been let into possession by the trespasser or his predecessor-in-interest, estopped from denying the trespasser's title. The illegitimate son of a Sudra by "an unmarried Sudra woman" is entitled to a share of the family property, if the concubinage was continuous and if the connection was not incestuous or adulterous or in violation of or forbidden by law. But the offspring of a connection forbidden by the customary law of the parties has no right of inheritance to the property of his father. **Annayan v. Chinnan alias Muni Venkata Chetty**, 5 Ind. Cas. 84—7 M.L.T. 140—20 M.L.J. 355.

WHITE, C.J. and BENSON, J.

- (2) *Adverse possession—Suit against Government for recovery of a tank—Acts constituting adverse possession—Enjoyment of fruits and flowers on the banks of the tank—*

Adverse possession—(Continued).

Removal of silt from tank—Entry of tank in Settlement Register as poramboke, effect of—Burden of proof.

The mere enjoyment of fruits and flowers on the banks of a tank and of fishery in the tank for even thirty and forty years will not, as against Government, indicate ownership, as Government generally allows villagers such enjoyment in small villages, and the non-interference of Government with such enjoyment does not imply a denial of ownership of Government or abandonment by Government of its ownership (a).

The clearing of silt from a tank, and the construction of masonry sluices in it by a person, and the possession and enjoyment of the tank adversely to the Government for thirty or forty years, raise a presumption of ownership in favour of that person, and shift on to Government the burden of showing a title, or that it was in possession at some time within sixty years prior to suit.

If the Government fails to prove that it was ever in possession of the tank, the person's possession should be presumed to have continued for more than the statutory period and to have established a title by prescription.

The mere entry of the tank in the *Paimash* and Settlement Registers as Government *poramboke* is insufficient to prove that the tank is the property of Government (b). **Yenkatarama Aiyar v The Secretary of State for India**, 5 Ind. Cas. 118—7 M.L.T. 139—20 M.L.J. 71.

BENSON and ABDUR RAHIM, JJ.

References—(a) 28 M. 257 (285), P. (b) 14 C. 740 (748), R.

- (3) *Adverse possession, nature of—How to be established—Constructive possession, doctrine of, not applicable to wrong-doer.*

In order to prove title to land by adverse possession, it is not sufficient to show that some acts of possession have been done, but the possession must be adequate in continuity, in publicity and in extent of area, to establish that it is possession adverse to the competitor and to take the title out of the true owner.

The adverse possession to be effective must be actual, visible, exclusive, hostile and continuous for the statutory period.

The doctrine of constructive possession applies only in favour of a rightful owner, and must not, as a rule, be extended in favour of a

Adverse possession—(Continued).

wrong-doer, whose possession must be confined to the land of which he is actually in occupation. **Baroda Prosad Roy Chowdhury v. Annoda Mohan Roy**, 6 Ind. Cas. 359.

MOOKERJEE and CARNDUFF, JJ.

References:—7 C.L.J. 114; 12 C.W.N. 273; 9 M.L.T. 212; 27 C. 843 (P.C.); 27 I.A. 136; 4 C.W.N. 597; 35 C. 961; 12 C.W.N. 127; 6 C.L.J. 735, R.

(4) *Adverse possession—Co-sharer—Mohammedan Law—Question of fact—Revision.*

In a suit by a Mohammedan co-sharer, for possession of immoveable property, against a third person, who pleaded purchase from another co-sharer:

Held, (1) that, having regard to the main allegation of the defence, which is, not that plaintiff and their mother never entered into possession, but that plaintiff's mother sold her share to the present petitioner—an allegation which has been held to be not proved, there was good ground for presuming that the petitioner's possession was not adverse (a).

(2) The question whether an entry by one co-heir is an entry on behalf of all co-heirs or on behalf of the entering co-heir alone is a question of fact (b). **Farid-ud-din v. Ali Hussain**, 79 P.W.R. 1910.

CHEVIS, J.

References:—(a) C. 89 P.R. 1888; C. 30 P.R. 1902, D. (b) C. 97 P.R. 1890; C. 42 P.R. 1889, D.; C. 89 P.R. 1881, *dissented from*.

(5) *Adverse possession—One of several reversioners taking possession of whole property—Suit by other reversioners for their shares after twelve years—Limitation.*

In 1871 there was a litigation between two brothers and widows of two brothers pre-deceased, with the result that the widows were given their husband's shares to be held for life for their maintenance, and that these shares were to pass to the two surviving brothers upon the death of the widows in equal shares. Upon the death of the widows, one of the two brothers got into exclusive possession of the shares allotted to the widows: *Held*, that this title became adverse to the other brother from the death of the widows, and the suit by the other brother beyond twelve years of the widow's death was barred by time. **Ganpat Singh v. Mussal Singh**, 6 Ind. Cas. 695.

BANERJI, J.

(4) *Character of—*. See ACT XV OF 1891 (MURSHIDABAD), No. 1, 6 Ind. Cas. 392.

Adverse possession—(Continued).

(6) *Limitation—Adverse possession—Possession granted for doing prohibit service—Cessation of prohibit service—Whether renders possession adverse.*

Where the defendant was let into possession of the suit land on condition of his doing prohibit service, and the defendant pleaded that he ceased to perform prohibit service, from a period to twelve years before the institution of the suit.

Held, that the mere cessation of service was not sufficient to make defendant's possession adverse (a). **N.S. Narayanasami Aiyer v. Yathiar Rama Aiyer**, 7 Ind. Cas. 252.

MUNRO and SANKARAN NAIR, JJ.

Reference:—(a) 23 B. 602, *Ref. to*.

(7) *Adverse possession—Enjoyment—Period, more than twelve years—Acquisition of title.*

If a plaintiff has put a buttress and has been in possession and enjoyment thereof for more than twelve years, he must be deemed to have a title, and not merely an easement, to the site covered by the buttress, by adverse possession. **Ravutu Adinarayanamma v. Sahukara Syed Murtuza Saheb**, 8 M.L.T. 282.

BENSON and KRISHNASWAMI Aiyar, JJ.

(8) *Possession lawful under a lease—Whether adverse—Acceptance of new lease—Effect—Lease declared void—Effect—Implied surrender.*

In the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law making void the surrender in case the new lease should be made void.

There can be no adverse possession and a consequent title by prescription, if the possession would be lawful and under a lease. **Kerala Yarma Valia Rajah v. Mayankutty**, 8 M.L.T. 309.

WALLIS and KRISHNASWAMY IYER, JJ.

References:—(a) 11 Q.B. 702 (712), *F.*; 15 M. 166, *It*.

(9) *Property acquired by a female by—Stridhan.* See HINDU LAW (STRIDHAN), No. 1, 7 A.L.J. 153.

(10) *Defendant not himself in possession—Plea of.* See PARTITION, No. 3, 5 Ind. Cas. 325.

(11) *Rights of successive holders of hereditary and impartible estates, whether may be barred by.* See SARANJAM, No. 1, 12 Bom. L.R. 208.

Adverse possession—(Concluded).

(12) Possession by transferee from widow under a compromise—Whether adverse. See *HINDU LAW (WIDOW)*, No. 6, 7 M.L.T. 310.

(13)—of debutter property—What amounts to. See *DEBUTTER PROPERTY*, No. 4, 14 C.W.N. 889.

(14) Assertion of absolute title by life-tenant—Estoppel. See *BENAMI TRANSACTIONS*, No. 1-a, 7 Ind. Cas. 218.

(15) *Wakf* property—Acquisition of title by. See *MAHOMEDAN LAW (WAKF)*, No. 7, 7 A.L.J. 1095.

(16) Independent trespassers—Adverse possession—Limitation. See *LIMITATION ACT* (1877), No. 88, 7 A.L.J. 1184.

(17) —of profits alone without the office—Right to beneficial enjoyment of property—Starting point. See *LIMITATION ACT* (1877), No. 79, 20 M.L.J. 781.

(18) Whether plea of title by, should be allowed though not raised in plaint—Test. See *ACT X OF 1865 (SUCCESSION)*, No. 1, 12 C.L.J. 459.

(19) Tenant erecting temporary structures—Effect. See *LANDLORD AND TENANT*, No. 55, 8 I.C. 703.

(20) Necessity for finding whether defendant's possession was adverse or derivative—Failure to account for origin of possession—Legal presumption—Derivative possession. See *POSSESSION*, No. 6-a, 8 I.C. 506.

Advocate.

—and pleader—Authority to represent client—Distinction. See *CIV. PRO CODE* (1882), No. 61, 3 Sind L.R. 208.

Advocate General.

Powers of, to interfere in cases of public nuisance. See *ACT III OF 1883 (CITY OF BOMBAY MUNICIPALITY)*, No. 3, 12 Bom. L.R. 274.

Affidavit.

(1) Defamatory statement in—Privilege—Suit for damages—Maintainability. See *EVIDENCE*, No. 2, 6 Ind. Cas. 309.

(2) —before whom to be sworn. See *CIV. PRO. CODE*, (1908), No. 72, 5 Ind. Cas. 537.

(3) —Contents of—Practice. See *CIV. PRO. CODE* (1908), No. 112, 37 C. 259.

Age.

Proof and evidence as to. See *GUARDIAN AND MINOR*, No. 7, 96 P.W.R. 1910.

Agent.

(1)—his authority to do what is necessary and useful—Power to refer disputes to arbitration. See *CONTRACT ACT*, No. 60, 3 Sind L.R. 164.

(2) Commission—Agent's right to claim—Sale falling through owing to vendor's neglect. See *CONTRACT*, No. 7, 8 M.L.T. 40.

(3) Negligence of, not sufficient cause for setting aside abatement of appeal. See *CIV. PRO. CODE* (1908), No. 131, 7 Ind. Cas. 391.

(1) See *PRINCIPAL AND AGENT*.

Agra Tenancy Act

See *ACT II OF 1901 (N.W.P)*

Agreement.

(1) Stipulation to recognise tenancy—Existence of right—Effect of. See *LANDLORD AND TENANT*, No. 1, 11 C.L.J. 68.

(2)—vague and uncertain—Effect. See *MORTGAGE (GENERAL)*, No. 16, 5 Ind. Cas. 373.

(3)—with Municipality to officiate as priest, if specifically enforceable. See *CIV. PRO. CODE* (1908), No. 10, 12 C.L.J. 74.

(4)—for son-in-law to be maintained in father-in-law's family. See *MAINTENANCE*, No. 7, 7 Ind. Cas. 118.

(5) Between Mahomedans and Hindus regarding sacrifice of cows—Validity—*Nudum Pactum*. See *SPECIFIC RELIEF ACT*, No. 24, 7 Ind. Cas. 318.

(6) That land would go to a shrine on the death of persons who were parties to the agreement—Gift in favour of shrine by one of the parties—Suit to question the gift by another party. See *GIFT*, No. 2, 46 P.L.R. 1910.

Agricultural lease.

(1) Transfer of Property Act how far a guidance to principles applicable to. See *LANDLORD AND TENANT*, No. 14, 7 M.L.T. 231.

(2) Whether interest heritable. See *TRANSFER OF PROPERTY ACT*, No. 81, 7 Ind. Cas. 861.

Alienation.

(1) *Manager of a charitable or religious institution, powers of—Burden of proof of necessity for alienation—Money decree against manager how far evidence of necessity.*

The powers of a manager of the property of a charitable or religious institution are the same as those of a manager for an infant heir.

Alienation—(Concluded).

Where property belonging to such an institution has been alienated by the manager, the burden of proving necessity for the alienation lies upon the alienee.

Where money had been borrowed by the manager in order to satisfy a decree against him, which had been followed by an attachment and an order for sale of property belonging to the institution, *held*, that the Court was not bound to accept the decree and the order for sale as conclusive proof of necessity. **Basdeo Ban (Mahant) v. Sri Kishan Gir**, 13 O.C. 79—5 Ind. Cas. 1005.

CHAMBER and EVANS, O.J. CS.

(2) Alienation—Fraud—Creditor.

T sold a house to A in 1896, and in the following year executed a hypothecation deed in his favour in respect of certain lands. The consideration for the sale and hypothecation was stated to be the payment of the debts due by T to four of his creditors. M, who lent certain moneys to T subsequent to the dates of the aforesaid sale and hypothecation, obtained a decree against T, and, in execution thereof, attached the said house and lands. A preferred a claim and, being unsuccessful, brought a regular suit to set aside the attachment. M contended that the alienations were nominal and fraudulent, and that consequently they could not operate as against him.

Held, that, even if it be true that no money was paid to T's creditors as mentioned in the deeds, the transactions could not be held to be void, since they had the effect of vesting T's property in A as trustee for the benefit of the creditors named therein, and that, if they could be impeached at all, they could only be impeached by the whole body of creditors, or if the transactions could be held to amount to an act of bankruptcy (a). **Mayanna v. Appaji Setty**, 15 M.C.C.R. 104.

NANJUNDAYYA and KRISHNA RAO, JJ.

References:—(a) (1892), 16 M. 397; (1883) 13 B. 434, P'.

(3)—by debtor to defeat execution—Preference of creditor—Legality. See EXECUTION OF DECREE, No. 19, 15 M.C.C.R. 108.

(4) meaning of, in S. 325, C.P.C.—Will whether an. See CIV. PRO. CODE (1882), No. 165, 7 A.L.J. 1176.

(5)—of office by mother-in-law to son-in-law—Validity. See HEREDITARY OFFICE, No. 1, 8 M.L.T. 325.

Alienation of Land Act.

See ACT XIII OF 1900 (PUNJAB).

Aliyasanthana Law.

(1) *Property in the name of the de facto manager of the family—Onus of proof that it is his private property.*

Suit by certain members of a family governed by the Aliyasanthana law to recover on behalf of the family certain properties which, the plaintiffs alleged belonged to the family and were acquired out of family funds. D, the *de facto* manager of the family, executed a conveyance, by which he purported to convey the whole of the properties in dispute to his wife, the first defendant, and to his children, defendants 2 to 5. *Held* that, on the facts proved and admitted, viz., that the family was undivided, that D was one of the managers and that the property was acquired in his name, the onus was on the defendants to prove that these properties were in fact acquired out of the private funds of D, and that this onus was not discharged. **Thimmakke v. Parameshri**, 8 M.L.T. 162—7 Ind. Cas. 145.

WHITE, C.J., and ABDUR RAHIM, J.

Reference:—10 W.R. 122, R.

(2) *Ejman of family—Removal of ejman—Causes.*

A long course of unbusiness like or improvident conduct on the part of the Ejman of an Aliyasanthana family would constitute a ground for his removal (a). **Thimmakke v. Akku**, 8 M.L.T. 159—7 Ind. Cas. 153.

ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 1 M. 153; 3 M. 169; 14 M. 78, R.

Almanac.

Copyright in—Burden of proof—Injunction. See COPYRIGHT, No. 1, 95 P.L.R. 1910.

Alteration.

Material—Of deeds after execution and without privity of party to be affected by it—Effect of—Deeds which have a continuing effect, and deeds taking effect at once—Distinction. See AWARD, No. 1, 6 N.L.R. 1.

Amaram tenure.

Nature of. See PERMANENT TENURE, No. 1, 8 M.L.T. 258.

Amendment.

(1) *Muktearnama, amendment of—Amendment, power of—Amendment of muktearnama, retrospective effect of—Inherent power of Court to amend.*

Amendment—(Continued).

When an application for execution of a decree has been presented by a muktear who was in fact authorised to file it, but whose name had been omitted by mistake from the muktear-nama, the Court has inherent power to allow the muktear-nama to be amended upon discovery of the mistake. The amendment, when made, validates the proceedings, for purposes of limitation, with retrospective effect from their commencement. **Chhayemannessa Bibi v. Kazi Basirar Rahman**, 11 C.L.J. 285 -5 Ind. Cas. 532.

MOOKERJEE and TEUNON, JJ.

(2) *Amendment of plaint in second appeal—New case—Practice—Second appeal.*

Where the suit was brought on an oral agreement which was found against, and amendment of the plaint was asked for so as to enable the plaintiff to claim on his title under a written contract,

held, the amendment ought not to be allowed in second appeal, especially as the effect would be to deprive the defendant of defences which would be open to him if a separate suit were brought on the alleged cause of action. **Eresan Nair v. Rao Bahadur Yasava Menon**, 7 M.L.T. 225 -6 Ind. Cas. 288.

SIR ARNOLD WHITE, C.J., and KRISHNASWAMY IYER, J.

Reference :—18 M. 33 (38), R.

(3) *Plaint—Amendment in second appeal.*

Where the plaintiff stated a wrong date as to a certain event in his plaint, and the first Court disposed of his case on that allegation ; and on appeal before the District Judge on the day of hearing, he, for the first time, gave out a suggestion that that date was wrong, but did not ask for the amendment of the plaintiff : *Held*, that he could not be allowed to amend his plaint in second appeal. **Badri Prasad v. Dila**, 6 Ind. Cas. 542.

RICHARDS and FUDBALL, JJ.

(4) *Plaint—Defective averments—Amendment to be allowed—Suit for declaration—Non-averment of ownership—Dismissal of suit—Illegality.*

Where the plaintiff, in a suit for declaration of right in respect of a tank, stated in the plaint that he had been in enjoyment, that he made repairs and took the fish from the tank, but omitted to make any averment as to his ownership, and the Court in consequence dismissed the suit :

Amendment—(Continued).

Held, that the order of dismissal was illegal and that the plaintiff should have been allowed to amend the plaint to make his meaning clear. **Mukti Gopaludu v. Krishna Chandra**, 6 Ind. Cas. 876 = 8 M.L.T. 245.

BENSON and KRISHNASWAMY AIYAR, JJ.

(4-a) *Estoppel—Acceptance of order of Court and action under it on protest Right of appeal from order, if barred—C.P.C. (Act I of 1908), O. VI, r. 17—Plaint—Amendment—Prayer for injunction to restrain defendant from executing fraudulent decree—Subsequent amendment of plaint by alleging that plaintiff's claim is preferential to defendant's decree—Amendment, whether changes character of suit—Amendment, order of—Discretion of Court.*

A party, who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. But where the party accepts the order under protest, he is not debarred from appealing against it.

The plaintiff claimed to have acquired title to the disputed property by purchase at an execution sale, and alleged that the defendant was about to bring it to sale in execution of a fraudulent mortgage decree, and, therefore, he prayed that the defendant might be perpetually restrained from proceeding with execution of his decree. Subsequently the plaintiff asked leave to amend his plaint, and the object of the amendment was to show that, apart from the fraud, the mortgage decree of the defendant was not enforceable against the property, because the transaction under which the plaintiff derived his title gave him in law a preferential title to that of the defendant.

Held, that the amendment was rightly allowed ; that it merely enabled the plaintiff to urge an alternative ground in support of his claim for injunction ; that the plaintiff would have been seriously prejudiced if the amendment had not been allowed, for he could not have asserted this ground in another litigation ; and that the effect of the amendment was not to alter the fundamental character of a suit and to convert it into another of a different and inconsistent character.

Amendments must not be allowed to prejudice the substantial rights of the party in favour

Amendment—(Continued).

of whose opponent they are allowed; but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court. **Mani Lal v. Harendra Lal Roy**, 8 Ind. Cas. 79.

MOOKERJEE and **SHARF-UD-DIN**, JJ.

(5) Extent to which plaint can be amended. See **GUARDIAN AND MINOR**, No. 7, 86 P.W. R 1910.

(6)—of decree under appeal. See **APPEAL TO PRIVY COUNCIL**, No. 5, 12 Bom. L.R. 646.

(7) Appeal dismissed—Amendment of decree application for, to whom to be made. See **CIV. PRO. CODE** (1882), No. 80, 11 C.L.J. 81.

(8) —of decree when may be made—Decree of lower Court—Confirmation in appeal—Amendment of appellate decree. See **DECREE**, No. 1, 11 C.L.J. 155.

(9) —of decree. See **DECREE**.

(10) Practice — Plaint — Amendment. See **CIV. PRO. CODE** (1908), No. 98, 7 M.L.T. 185.

(11) Decree affirmed on appeal, if may be amended by first Court. See **DECREE**, No. 3, 14 C.W.N. 667.

(12) —of plaint in second appeal. See **MORTGAGE (REDEMPTION)**, No. 12, 7 A.L.J. 821.

(13) Refusal to amend decree—Revision. See **REVISION**, No. 4, 6 Ind. Cas. 707.

(14) —of judgments, decrees or orders—Ground of—Power of Court. See **CIV. PRO. CODE** (1908), No. 89, 13 O.C. 114.

(15)—of plaint, whether a question of procedure—Change in law of Procedure—Effect. See **PROCEDURE**, No. 1, 13 O.C. 151.

(16) Defective plaint—Procedure—Amendment of plaint. See **CIV. PRO. CODE (MYSORE)**, No. 4, 15 M.C.C.R. 112.

(17) Failure to mention receipt as ground of exemption from law of limitation—Plaint whether allowed to be amended in revision. See **LIMITATION ACT** (1908), No. 7, 8 M.L.T. 199.

(18) Amendment of the heading of appeal whether allowed by appellate Court. See **APPEAL (GENERAL)**, No. 3, 8 M.L.T. 199.

(19)—of plaint—*De facto* manager "instead of executor"—Whether character of suit is changed. See **MOHUNT**, No. 2, 7 Ind. Cas. 161.

(20)—of plaint—Conversion of suit for possession into suit for declaration that alienation

Amendment—(Concluded).

was without necessity. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 28, 151 P.L.R. 1910.

(21) —of plaint—Test—Discretion. See **LIMITATION ACT** (1877), No. 5, 12 C.L.J. 423.

(22) —of plaint—Inconsistent pleadings. See **BANKER AND CUSTOMER**, No. 10, 2 I.C. 98.

(23) —when to be allowed. See **CIV. PRO. CODE** (1908), No. 104a, 8 I.C. 600.

Ancestral property.

(1) *Ancestral property—Occupancy holding—Proprietary holding—Burden of proof.*

Where plaintiff claims to succeed to land or to restrain its alienation on the ground of the same being his ancestral property, the onus of proving that the land is ancestral lies on him. He must prove the fact by evidence beyond reasonable doubt.

The plaintiffs claimed possession of proprietary and occupancy holdings and alleged that the holdings were ancestral. The original and the lower appellate Courts found that the property was ancestral of the plaintiff and decreed the claim. Revision against the decree was admitted under S. 70 (i) (b) of the Punjab Courts Act.

Held that the findings of fact of the lower Courts could not be questioned, but the respondents were at liberty to support the decree in their favour by any arguments, whether on facts or law or custom, which they might have used in the lower Courts, and therefore the case was virtually, so far as the respondents were concerned, an open one.

The lower appellate Court observed that, since the occupancy holding was held by brothers in equal shares, there was a strong presumption that they had inherited it from their father. In the Settlement of 1851, it was entered that the brothers were tenants since ancient times, and in the papers of the next year there was entry that they were tenants styled *hakdaran* and had held for 60 or 70 years.

Held, that this established a strong presumption that their father must have held the land before them.

In the Settlement of 1882 in the pedigree table, the name of the father of the brothers was shown in dotted lines, meaning that he was a *Farzi muras*, meaning an ancestor from whom the land did not come down.

Ancestral property—(Concluded).

Held, that such an entry must have been deliberately made, and, as it was made before any dispute had arisen, it carried great weight, and, taken with the fact that at mutations in 1906 it was admitted that both the holdings were not ancestral, the land must be held as not ancestral. Land inherited by a person from his father and transferred to his sister, or sister's son when they have no right to inherit the same, ceases to be ancestral, as it involves the break of continuity. **Bel Parkash v. Partapa**, 19 P.L.R. 1910.

JOHNSTONE and ROBERTSON, JJ.

(2) Character of land, taken in exchange for.

In the case of an exchange, the character of the land acquired would be that of the land parted with, and if the latter were ancestral, the acquired land would be equally ancestral. **Ghauns v. Imam Dino**, 57 P.R. 1910.

SHAH DIN, J.

(3) What is—Alienation of—Legal necessity.
See CUSTOMS (PUNJAB—ALIENATION), No. 23, 109 P.W.R. 1910.

Anubhavam.

Malabar Law—Anubhavam grant of lands
—*Kanom already advanced on the lands*
—*Effect.*

Where a deed purports to make a renewed *anubhavam* grant of lands, and the grant relates only so far as thirty-five paras of paddy are concerned,

held, that the lands are *prima facie* granted in *anubhavam* (a). The fact that there was *kanom* advanced does not make it any the less an *anubhavam*. **Chiralayath Ayinkoottih Moopil Kunhan Raja v. Thozhukat Utaya Sekhari Nambiar**, 7 M.L.T. 188-5 Ind. Cas. 933.

BENSON, OFFG. C.J., and SANKARAN NAIR, J.

Reference :—(a) 29 M. 501, D.

Appeal.**1.—GENERAL.****2.—(SECOND APPEAL).****3.—(TO PRIVY COUNCIL).****—1.—General.**

(1) Non-appealing defendant seeking to have decree set aside against him—Appeal not against whole decree—Applicability of S. 544, C. P. C. 1882—Decree in force under C. P. C. 1882—Whether C. P. C. 1908, operates retrospectively.

Appeal—(Continued).**—1.—General—(Continued).**

Where a non-appealing defendant seeks to have the decree set aside against him also, *held*, that S. 544, C.P.C., 1882, does not apply to the present case, as the present appeal is not against whole decree. Where, prior to the date when the present Code came into force, the plaintiff had become entitled to hold her decree against the defendant undisturbed.

Held, that the present Code cannot be applied retrospectively, so as to deprive the decree holder of it. **Sree Rajah Yenkata Narasimha Appa Row Bahadur v. Sree Rajah Malaraju Lakshmi Venkayamma Row Bahadur**, 7 M. L.T. 296=5 Ind. Cas. 102.

WHITE, C.J., WALLIS and MILLER, JJ.

Reference :—1905 A. C. 373, R.

(2) Appeal—Decree against minor—Respondent not represented by guardian.

Held, that a minor respondent, not duly represented by a guardian, cannot be treated as having appeared, though actually present in the Appellate Court, and that any decree passed by it against the unrepresented minor is not merely to be considered as an *ex parte* one, but is illegal and liable to be set aside by the High Court. **Musammam Ido v. Rulia**, 55 P.W.R. 1910.

REID, C.J.

References :—24 C. 25; 24 A. 383; 28 A. 137, F.; 22 M. 187, R.

(3) Amendment of the heading, whether allowed by the appellate Court—Practice.

Where an appeal, which ought to have been presented under S. 588, C.P.C. (1882), was presented under a wrong section, *held*, that the heading might be allowed to be amended and the appeal should be heard under S. 588. **Nanjundiar v. T. Venkata Rao**, 8 M.L. T. 199=7 Ind. Cas. 797.

WALLIS and KRISHNASWAMY IYER, JJ.

(4) Dismissal of suit against first defendant—No appeal by plaintiff—Decree against first defendant on appeal by second defendant—Legality.

Where the suit is dismissed in the first Court as against the first defendant and there is no appeal or memo of objections put in against by the plaintiff, the lower appellate Court will be wrong in passing a decree against the first

Appeal—(Continued).**1.—General—(Continued).**

defendant on the second defendant's appeal. **Hari Kamayya v. Ayyagari Somayya**, 8 M. L.T. 221.

WALLIS and KRISHNASWAMY AIYER, JJ.
Reference :—28 M. 229, R.

(5) *Whether all appeals are by way of re-hearing—English and Indian Law.*

There is not to be found in the sections of the Code which relate to the powers of an appellate Court, or in the rules, any provision which corresponds to O. LVIII. r. 1 of the English Rules of the Supreme Court that all appeals shall be by way of re-hearing. **Raja of Venkatagiri v. Mukhu Narasayya** 8 M.L.T. 258.

WHITE, C.J., and ABDUR RAHIM, J.

(6) Abatement of—Calculation of time for execution of a decree. See CIV. PRO. CODE, (1882), No. 84, 7 A.L.J. 58.

(7) Appeal against order amending decree—Appeal from decree as amended, See CIV. PRO. CODE (1882), No. 80, 11 C.L.J. 81.

(8) What determines the forum of—Decision of trying Court as to valuation of suit—Appeal. See COURT FEES ACT, No. 14, 14 C.W.N. 343.

(9) Finding by Assistant Collector—S. 111, Act III of 1901—Appeal. See Act III OF 1901 (U.P. LAND REVENUE), No. 5, 5 Ind. Cas. 107.

(10) Time for appeals under the Companies Act—Power to extend time. See Act VI OF 1882 (COMPANIES), No. 3, 1 Ind. Cas. 872.

(11) Right of Appeal from order of Rent Court. See Act II OF 1901 (AGRA TENANCY), No. 17, 7 A.L.J. 246.

(12) Partition—Appeal against preliminary decree after final decree—Not maintainable. See PARTITION, No. 2, 7 A.L.J. 210.

(13) Order dismissing for default—Application under S. 311, C.P.C.—Appeal. See CIV. PRO. CODE (1882), No. 156, 14 C.W.N. 573.

(14) Order passed on review of previous order in execution proceedings—Appeal. See CIV. PRO. CODE (1882), No. 110, 5 Ind. Cas. 483.

(15) Order of remand directing addition of parties by Court—Legality of order. See CIV. PRO. CODE (1882), No. 216, 37 C. 171.

(16)—by Official Assignee—Maintainability. See INSOLVENCY ACT, No. 1, 7 M.L.T. 214.

(17) Appeal on the merits where section wrongly applied. See CIV. PRO. CODE (1882), No. 59, 14 C.W.N. 594.

Appeal—(Continued).**—1.—General—(Continued).**

(18) Report recommending appointment of a receiver—Order refusing to make the appointment—Appeal. See CIV. PRO. CODE (1882), No. 199, 20 M.L.J. 78.

(19) Order of Assistant Collector rejecting plaint—Appeal. See Act II OF 1901 (AGRA TENANCY), No. 18, 5 Ind. Cas. 371.

(20) Appeal—Orders under Ss. 7 and 19 of Act VII of 1889. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 3, 7 M.L.T. 246.

(21) Order rejecting appeal for failure to furnish security for costs—Order affirming decision of Court below, meaning of—Final order passed on appeal, meaning of. See CIV. PRO. CODE (1908), No. 58, 13 O.C. 59.

(22) Appeal, whether lies from order dismissing petition pleading exemption from arrest. See CIV. PRO. CODE (1882), No. 111, 20 M. L.J. 136.

(23) Grant of review—Delay—Appeal. See REVIEW, No. 1, 7 M.L.T. 387.

(24) Application to restore appeal made after expiry of 30 days—Application treated as review. See CIV. PRO. CODE (1882), No. 76, 7 P.L.R. 1910.

(25) Dismissal of suit for default—Application for suit to be restored by some of the plaintiffs—Appeal by co-plaintiff who had not joined in the application. See CIV. PRO. CODE (1882), No. 213, 21 P.L.R. 1910.

(26) Order under S. 295, C.P.C.—Appeal. See CIV. PRO. CODE (1882), No. 145, 12 Bom. L.R. 365.

(27) Application for amendment of sale proclamation—Appeal. See CIV. PRO. CODE (1882), No. 107, 6 Ind. Cas. 180.

(28) Order refusing recognition of assignment of decree—Appeal. See ASSIGNMENT, No. 3, 6 Ind. Cas. 199.

(29) Erroneous decision in an interlocutory order—Appeal. See CIV. PRO. CODE (1882), No. 227, 6 Ind. Cas. 239.

(30) Subject-matter of suit exceeding Rs. 5,000—Appeal—Jurisdiction. See Act II OF 1901 (AGRA TENANCY), No. 19, 6 Ind. Cas. 249.

(31) Appeal dismissed for default—Memorandum of objections—Costs. See CIV. PRO. CODE (1882), No. 208, 6 Ind. Cas. 309.

Appeal—(Continued).**—1.—General—(Continued).**

(32) Unreasonable amount of dower or expenses on marriage and illness of a life tenant—Right of reversioners—Appeal. See CUSTOM (PUNJAB—ALIENATION), No. 10, 71 P.W.R. 1910.

(33) Requisites of valid appeal. See PARTITION, No. 8, 11 C.L.J. 580.

(34) Suit for partition of revenue-paying lands—No question of proprietary title—Appeal. See ACT III OF 1901 (U. P. LAND REVENUE), No. 6, 7 A.L.J. 553.

(35) Decree in accordance with award—No appeal lies. See ARBITRATION, No. 3, 5 Ind. Cas. 621.

(36) Appeal from order under S. 32, Act I of 1894, whether lies. See ACT I OF 1894 (LAND ACQUISITION), No. 11, 6 Ind. Cas. 157.

(37) Application to set aside sale dismissed for default—Confirmation of sale—Appeal. See CIV. PRO. CODE (1882), No. 64, 6 Ind. Cas. 148.

(38) Memo. of cross-objections—Right of respondents in appeal to urge objections as against co-respondents who have not appealed. See CIV. PRO. CODE (1908), No. 154, 6 N.L.R. 51.

(39) Order refusing to set aside *ex parte* dismissal of application to set aside sale—Appeal. See CIV. PRO. CODE (1882), No. 64, 6 Ind. Cas. 148.

(40) Whether giving of a right of appeal is a matter relating to procedure. See ACT OF 1900 (LOWER BURMA COURTS), No. 1, 5 L.B.R. 148.

(41) Appeal pending against the judgment—Sanction to prosecute should not be granted. See SANCTION TO PROSECUTE, No. 5, 7 A.L.J. 647.

(42) Petitioner for revocation of probate, if can withdraw entire proceeding pending appeal by the objector—Appellate Court's power to add as party respondent person not party to the suit. See PROBATE, No. 3, 12 C.L.J. 91.

(43) Two suits tried together—One judgment but two decrees—Appeal against one decree—Finality of the other decree—*Res judicata*. See CIV. PRO. CODE (1908), No. 13, 7 A.L.J. 861.

(44) Plea of minority, whether may be raised for the first time in appeal. See MINOR, No. 2, 6 Ind. Cas. 379.

Appeal—(Continued).**—1.—General—(Continued).**

(45) Order of Assistant Collector refusing to restore suit dismissed for default—Appeal. See CIV. PRO. CODE (1882), No. 65, 6 Ind. Cas. 461.

(46) Two or more decrees, whether can be challenged by one appeal. See CIV. PRO. CODE (1908), No. 13, 7 A.L.J. 861.

(47) Examination of account of Receiver—Interlocutory order—Appeal. See MORTGAGE (GENERAL), No. 24, 6 Ind. Cas. 323.

(48) Specific ground on which appeal is fought in lower Court—Waiver by the parties of the other grounds—Presumption. See PLEADINGS, No. 4, 12 Bom. L.R. 795.

(49) Jurisdiction cannot be questioned in appeal. See JURISDICTION (GENERAL), No. 5, 12 Bom. L.R. 712.

(50) Admission of appeal after time. See LIMITATION ACT (MYSORE), No. 1, 15 M.C.C.R. 143.

(51) Judge invested with small cause jurisdiction trying suit under his ordinary jurisdiction—Appeal. See MALICIOUS PROSECUTION, No. 3, 15 M.C.C.R. 151.

(52) Application for setting aside sale on deposit of debt—Order rejecting application—Appeal. See CIV. PRO. CODE (MYSORE), No. 20, 15 M.C.C.R. 111.

(53) Order under S. 170, C.P.C. (1882)—Appeal. See CIV. PRO. CODE (1882), No. 78, 7 Ind. Cas. 100.

(54) Order of District Judge that he has jurisdiction to entertain application for letters of administration—Appeal. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 10, 91 P.W.R. 1910.

(55) Order refusing to set aside execution sale—Appeal. See CIV. PRO. CODE (1908), No. 124, 105 P.W.R. 1910.

(56) Plaint clumsily drawn—Reading issues to ascertain the case—Difficulty arising from confusion in plaint—Inability of appellant to pay costs—Practice. See PLEADINGS, No. 5, 8 M.J.T. 202.

(57) Right of appeal under S. 54, Land Acquisition Act—Appeal against preliminary order. See ACT I OF 1894 (LAND ACQUISITION), No. 13, 4 S.L.R. 34.

(58) Refusing application to file award—Appeal. See CIV. PRO. CODE (1882), No. 206, 7 Ind. Cas. 338.

Appeal—(Continued).**—1.—General—(Continued).**

(59) Order of single High Court Judge—"Dismissed with costs"—Whether amounts to judgment—Appeal. See **LETTERS PATENT**, No. 3, 8 M.L.T. 288.

(60) Dismissal for default—Sufficient cause—Effect of absence of pleader. See **CIV. PRO. CODE** (1908), No. 150, 34 P.L.R. 1910.

(61) Order directing prosecution of guardian—Appeal. See **GUARDIAN AND MINOR**, No. 9, 88 P.L.R. 1910.

(62) Difference in opinion of arbitrators on a question of law—Statement of a special case for the opinion of the Court—Appeal from Court's order. See **CIV. PRO. CODE** (1908), No. 52, 12 Bom. L.R. 852.

(63) Application to file award in 1908—(Order refusing to file award made in 1909—Appeal. See **CIV. PRO. CODE** (1908), No. 51, 7 A.L.J. 1070.

(64) Refusal of arbitrator to sign award—Legality of award—Appeal. See **ARBITRATOR**, No. 1, 7 A.L.J. 890.

(65) Same issue in two suits—Finding in one incorporated in the other—Appeal against one decree only—Effect. See **RES JUDICATA**, No. 12, 7 A.L.J. 995.

(66) Order under S. 195, **Crim. PRO. Code**—Appeal—Jurisdiction. See **SANCTION TO PROSECUTE**, No. 3, 15 M.C.C.R. 73.

(67) Transferee's right of appeal when transfer annulled. See **ACT III OF 1907 (PROVL. INSOLVENCY)**, No. 10, 7 Ind. Cas. 765.

(68) Power of appellate Court to transfer appeal. See **CIV. PRO. CODE** (1908), No. 27, 8 M.L.T. 247.

(69) Order of Collector refusing to intervene—Appeal. See **CIV. PRO. CODE** (1908), No. 38, 5 P.R. 1910 (Rev.).

(70) Acceptance of order of Court and action under it on, protest—Right of appeal from order. See **AMENDMENT**, No. 4a, 8 Ind. Cas. 79.

(71) Order striking off certain defendants—Appeal. See **CIV. PRO. CODE** (1908), No. 1e, 8 Ind. Cas. 409.

(72) Appeal filed out of time—Dismissal of appeal—Memo of objections also liable to be dismissed. See **CIV. PRO. CODE** (1908), No. 111a, 8 Ind. Cas. 140.

(73) Suit for partition—Decree for plaintiff—Reduction of some defendants' share in consequence—Appeal by such defendants whether

Appeal—(Continued).**—1.—General—(Concluded).**

lies—Relief to party not filing appeal or cross objections. See **CIV. PRO. CODE** (1908), No. 160a, 8 Ind. Cas. 337.

(74) Usurpation of jurisdiction by Court below—Party benefited not to assume inconsistent position in appeal. See **EXECUTION OF DECREE**, No. 22a, 8 Ind. Cas. 26.

—2.—(Second appeal).

(1) *Custom—Evidence—Tenant occupying house in abadi—Rights of such a tenant.*

Whether or not a custom prevails whereby tenants of houses are empowered to sell the materials of their houses and the sites of the houses so long as the houses are standing is to some extent a question of law. The High Court, in second appeal, has jurisdiction to consider the evidence given in support of such a custom and determine whether or not that evidence is sufficient in point of law to establish a custom.

Where, the tenants of a certain village sold the sites of their houses alleging a custom that they had a right to do so by virtue of a local custom and the Zamindar sued to have those sale-deeds cancelled, and the lower Court found on the evidence that the custom did prevail, held that the Court below was right in the conclusion to which it had come. **Girraj Singh v. Hargobind Sahai**, 7 C.L.J. 36 = 4 Ind. Cas. 304 = 32 A. 125.

STANLEY, C.J., and KARAMAT HUSAIN, J.

References:—28 A. 698; 30 A. 311 (F.B.), F.

(2) *Suit by landlord for a moiety of cess paid to Government—Dismissal of suit by lower Courts as being in contravention of S. 7, Rent Recovery Act—Second appeal.*

A suit by a landlord for the recovery of a moiety of cess paid to Government was dismissed by the lower Courts on the ground that it was in contravention of the provisions of S. 7 of the Rent Recovery Act. Held, no second appeal lay. **Narayanasawmy Naidu Garu v. Kolachina Venkatappaya**, 7 M.L.T. 362.

BENSON, O.C.J., and KRISHNASWAMY IYER, J.

Reference:—13 M.L.J. 211, F.

(3) *Pleadings—Setting up new case in second appeal—Suit for partition—Prayer in the nature of an easement, whether can be granted—Practice.*

Appeal—(Continued).**—2.—(Second Appeal)—(Continued).**

Where the plaintiff has sued only for partition between himself and the defendants, he cannot, in second appeal, be permitted to set up a new case in the nature of an easement, and ask for an injunction restraining defendants from interfering with his user of the property as a cattle pen. **Sankaralinga Maistry v. Poonamali Maistry**, 6 Ind. Cas. 423=8 M. L.T. 87.

BENSON and KRISHNASWAMY AIYAR, JJ.

References:—31 C. 51; 4 C.L.J. 437; 11 C. W.N. 20; 1 M.L.T. 364. D.

(3-a) *Pleadings—Second appeal—Point raised for the first time—When not to be allowed—Civ. Pro. Code (Act V of 1908), S. 100—Res judicata between co-defendants—Previous rent suit—Subsequent title suit.*

Where a point was not raised in the written statement, nor was any issue framed upon it, and no evidence was adduced by either of the parties with regard to it, and the Courts below had not expressed any opinion on the point:

Held, that that point cannot be allowed to be raised for the first time in second appeal.

Where, in a previous rent suit, the real question for determination was whether the landlords were entitled to recover rent from all the defendants or from some of the defendants only, and the Court held that the landlords had failed to prove that they were entitled to recover rent from some of the defendants:

Held, that this finding cannot preclude these defendants from establishing their title to the property as against the other defendants in the previous suit, if they have any title (a). **Jinnat Ali v. Nissa Bibi**, 7 Ind. Cas. 123.

SHARFUDDIN and DOSS, JJ.

References:—(a) 31 C. 959; 8 C.W.N. 30; 1 Ind. Cas. 913; 36 C. 193; 5 C.W.N. 724, *relied on*.

(4) Failure of plaintiff to establish ground of enhancement—Decision settling rent—Second appeal. See ACT VIII OF 1885 (BENGAL TENANCY), No. 40, 6 Ind. Cas. 501.

(5) Suit for damages for cutting away crops—Question of title tried incidentally—Second appeal. See CIV. PRO. CODE (1908), No. 18, 6 Ind. Cas. 415.

(6) Power to enter into question of jurisdiction of Court deciding appeal. See CIV. PRO. CODE (1882), No. 65, 6 Ind. Cas. 464.

Appeal—(Continued).**—2.—(Second Appeal)—(Continued).**

(7) *Plaint—Amendment in second appeal.* See AMENDMENT, No. 3, 6 Ind. Cas. 542.

(8) *Legal effect of transaction ignored by parties and the Judges in lower Courts—Rights of appellants to press the view in second appeal.* See PRE-EMPTION, No. 27, 6 N.L.R. 78.

(9) *Question of fact—Jurisdiction of High Court.* See CIV. PRO. CODE (1908), No. 47, 6 Ind. Cas. 760.

(10) *Appellant in second appeal cannot rely on grounds of appeal abandoned before lower appellate Court.* See HINDU LAW (PARTITION), No. 10, 6 Ind. Cas. 795.

(11) *Ground not raised in lower Courts or in memo. of appeal cannot be raised for the first time in arguments in Chief Court.* See REGISTRATION ACT (1877), No. 44, 6 Ind. Cas. 651.

(12) *Powers of appellate Court.* See MADRAS ACT I OF 1908 (ESTATES LAND), No. 3, 20 M.L.J. 528.

(13) *Question of mixed law and fact, whether can be raised in second appeal.* See HINDU LAW (STRIDHAN), No. 2, 6 N.L.R. 3.

(14) —when lies. See ACT VIII OF 1895 (BENGAL TENANCY), No. 46, 5 Ind. Cas. 158.

(15) *Judgment in appeal not in conformity with S. 574, C.P.C.—Order of remand in second appeal.* See CIV. PRO. CODE (1882), No. 218, 7 M.L.T. 120.

(16) *Remand order, not appealed against—Point decided when remanding, if can be taken in second appeal.* See CIV. PRO. CODE (1882), No. 215, 7 M.L.T. 93.

(17) *Plea of res judicata whether can be taken in second appeal.* See RES JUDICATA, No. 3, 5 Ind. Cas. 294.

(18) *Objection as to want of notice or cause of action can be allowed for the first time in second appeal.* See LEASE, No. 8, 5 Ind. Cas. 336.

(19) *Decree not at admitted rate but at a lessor one—Second appeal.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 45, 5 Ind. Cas. 340.

(20) *Amendment of plaint—When allowed.* See AMENDMENT, No. 2, 7 M.L.T. 225.

(21) *Second appeal—Question of fact—Whether can be raised for the first time.* See ACT XX OF 1863, No. 2, 7 M.L.T. 311.

Appeal—(Continued).**—2.—(Second Appeal)—(Concluded).**

(22) Suit embracing two or more distinct subjects—Value for Court fees and for appeal—Right of further appeal. See VALUATION OF SUIT, No. 1, 41 P.R. 1910.

(23) Question of jurisdiction and important point of law allowed to be taken for the first time in second appeal. See CIV. PRO. CODE (1882), No. 67, 5 Ind. Cas. 525.

(24) Power to allow fresh evidence to be given in second appeal. See HINDU LAW (REVENUE), No. 2, 5 Ind. Cas. 666.

(25) Question of law arising upon facts found—Second appeal. See ACT IX OF 1883 (C.P. TENANCY), No. 1, 6 Ind. Cas. 75.

(26) Question of waiver may be raised in second appeal. See INSTALMENT DECREE, No. 1, 6 Ind. Cas. 138.

(27) Objection as to jurisdiction, whether may be taken for the first time in second appeal. See JURISDICTION (GENERAL), No. 4, 6 Ind. Cas. 384.

(28) Pleading—Finding of fact not challenged in first appeal cannot be agitated in second appeal. See MORTGAGE (GENERAL), No. 26, 6 Ind. Cas. 331.

(29) Suit by auction purchaser for refund of purchase money on failure of consideration—Cognizability by Small Cause Court—Second appeal. See EXECUTION SALE, No. 3, 12 Bom. L.R. 723.

(30) Nature of tenancy—Question of law—Second appeal. See ACT VIII OF 1885 (BENGAL TENANCY), No. 8, 7 Ind. Cas. 785.

(31) Determination of question whether there is a garden—Second appeal. See ACT XI OF 1859, (REVENUE SALE LAW), No. 5-a, 7 Ind. Cas. 912.

(32) Decision in ejectment suit—Second appeal. See ACT II OF 1901 (AGRA TENANCY), No. 20-b, 8 Ind. Cas. 529.

(33) Order for security made by appellate Court—Non-compliance with order—Dismissal of appeal—Second appeal. See CIV. PRO. CODE (1882), No. 213-a, 8 Ind. Cas. 436.

(34) Finding of fact based on evidence cannot be disturbed in second appeal. See EVIDENCE ACT, No. 2, 8 Ind. Cas. 728.

—3.—(To Privy Council).

(1) *Privy Council appeal—Security bond, extension of time to file—Power of High*

Appeal—(Continued).**—3.—(To Privy Council)—(Continued).**

Court—Sufficient reasons for delay—Computation of time—Date of decree, meaning of—Civ. Pro. Code (Act V of 1908) O. 45, R. 7.

The High Court has power to extend the time for depositing costs in Court, but it ought not to do so without some cogent reasons (a).

Where a petition for filing security bond out of time stated that the delay was caused by a misapprehension of the appellants about the date of re-opening of the High Court and that, none of the appellant's men being present in Calcutta on that date, the bond was not filed.

held,—that these were not reasons over which the applicant had no control, and that the delay was not due to a mistake which would be regarded as not unreasonable or caused by negligence; that they were therefore not cogent reasons such as to justify the extension of time.

“Date of decree” in O. 45, R. 7, C.P.C., means the date on which the decree is pronounced, and not that on which it is signed (b). **Harendra Lal Roy Chowdhury v. Sm. Hari Dasi Debi**, 14 C.W.N. 420-5 Ind. Cas. 844.

BRETT and SHARFUDDIN, JJ.

References:—(a) 11 C.W.N. 1104; 10 C. 557; 14 M. 391, F. (b) 7 C. 547, F.

(2) *Privy Council—Application for leave to appeal—Appealable value—Decision indirectly involving amount.*

Defendants, who were co-sharers of the plaintiff in the Zemindari, having purchased certain holdings from the tenants, the plaintiff sued them for their share of the rent due from one such holding, amounting to Rs. 230. The High Court, reversing the decree of the lower Court, dismissed the suit on the ground that, as there was no contract of tenancy between the parties, there was no relation of landlord and tenant between them. The plaintiff, in applying for leave to appeal to the Privy Council, proved that there were other holdings similarly purchased by the defendants, and that the decision of the High Court would have the effect of depriving him of rents of all such holdings amounting to Rs. 800 a year, which, capitalized, came up to over Rs. 10,000.

Held, that the decision indirectly involved a claim or question to or respecting property of

Appeal—(Continued).**—3.—(To Privy Council)—(Continued).**

the value of Rs. 10,000 or upwards, and leave ought to be granted. **Srinath Pal Chowdhury v. Grindra Chandra Pal Chowdhury**, 14 C.W. N. 651=6 Ind. Cas. 598.

GHOSE and CASPERSZ, JJ.

- (3) *Privy Council Appeal—Value of subject-matter of suit in first Court—Possible increase in quantity of land by alluvion—Increase of value after institution of suit—Civ. Pro. Code (Act V of 1908), S. 110. O. XLV, R. 5.*

In estimating the value of the subject-matter of an appeal to the Privy Council, only the lands which existed when the suit was instituted are to be taken into consideration, and not also the lands which possibly may be formed by alluvion in the course of future years.

The amount or value of the subject-matter in dispute on appeal is dependent on the amount or value of the subject-matter in the Court of first instance, and the High Court will not take into account the increase in the value of the lands in suit in the interval between the institution of the suit and the filing of the application for leave to appeal to the Privy Council. **Administrator General of Bengal v. Ashutosh Burdhan Roy**, 5 Ind. Cas. 645.

BRETT and SHARFUDDIN, JJ.

- (4) *Privy Council—Leave to appeal—Appealable value—Right of party to prove value of subject-matter contrary to valuation in plaint or memo. of appeal—Mesne profits pending suit if to be added.*

The valuation made in conformity with the stamp law does not prevent a party from obtaining leave to appeal, by proving that the real value of the subject-matter does not fall short of the appealable amount. But a defendant, who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him, should not be allowed to contest that valuation, on the principle that a party cannot both approbate and reprobate.

In a suit for recovery of possession of immovable property with mesne profits, the subject-matter to be valued would include mesne profits claimable from the institution of the suit to the date of the delivery of possession, or until the expiration of three years from the date of the decree with interest. **Kumar Basanta**

Appeal—(Concluded).**—3.—(To Privy Council)—(Concluded).**

Kumar Roy v. The Secretary of State for India in Council, 14 C.W.N. 872=6 Ind. Cas. 792.

JENKINS, C.J., and DOSS, J.

- (5) *Practice—Dismissal of the appeal—Amendment of the decree under appeal—Absence of petition of appeal by the respondents.*

Their Lordships dismissed the appeal, but amended the decree appealed against, by providing for interest subsequent to the decree, in accordance with the prayer in the petition for special leave to appeal presented by the respondents, who did not lodge their petition of appeal as required under the Judicial Committee Rules, 1908. **Kasim Ahmed Jawa v. Narain Chetty**, 12 Bom. L.R. 616 (P.C.)=12 C.L.J. 231=20 M.L.J. 630=37 C. 623=8 M.L.T. 229.

LORD MACNAGHTEN, LORD COLLINS,
SIR ARTHUR WILSON and MR. AMEER
ALI.

- (6) *Appeal to Privy Council—Special leave—Injunction—Stay of execution proceedings—High Court's jurisdiction—Civ. Pro. Code (Act V of 1908), O. XLV.*

Where, after the refusal by the High Court to grant leave to appeal to His Majesty, special leave has been granted by the Judicial Committee, the High Court has no power to entertain an application for an injunction staying certain proceedings in execution, pending disposal of the appeal by the Privy Council (*a*). **In re Kunwar Raghubir Singh v. Musammat Moti Kunwar**, 7 Ind. Cas. 188.

STANLEY, C.J., and GRIFFIN, J.

References:—(a) 27 C. 1; 10 C.L.J. 326; 4 Ind. Cas. 452, *relied upon*.

(7) Order dismissing appeal on default—Effect—Limitation for execution of decree. See LIMITATION ACT (1877), No. 107, 7 A.L.J. 1001.

(8) Subject-matter not exceeding Rs. 10,000—Certificate granted in connected cases—Same question involved—Leave to appeal. See CIV. PRO. CODE (1908), No. 57, 5 Ind. Cas. 583.

(9) Poverty, whether sufficient reason for extension of time allowed for the deposit of security for Respondent's costs in. See CIV. PRO. CODE (1908), No. 163, 44 P.R. 1910.

(10) Interpretation of decree—Res judicata—Appeal. See CIV. PRO. CODE (1908), No. 56-a, 8 Ind. Cas. 485.

Appellate Court.

(1) Powers of, in India. See ACT I OF 1908 (MADRAS ESTATES LAND) No. 2-c, 8 Ind. Cas. 73C.

(2) Powers of. See CIV. PRO. CODE (1908), No. 160, 9 M.L.T. 377.

Appellate decree.

—in favour of respondents, whether enures for the benefit of respondent who did not appeal. See CONTRACT ACT, No. 3, 5 Ind. Cas. 102.

Appropriation of payments.

(1) Creditor and debtor—Payments appropriated towards interest—Absence of evidence of appropriation by creditor at the time—Creditor's right.

Even in the absence of evidence that any appropriation was made by the creditor at the times when the various sums were paid by the debtor, the creditor can be allowed to make out his account on the basis that, when each sum was paid, portion of it was appropriated towards the interest then due (a). **Yaranasi Seethamma v. Sreshtalur Vijiaraghava Charyulu**, 7 M.L.T. 199=5 Ind. Cas. 940.

SIR ARNOLD WHITE, C.J., and MUNRO, J.

Reference:—(a) 8 B.L.R. 110, F.

(2) Payment of half notes—Effect. See CURRENCY NOTES, No. 1, 5 Ind. Cas. 202.

Arbitration.

(1) Arbitration award—Reference by Tahsildar—Ultra vires—Hindu law—Mother's share—Right to inherit.

In a mutation case, the parties made an application to the Tahsildar, who was a Magistrate of second class, stating that they would be bound by the award of one P. The Tahsildar made a reference to arbitration. Held that the Tahsildar had no power to make the reference, and the award, not having been made on private reference, was *ultra vires*.

The share which a Hindu mother gets on partition between her sons is her *stridhan*. **Mathura Prasad v. Ganga Ram**, 7 A.L.J. 69=5 Ind. Cas. 519.

BANERJI, J.

(1-a) C.P.C. (1908), Sch. II, S. 16—Refusal of arbitrator to sign award—Legality of award—Decree passed on such award—Appeal.

Held that no appeal lies from the decree of a Court passed in accordance with an award, in a

Arbitration—(Continued).

case where five arbitrators were nominated and two of the arbitrators appointed by one party refused to sign it, but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. **Kamta Prasad v. Jodha Singh**, 7 A.L.J. 890=7 Ind. Cas. 99.

KNOX and GRIFFIN, JJ.

(2) Arbitrator's award made after the death of one of the parties—*Nunc pro tunc*, whether applicable to the award—Submission to arbitration, revocation of, by the death of a party.

Where a submission to arbitration has been made a rule of Court, the death of one of the parties does not work a revocation.

Where, an agreement to refer having been filed in Court the Court appointed an arbitrator, who, after finishing his enquiries and hearing the arguments of the pleaders of the parties, reserved his report and award, and then one of the parties died.

Held—that, under the circumstances of the case, the death of a party did not make the award void, and the doctrine of *Nunc pro tunc* was applicable as in the case of a judgment of Court, **Hara Krishna Mitra v. Ram Gopal Mitra**, 14 C.W.N. 759=6 Ind. Cas. 170.

MOOKERJEE and TEUNON, JJ.

(3) Decree in accordance with the award—No appeal lies—Arbitrator delegating authority.

Where a decree is in accordance with the award, no appeal lies.

Where parties to an arbitration agreed to accept certain estimate and valuation made by a certain person, and the arbitrator proceeded to examine that person as a witness and accepted his estimate and valuation:—Held, that the arbitrator was thereby not guilty of delegating his authority to that person. **Hafiz Haji Muhammad Fakhar-ud-din v. Murli-dhar**, 5 Ind. Cas. 621.

STANLEY, C.J., and BANERJI, J.

(4) Arbitration—Award—Appeal—Revision—Tearing original and making fresh award—Taking evidence in absence of parties—Corruption or misconduct—Civ. Pro. Code, 1908, second Schedule, paras. 15 and 16.

Held, that a decree passed in accordance with an award, after finding that there was no misconduct or corruption of the arbitrators,

Arbitration—(Continued).

to whom a case is referred for arbitration on the application of the parties, is neither subject to appeal nor to revision, and that an Appellate Court's action to interfere with it in any way even with the consent of the parties is *ultra vires ab initio* (a).

Held, also, that, on the objection of any party, the arbitrators can reconsider their award after it is made, but before it is submitted to the Court. Thus a fresh award is valid and legal even if it is different in its terms from the original one.

Held, further, that it does not amount to misconduct of an arbitrator if he takes evidence in the absence of the parties, with their express or implied consent. **Dial Chand v. Khuda Bakhsh**, 73 P.W.R. 1910.

JOHNSTONE, J.

References:—C. 92 P.R. 1903; 25 C. 141, P.; C.P.R. 66—148 P.W.R. 1907; 18 Bom. 299, R.

(4-a) *Arbitration, reference to—Award not submitted on due date—Setting aside of order of reference—Procedure to be followed by Court.*

Where a reference to arbitration falls through owing to non-submission of the award on the date fixed for submission, the course the Court should follow is to fix a date for the hearing of the suit, so as to enable the parties to appear and adduce evidence in support of their respective cases. Where this procedure was not followed, the High Court set aside the order of dismissal of the suit for default of appearance. **Gopal Lal Mandal v. Suresh Chandra Mukerji**, 12 C.L.J. 624.

MOOKERJEE and TEUNON, JJ.

(5) Award of arbitrators—No application for filing award in Court—Whether award can be pleaded in subsequent suit. See **AWARD**, No. 1, 6 N.L.R. 1.

(6) Father's power as managing member to refer a partition question to—Award—Whether sons bound. See **HINDU LAW (PARTITION)**, No. 9, 6 Ind. Cas. 123.

(7) Dispute about succession to trusteeship cannot be referred to—Award—Application to file award—Jurisdiction of Court—What matters can be referred to. See **MAHOMEDAN LAW (WAKF)**, No. 5, 6 Ind. Cas. 219.

(8) Contract to refer to—What amounts to revocation of the contract—Rights of parties—Limitation. See **SPECIFIC RELIEF ACT**, No. 12, 6 Ind. Cas. 420.

Arbitration—(Concluded).

(9) Reference to—Minor member whether bound by reference made by Karta—Effect of reference by misrepresentation and undue influence. See **CIV. PRO. CODE** (1882), No. 205, 7 Ind. Cas. 31.

(10) Guardian's power to submit to. See **GUARDIAN AND MINOR**, No. 8, 15 M.C.C.R. 129.

(11) Application by arbitrator for extension of period allowed for making award—Dismissal for default—Legality. See **CIV. PRO. CODE** (1908), No. 107, 29 P.L.R. 1910.

(12) Private arbitrators—Their rights and duties. See **CIV. PRO. CODE** (1882), No. 206, 7 Ind. Cas. 333.

(13) Reference by Court to—Munsarim's power to fix date for hearing—Effect of Sch. 2, cl. 8, C.P.C. (1908). See **REVISION**, No. 7, 13 O.C. 341.

(14) Partition by—Whether binding on persons not parties. See **PARTITION**, No. 14-b, 8 Ind. Cas. 439.

Arbitration Act.

See **ACT IX** of 1899.

Army Act.

Army Act, 1881 (44 and 45, Vic. c. 58), S. 144, exemption under—Attachment of Military Assistant Surgeon's pay. See **CIV. PRO. CODE** (1908), No. 37, 10 P.R. 1910.

Arrest.

(1) Order negating exemption from—Appealability—Power of Court to release. See **CIV. PRO. CODE** (1882), No. 111, 20 M.L.J. 136.

Assault.

Insult—Suit for damages—Cause of action—Limitation. See **LIMITATION ACT** (1877), No. 43, 5 Ind. Cas. 124.

Assessment.

(1) Grant of—Consideration in shape of services rendered—Sale—Gift—Registration. See **TRANSFER OF PROPERTY ACT**, No. 37, 12 Bom. L.R. 9.

(2) Increase of, after hundred years—Legality. See **GRANT**, No. 2, 8 M.L.T. 378.

(3) Liability of mortgagor to pay enhanced assessment. See **MORTGAGE (USUFRUCTUARY)**, No. 7, 8 M.L.T. 420.

Assignment.

(1) *Execution—Application in accordance with law—Assignment of decree by some of decree-holders to one of them—Refusal of those who did not assign to join assignee in execution—Failure to prove validity of assignment, effect of—Parties.*

Some of the decree-holders in a suit assigned the decree in favour of one of them. The others having refused to join the assignee in execution, he applied for execution, making them defendants.

Held, (1) that this was an application in accordance with law ;

(2) that the failure of the assignee decree-holder to prove the validity of the assignment did not make his application any the less in accordance with law. **Yasha Kuthiyakath Uduman Hajee v. Ashi Kalakath Mamikutti**, 5 Ind. Cas. 120.

BENSON and ABDUR RAHIM, JJ.

Reference :—12 M.L.J. 348, R.

(2-a) *Transfer of Property Act (IV of 1882), Ss. 130, 131, 134—Assignment of debt—Recognition of assignment by debtor—Notice of assignment to debtor—Notice for payment of debt to assignee, conditioned on non-payment by the assignor—Notice by transferee as effectual as by assignor.*

An assignment of a debt lawfully due and owing by a person to the assignor binds the debtor, who is thenceforward liable for its payment to the transferee. The debtor cannot refuse to recognise the transfer, provided he has notice of it, and payment to the assignor, after notice of assignment will not absolve the debtor from liability to the transferee.

If the debtor has paid the original creditor before notice of assignment, he can plead such payment in discharge of his liability, although, at the time of payment, the right had vested in the assignee.

Notice of assignment may have conditions or qualifications attached to it.

Where the assignor notified to his debtor that the money due to him should be paid to his assignee, provided it was not paid already by the assignor himself :

Held, that the notice was perfectly valid as a notice of assignment and did not entitle the debtor to refuse payment to the assignee if he knew that the assignor had not paid the amount himself (a).

Assignment—(Continued).

Under S. 131 of the Transfer of Property Act the transferee can sign the notice if the transferor refuses to do so, and he need not set out the circumstances under which he gives notice.

If the transferor gives an invalid notice, the transferee is entitled to give a legal notice, so as to prevent the original debtor from defeating the assignment.

Obiter.—The Transfer of Property Act does not lay down what the debtor is to do when the fact of the assignment or its validity and operation is in dispute, but there can be no doubt that, in such a case, if he has received a duly signed notice of the alleged assignment, the only safe course for him is not to pay either of the claimants but to ask them to interplead. If he pays one of them he does so at his peril, and he will be obliged to pry over again to the right person, if the person to whom he paid had no title (b). **R. Gopalakrishna Iyer v. D. Gopalakrishna Iyer**, 4 Ind. Cas. 420 : 7 M.L.T. 97 = 33 M. 123.

MUNRO and ABDUR RAHIM, JJ.

References :—(a) (1896) 1 Q.B. 765 ; 67 L.J. Q.B. 484 ; 48 L.T. 438, D. (b) (1905) A.C. 451 ; 74 L. J. K. B. 898 ; 93 L. T. 495 ; 21 T.L.R. 710 ; 11 Bom. Cas. 1, R.

(3) *Assignment of decree—Order refusing recognition of—Appeal.*

An appeal lies against an order refusing to recognise an assignment of a decree. **Unnamali Ammal v. Kandasawmy Madpanor**, 6 Ind. Cas. 199 = 8 M.L.T. 56.

SANKARAN NAIR and KRISHNASWAMI AIYAR, JJ.

Reference :—25 M. 383, F.

(4) *Assignment—Rights of third party to impeach—Assignment defrauding the third party.*

Ordinarily an assignment cannot be impugned by a third party when the assignor admits. But it is otherwise where the question is whether the transaction to which the assignment relates is colourable and intended to defraud that third party. **Gaurishankar v. Hiralal**, 12 Bom. L.R. 822.

CHANDAVARKAR and HEATON, JJ.

(5)—Of decree—Attachment, effect of, on execution application by assignee. See CIV. PROC. CODE (1882), No. 134, 7 M.L.T. 83.

(6)—of a right to recover subscription—Right of holder of a charge. See TRANSFER OF PROPERTY ACT, No. 94, 7 M.L.T. 125.

Assignment—(Concluded).

(7) Determination of validity of, after notice to parties—Effect. See *RES JUDICATA*, No. 6, 7 M.L.T. 224.

(8) Claim merged in judgment—Assignment of right under judgment whether original cause of action be alienable or not—Assignment of decree for maintenance. See *MAINTENANCE*, No. 4, 14 C.W.N. 918.

(9) Rights of assignee of decree. See *CIV. PRO. CODE* (1908), No. 30, 7 Ind. Cas. 55.

(10) Deposit of policy as security for debt—Subsequent assignment of policy to another creditor—Priority. See *INSURANCE*, No. 3, 12 Bom. L.R. 717.

(11) Lease—Liability of assignee for rent—When ceases. See *TRANSFER OF PROPERTY ACT*, No. 87, 14 C.W.N. 831.

(12)—by mortgagee for lesser consideration—Right of assignee to recover entire amount due to his assignor. See *MORTGAGE (USUFRUCTUARY)*, No. 7, 8 M.L.T. 420.

Attachment.

(1) *Wrongful attachment—Property stolen during attachment—Liability of the decree-holder—Cause of action—Damages.*

Certain crops were wrongfully attached at the instance of a decree holder. During the subsistence of the attachment, the crops were stolen: *Held*, that the decree-holder, who had obtained the wrongful attachment, was responsible for the value of the crops: *Held*, further, that a complete cause of action for the recovery of the attached property accrued in favour of the plaintiff at the date of the wrongful attachment, and it was not impaired by any subsequent occurrence for which the plaintiff was not responsible. **Bishambar Das v. Goddar**, 6 Ind. Cas. 789.

GRIFFIN, J.

References:—3 B. 74, F.; 17 C. 436; 17 I.A. 17, R.

(1-a) *Attachment of holding before judgment—Surrender of holding during attachment—Surrender invalid if holding transferable—C.P.C. (Act V of 1908), S. 64.*

In a suit for money, a holding of the defendant was attached before judgment. During the continuance of the attachment, the defendant surrendered the holding, and the landlord settled it with another person. The plaintiff obtained a decree and in execution purchased the holding.

Attachment—(Continued).

Held, that, if the holding was transferable, a surrender of it after attachment could not, in view of the provisions of S. 64 of the Code of 1908, affect the position of the decree-holder purchaser or create in the landlord and his new tenant any preferential right. **Indra Narain v. Nut Behary Jana**, 8 Ind. Cas. 76.

MOOKERJEE and TEUNON, JJ.

(1 b) *Blacksmith's inam in proprietary estate whether liable to be attached in execution* See *ACT III OF 1895 (HEREDITARY VILLAGE OFFICES)*, No. 2, 5 Ind. Cas. 41.

(2)—of decree—Failure of attaching creditor to execute the attached decree—Attached decree barred by limitation—Right of decree-holder to claim damages from attaching creditor. See *EXECUTION OF DECREE*, No. 1, 5 Ind. Cas. 56.

(3) *Conditions necessary for.* See *CIV. PRO. CODE* (1882), No. 195, 11 C.L.J. 19.

(4) *Exemption of Military Assistant Surgeon's pay from—Army Act (1881) (44 and 45 Vic., c. 58), S. 144—Refusal by officer commanding to comply with order of—Procedure.* See *CIV. PRO. CODE* (1908), No. 37, 10 P.R. 1910.

(5) —by a Court without jurisdiction—Effect—Effect of due confirmation of sale. See *EXECUTION SALE*, No. 1, 13 O.C. 43.

(6)—in execution of money-decree, if creates a charge. See *LIS PENDENS*, No. 1, 14 C.W.N. 677.

(7) *Right of creditor attaching the debtor's property before judgment.* See *CONTRIBUTION*, No. 4, 7 A.L.J. 409.

(8) *Attachment for amount larger than due—Effect.* See *LANDLORD AND TENANT*, No. 22, 7 M.L.T. 429.

(9) *before judgment—Removal of, on K giving security—Suit dismissed by lower Court but decreed on appeal—Liability of surety for amount of appellate decree.* See *CIV. PRO. CODE* (1882), No. 196, 5 L.B.R. 156.

(10)—for recovery of excess amount drawn by Commissioner as fees—Power of Court. See *CIV. PRO. CODE* (1882), No. 233, 6 Ind. Cas. 386.

(11) *Right to maintenance when attachable.* See *MAINTENANCE*, No. 5, 12 C.L.J. 146.

(12) *Conditional order of—Transfer of suit—Power of Court to deal with.* See *CIV. PRO. CODE* (1882), No. 26, 6 Ind. Cas. 746.

Attachment—(Concluded).

(13) *Claim to attached property—Judgment-debtor, how far a party.* See CIV. PRO. CODE (MYSORE), No. 18, 15 M.C.C.R. 89.

(14) —in execution of decree under S. 276, C.P.C. (1882)—Private alienation, during the continuance of attachment, what is—Effect—Sale in pursuance of a contract anterior to—Its validity—Collusive decree—Proceedings in execution—Alienation—Pending—How far affected. See CIV. PRO. CODE (1882), No. 135, 8 M.L.T. 197.

(15) Attachment, wrongful—Sheriff's right to poundage. See PRACTICE, No. 2, 37 C. 649.

(16) Attaching creditor whether should be made party in apportionment proceedings. See ACT I OF 1894 (LAND ACQUISITION), No. 14, 7 Ind. Cas. 481.

(17) Position of attaching creditor—Right to notice. See CIV. PRO. CODE (1882), No. 70, 20 M.L.J. 521.

(18) Insolvent's salary when exempt from. See INSOLVENT ACT (46 and 47, Vic., c. 52), No. 1, 8 Ind. Cas. 438.

Attestation.

(1) *Estoppel—Attesting a deed as witness.*

The mere fact of a person attesting a deed is not in itself sufficient proof that he consented to it or knew its contents, and does not necessarily import his assent to all the recitals therein. **Mewa Singh v. Bhagwant Singh**, 5 Ind. Cas. 252.

PIGGOTT, J.

References :—9 C. 463 ; 3 B.L.R. 57 (P.C.) ; 12 W.R. 47 (P.C.) ; 13 M.I.A. 209, F. ; A.W.N. (1888) 294, D.

(2) *Attestation—Attesting witness—Party to deed cannot be attesting witness—Meaning of attestation—Pardanashin lady—Execution behind parda—How to be attested—Document to be exclaimed to, and understood by, pardanashin lady—Payment of interest—Agent duly authorised—Limitation Act (XV of 1877). S. 20.*

A person, who is a party to a deed, cannot be regarded as an attesting witness ; therefore, a co-executant cannot be considered as an attesting witness (a).

When an instrument is required to be attested, the meaning is that a witness would be present at its execution and shall testify that it has been executed by the proper person (b).

Attestation—(Continued).

Where, according to the custom of the country, *pardanashin* ladies are unable to appear before male witnesses, a document, which by independent testimony is conclusively proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *parda*, and who before attestation satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze (c).

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those, who rely upon them, should satisfy the Court that they had been explained to, and understood, by those who executed them.

In a case where such a lady had the advice of her eldest sister who joined her in the transaction of a mortgage, and the husband of the eldest sister looked after the matter for the benefit of both, and the money was paid into the hands of the ladies and was urgently needed to meet the expenses of the litigation then pending in respect of the estate of their father : *Held*, that the mortgage-deed executed by the lady under such circumstances was valid.

Payments of interest on the mortgage-money made by the lady's sister's husband, who held a power of attorney from both the sisters, were held to be made by an agent of both the ladies duly authorised within the meaning of S. 20 of the Limitation Act, 1877. **Nawab Sarurjigar Begam v. Baroda Kant Mitter**, 5 Ind. Cas. 539.

MOOKERJEE and TEUNON, JJ.

References :—(a) L.R. 1 Eq. 17 ; 7 Q.B. 10, 516 (519) ; 50 L.J.Q.B. 316 ; 44 L.T. 501 ; 29 W.R. 598, F. (b) 4 O.L.J. 41 ; 33 C. 861 ; 9 M. and W. 404 ; 6 L.R. 769 ; 9 Q.B. 10, 139 ; 51 L.J. Q.B. 558 ; 46 L.T. 666 ; 30 W.R. 741 ; 4 E. and B. 450 ; 99 R.R. 553 ; 24 L.J.Q.B. 171 ; 3 Bom. L.R. 513 ; 1 Jur. (N.S.) 444, *relied upon*. (c) 13 C.W.N. 40 ; 3 Ind. Cas. 309 and 3 Ind. Cas. 311 ; 14 C.W.N. 165, F.

(3) *Vendor's title—Whether attestation amounts to representation as to validity of title.*

The mere attestation of a deed of sale executed by a person does not in law amount to a representation by the attester that the vendor has a good title to the property. **Dheenabandu Choudari v. Vinayaka Doss**, 8 M.L.T. 171.

ABDUR RAHIM, J.

Attestation—(Continued).

- (4) *Attestation—Estoppel—Attestation, whether amounts to a guarantee of title in the vendor.*

The mere attestation of a deed of sale executed by a person does not in law amount to a representation by the attester that the vendor has a good title to the property, so as to create an estoppel against the attester.

Plaintiff attested a sale-deed executed to second defendant by the third and fifth defendants. Later he obtained a mortgage of the same property from the first defendant, who was found to be the real owner, and sued to enforce his mortgage :

Held, that the mere attestation by plaintiff in second defendant's sale-deed did not amount to a representation of good title in the vendor, and that the plaintiff was entitled to enforce his mortgage. **Deenabandu Choudari v. Vinayaka Doss**, 7 Ind. Cas. 174.

ABDUR RAHIM, J.

- (4-a) *Attestation—Essentials of—Necessity of signature—The word "gawah," "witness" prefixed to executant's signature—Due execution—Presumption—When repelled—Signature of scribe—Whether attestation—Evidence Act, S. 68 - S. 59, Transfer of Property Act.*

A witness competent to prove the execution of a deed of mortgage can only be an attesting witness, and mere presence at, and visual observance of, execution, do not amount to an attestation; added to them, there must be a signature made in token of such presence and observation (a).

Meaning of "attested" in S. 59, Transfer of Property Act, and S. 68, Evidence Act, discussed.

In the absence of proof to the contrary, Indian Courts presume that the word 'gawah' (witness), means that the necessary steps of attestation have been performed, namely, that each witness was present, and, having therefor soon the executant sign the instrument, thereafter subscribed his own name thereon as a witness of that fact; or, in other words, the presence of a name subscribed to an executant's signature on an instrument, such subscription having prefixed to it (in full or in abbreviated form) some such word or words as 'gawah' (witness), or 'in the presence of,' raises an implication which takes the place of the express declaration of facts contained in the attestation clauses appended to more formally executed instruments (b).

Attestation—(Concluded).

But such an implication is absolutely repelled in the case of a scribe of the body of an instrument, who has signed the same before execution merely in acknowledgment of the fact that he is such a scribe. His subsequent presence at the execution will not make his said signature an act of attestation for the purposes either of S. 68, Evidence Act or of S. 59, Tr.P. Act. **Ajab v. Mangal**, 6 N.L.R. 152.

STANYON, A.J.C. •

References:—(a) 5 N.L.R. 3, F; 5 C.W.N. 454, Diss; 7 C.W.N. 160; 33 C. 861 (864); 11 L.J. Ex. 193; 21 L.J. Q.B. 171; 51 L.J. Q.B. 64; 51 L.J. Q.B. 558, R. (b) 14 C.P.L.R. 42 (45); 2 N.L.R. 65, R.

(5) Knowledge of contents of document—Effect of signing document as witness. See **ESTOPPEL**, No. 1, 7 A.L.J. 664.

(6) Co-executant if may attest execution by others See **TRANSFER OF PROPERTY ACT**, No. 38, 14 C.W.N. 1016.

Auction sale.

(1) — when complete. See **CIV. PRO. CODE** (1882), No. 78, 7 Ind. Cas. 100.

(2) Auction-purchaser obtains no guarantee of title. See **LIMITATION ACT** (1877), No. 85, 7 Ind. Cas. 570.

(3) Auction-purchaser how far a representative of decree-holder or judgment-debtor—Mortgage decree or money decree—Party to suit or stranger as purchaser—Difference. See **CIV. PRO. CODE** (1882), No. 100, 8 Ind. Cas. 429.

Award.

- (1) —of arbitrators—No application for filing it in Court—Whether it can be pleaded in subsequent suit—Deeds—Material alteration after execution and without privity of party to be affected by it, effect of—Deeds which have a continuing effect, and deeds taking effect at once—Distinction—Costs—Relief given to plaintiff not being that which he claimed—Practice.

An award of arbitrators can none the less be pleaded in a subsequent suit, and if valid must be given effect to, though no application for filing it in Court has been made, or such application has been unsuccessful, if its validity has not been actually put in issue on such application (a).

A material alteration made in a written instrument after its execution and without the

Award—(Continued).

privity of the party to be affected by it, prevents the party in whose custody the instrument has been, from making any use of it at all (b). But there is a distinction between those deeds or clauses of a deed which have a continuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. For no case can be found in which a deed or clause of a latter nature has been prevented from taking effect because the deed was altered after execution, so that an altered deed may be given in evidence to prove any effect produced by it in its original form at the instant of its execution, or of any right which existed *ab initio*, and of which it is evidence (c).

In a suit brought by the plaintiff against the defendant the relief given to the plaintiff was not that which he claimed. *Held*, each party should bear his own costs throughout. **Ganpat v. Ramakrishnapuri**, 6 N.L.R. 1. 5 Ind. Cas. 425.

SKINNER, A.J.C.

References:—(a) 18 C. 414 (P.C.). (b) 12 C. P.L.R. 33. (c) 25 A. 580, F.

(2) *Private award—Suit based thereon independently of the summary procedure under S. 515, Civ. Pro. Code, 1882—Limitation for such suit—Decree appealable—Award affecting property out of British India.*

Held, that a suit can be brought upon a private award independently of the summary procedure authorized by S. 525, C.P.C., 1882. (Clauses 20 and 21 of Schedule II to Act V of 1908), and the decree passed therein is appealable, although there is no appeal from a decree passed in a mere summary proceeding under Chapter XXXVII of the Code (= Schedule II of Act V of 1908).

The difference between the two proceedings is:—

(a) An award can only be filed, as the result of a summary proceeding, provided that it is free from each and all of the defects under S. 520, Civ. Pro. Code (= Clauses 14 and 15 of Schedule II to Act V of 1908), and it can only be so filed within six months of its being given.

(b) A suit, however, can be well based upon a defective award—the Court having power to rectify its defects—and it can of course be brought at any period which the law for the limitation of suits permits.

Award—(Continued).

Obiter:—*Held*, also, that an award affecting property in a Native State cannot be converted into a decree by a British Indian Court so far as that property is concerned. **Wazir Ali v. Sheik Mulkyar**, 11 P.W.R. 1910=34 P.R. 1910=5 Ind. Cas. 597.

ROBERTS and WILLIAMS, JJ. "

Reference:—77 P.R. 1882, R.

(3) *Award, validity of—Private reference—Some of the plaintiff's parties—Stamp, want of, objection in second appeal.*

An award on a private reference, made by some of the plaintiffs and the defendants, is binding on the rights of the parties to it. The award is not invalid on the ground that all the plaintiffs were not parties to it.

An objection as to want of stamp cannot be taken for the first time in second appeal. **Jadu Nath Chowdhury v. Kailas Chunder Battacharjee**, 10 C.L.J. 41=2 Ind. Cas. 414—37 C. 63=14 C.W.N. 75.

JENKINS, C.J. and MOOKERJEE, J.

(4) *Construction of document—Award—Term in an award granting pre-emption to the co-owners over the joint family property—Property sold through Court in execution of decree—The condition of pre-emption attaches to private and voluntary sale—Court-sale not affected by the provision.*

An award, which effected partition of certain family property, provided, among other things, that, in the case of a sale by any of the co-sharers of his portion of the house of residence, he should sell it to his co-sharer for Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it.

The share of one of the co-sharers was subsequently sold in execution of a decree against him and purchased by an outsider. The other co-sharer then sued to have it declared that the purchase at the Court-sale was not binding upon him: *Held* that the privilege, which the award conferred upon the co-sharers of becoming purchasers by pre-emption attached to sales made privately and willingly, and not to sales *in invitum*. **Yithal Narayan Karandikar v. Maruti Narayan Kale**, 12 Bom. L.R. 582.

SCOTT, C.J., and BATCHELOR, J.

(5) *Power to extend time "for making award"—Arbitration Act (IX of 1899).*

Award—(Continued).

The Court is competent to extend the time for "making" the award, even after the award has been made by the arbitrator. **Seth Utoomal Yasoomal v. Seth Haridas Asanand**, 4 S.L.R. 26.

LEGGATT, J.

References :—13 A. 300; 14 A. 343; 9 M. 475, R.

(8) *Arbitration—Award—Minor bound by the award—Grounds for setting aside award—Inequality of benefit under award—Erroneous view of law taken by arbitrators.*

An award, which was open to no reproach but which affected the interests of a minor, was set aside at the minor's instance on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal :

Held that neither ground was sufficient to invalidate the award : since the validity of the award must be determined in the light of the circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. **Sakrappa Lingappa Hebsur v. Shivappa Basappa**, 12 Bom. L.R. 984.

CHANDAVARKAR and HEATON, JJ.

Reference :—2 M.I.A. 181, 249, R.

(7) Object of reference to arbitration—Stifling a criminal prosecution—Validity of Powers of Court. See CIV. PRO. CODE (1892), No. 202, 11 C.L.J. 131.

(8) Compromise amending award—Delay in acting upon its conditions—Effect. See CIV. PRO. CODE (1882), No. 182, 38 P.W.R. 1910.

(9) Order refusing to file an—Subsequent suit to enforce the *Res judicata*. See CIV. PRO. CODE (1882), No. 8, 7 A.L.J. 425.

(10) See ARBITRATION.

(11) Reference by parties interested—Defendant who did not appear not joining—Whether reference valid. See CIV. PRO. CODE (1908), No. 167, 7 A.L.J. 807.

(12)—Creating or declaring title to immoveable property—Registration. See REGISTRATION ACT (1877), No. 16, 6 Ind. Cas. 361.

(13) Arbitrator becoming incapable or acting—Order superseding arbitrators—Objections against award—Decree in accordance with—Appeal—Revision—Objection for the first time on appeal or revision. See CIV. PRO. CODE (1882), No. 200, 27 P.L.R. 1910.

Award—(Concluded).

(14) Application to file award in 1908—Order refusing to file award made in 1909—Appeal. See CIV. PRO. CODE (1908), No. 51, 7 A.L.J. 1070.

(15) Award directing payment to plaintiff within two months by assignment of debts—Failure to make payment—Interest. See ACT XXXII OF 1839 (INTEREST), No. 2, 9 M.L.T. 405.

'Babuana' grant.

(1) *Babuana grant by the Darbhanga Raj—Impartible and alienable—Mortgage by holder to pay off antecedent debt, if binds sons—Right to maintenance if revives on transfer or loss of grant—Sale by Maharaja of grant to realise revenue paid by him on grantee's default—Condition of grant—Custom.*

It being conceded that the lands or usufructs granted as *babuana* to junior members of the Darbhanga Raj family are impartible, descending to the eldest male heirs of the grantees to be held or managed by the persons to whom they descend for the maintenance of the family, and that, on failure of male descendants, they revert to the Raj—and there being no provision express or implied that the interest granted should be inalienable,

held, that such grants are alienable. That, notwithstanding their impartibility, such grants come, in the absence of some special family custom regulating their enjoyment, within the principle of the Mitakshara law, whereby a father may, in order to satisfy an antecedent debt of his own not being of an illegal or immoral character, mortgage ancestral property, and such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are not parties.

There is no authority for the proposition that, on the loss or alienation of *babuana* property, the right to maintenance of the present and prospective members of the branch against the Raj revives *toties quoties*.

It being a condition of *babuana* grants that, the holder should pay Government revenue due in respect of the property granted through the Maharaja, it cannot be permitted that the subject of the grant should be enjoyed and the condition upon which it was made disregarded. It cannot therefore be disputed that, if, on the failure of the holder to pay revenue, the Maharaja has to pay it, he may recover the amount

Babuana grant—(Concluded).

by suing the holder for it and putting the property granted to sale in execution of the decree obtained by him. Property, though impartible, may be alienable (a).

Held, that a custom of inalienability of *babuana* property was not proved in this case (b). **Durgadut Singh v. Maharaja Sir Rameshwar Singh Bahadur and Taradut Singh alias Taranandji v. Maharaja Sir Rameshwar Singh Bahadur**, 13 G.W.N. 1013 (P.C.) = 6 M. L.T. 68 = 11 Bom. L.R. 901 = 6 A.L.J. 817 = 36 C. 943 = 10 C.L.J. 233 = 19 M.L.J. 567.

LORD MACNAGHTEN, LORD ATKINSON,
LORD COLLINS, and SIR ANDREW
SCOBLE.

References:—(a) 8 I.A. 218; 15 I.A. 51 (65) (66) and 3 C.W.N. 415 = 26 I.A. 83, *relied on*.
(b) 15 I.A. 51 (65, 66), *R*.

Bailee.

Rule as to validity of delivery by the, to one of several joint bailors—Scope of the rule. See **HINDU LAW (PARTITION)**, No. 7, 5 Ind. Cas. 343.

Banker and Customer.

(1) *Direction by customer to purchase Government promissory note with money to his credit with the bank, and promise by Banker accordingly—Bankruptcy—Insolvency—Banker whether a trustee—Failure by Banker to purchase—Effect.*

L had, on the 5th August 1906, Rs. 600 standing to the credit of his current account with A & Co. On the above date he wrote to A & Co. requesting them to buy on his behalf a Government promissory note for Rs. 1,000 when the amount of his current account reached that sum. On the 30th September 1906 L again wrote requesting A & Co. to buy the promissory note as there was then Rs. 1,000 to his credit. On the 10th October, he, not having received any reply to his letter, interviewed some of the officers at the Bank who told him that no reply was necessary as his instructions would be carried out in due course. But in fact A & Co., never brought any promissory note before they suspended payment on the 22nd October 1906.

Per Munro, J.—It was competent to L to give such directions, as would thereafter cause A & Co. to hold the money in a fiduciary capacity. In the face of L's specific directions, A & Co. were not entitled to use the money as their own, but held it in a fiduciary capacity.

Banker and Customer—(Continued).

When money is handed to a Banker for the specific purpose of purchasing securities, the Banker has only a special property in the money so handed to him, and if he became a bankrupt while securities were unpurchased, the money would not go into the general account in the bankruptcy, but the whole amount must be paid to the customer (a).

Per Abdur Rahim, J. (Contra). A mere direction by L to A & Co. to buy Government promissory note, followed by a promise on their part to carry out the directions, cannot have the effect of making A & Co., bankers or trustees with respect to the amount in question, without an entrustment or bailment. Some unequivocal act on the part of the debtor is necessary, showing that he had changed his position into that of a bailee with respect to the money due from him. A mere promise to carry out the directions of the customer, so long as he does nothing towards appropriating the money to any specific purpose, will not suffice, for such a promise can have no higher legal effect than a promise to pay the debt. Something has to be done, which would enable the Court to say that a particular sum is held by the Banker as trustee or agent for some specific purpose, and which he is bound to keep apart from his own money. An entry to that effect in the Banker's books might be a sufficient act of separation or appropriation (b). **The Official Assignee of Madras v. Luprian**, 7 M.L.T. 151 = 5 Ind. Cas. 312 = 33 M. 145.

MUNRO and RAHIM, JJ.

References:—(a) 39 L.J. Eq. 635, *N.H.*; (1900) 2 Q.B. 504; 3 App. Cas. 325 (334); 14 East 590; L.R. 9 Ch. App. 561 (568), *F.*; O.S.A. 27 of 1908, *R.* (b) 39 L.J. Eq. 635, *R.*; O.S.A. 27, *R.*

(2) *Money in fixed deposit—Demand at maturity—Whether Banker a trustee for the creditor.*

Per Munro, J.—When a person pays money into a Bank, then, if nothing further appears, the money becomes the money of the Banker, who is entitled to mix it with his other money and use it as his own, but is bound to return its equivalent by paying a similar sum to that deposited with him when he is asked for it. In such a case, the relationship between the Banker and the person paying the money is that of ordinary debtor and creditor. The person paying the money, may, however, at the time of

Banker and Customer—(Continued).

payment, give directions to the Banker, which put the relationship upon a different footing and give it a fiduciary character. When this is the case, the money does not become the money of the banker. He is not entitled to mix it up with his own money and use it, and if he does so and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use, rather than the money which he had the right to dispose of. It is on this principle that money held by a banker in a fiduciary capacity may, if he fails, be recovered in full out of the general assets.

Such directions as would cause the banker to hold the money in a fiduciary capacity may be given either at the time of payment or subsequently with the same result.

Held that, when a banker receives a customer's demand for repayment, it was his duty to remit the money at once. After the demand, the Banker held it in the same way as if, on the day the demand was made, the customer had received the money and had then handed it back and asked the Banker to hold the money for him in trust, pending remittance to him at a future date (a).

Per Abdur Rahim, J.—Ordinarily money paid into a Bank on current or deposit account is no longer the customer's money but the Banker's. The banker is a debtor in respect of such moneys, and not a trustee.

A creditor is not competent, simply by making a demand for his debt, to turn his debtor into a trustee with respect to the amount, without the debtor having ever at any time accepted such a position.

The relationship of debtor and creditor must be taken to continue until it is terminated by payment, unless there is an agreement to hold the amount in trust for the customer, or to apply it in a particular manner as his agent, and something is done towards effectuating the trust or applying it for the specified purpose, and a new and different kind of relationship would be established between the parties in substitution of the old. The position of Bankers and customers *inter se*, discussed. **Official Assignee of Madras v. Ramachandra Iyer**, 7 M.L.T. 214 = 33 M. 134 = 5 Ind. Cas. 974.

MUNRO and RAHIM, JJ.

References:—8 Ch. 144; 2 H.L. 28; 13 Ch.D. 696; 34 L.J. Eq. 301; 11 Ch. D. 301 (311); 54 L.J. Ch. D. 439; 8 Ch. App. 144, F.

Banker and Customer—(Continued).

(3) *Banker and Customer—Fixed deposit—Expiry of period—Bank, whether trustee or debtor.*

K had Rs. 1,500 on fixed deposit with A. and Co., from 17th October, 1905 to 17th October, 1906, the conditions being that, after the 17th October, 1906, no interest should be payable unless the deposit was renewed. After 17th October, 1906, K sent up his deposit receipt on due course for repayment of the money, but before re-payment was made, A & Co. failed.

Held, that the money continued to remain as a deposit after 17th October, 1906.

A creditor cannot transform his debtor into a trustee by demanding the re-payment of the debt. **The Official Assignee of Madras v. N. Krishna Bhatta**, 7 M.L.T. 416 (F.B.).

MILLER, MUNRO and ABDUR RAHIM, JJ.

References:—8 Ch. App. 144, *not Appl.*

(4) *Banker and Customer—Deposit—Agreement by Banker to purchase Government promissory notes—Failure of Bank—Trust.*

A & Co., Bankers, agreed to purchase Government promissory notes for an amount held by them in deposit on behalf of the respondents, but before they could do so, they suspended payment.

Held, that no fiduciary relation was created so as to entitle respondents to claim return of the deposit. **The Official Assignee of Madras v. The Society for the Propagation of the Gospel**, 6 Ind. Cas. 212 = 8 M.L.T. 80.

MILLER, MUNRO and ABDUR RAHIM, JJ.

Reference:—Lupprian's case (Letters Patent Appeal, No. 138 of 1909), F.

(5) *Deposit—Agreement by Banker to buy securities for customer—Failure of Bank—Trust.*

A & Co., Bankers, agreed to buy securities for the respondents, whose moneys they held in deposit. Before doing so, however, they suspended payment.

Held, that the above agreement did not make A. and Co., trustees for the amount in deposit. **The Official Assignee of Madras v. The Society for Promoting Christian Knowledge**, 6 Ind. Cas. 240 = 8 M.L.T. 52.

MILLER, MUNRO and ABDUR RAHIM, JJ.

Reference:—Lupprian's case (Letters Patent Appeal, No. 138 of 1909), *referred to*.

(6) *Remittance to Banker to purchase shares—Failure of Bank—Trust.*

Banker and Customer—(Continued).

Respondent remitted to A and Co., Bankers, a cheque to purchase shares in certain companies. A & Co. bought some shares, and before completing the purchase they failed.

Held, that A & Co. stood in the position of trustees to the respondent, and the latter was entitled to a refund of the unspent balance of the money. **The Official Assignee of Madras v. J. W. Irwin**, 6 Ind. Cas. 250—8 M.L.T. 99.

MILLER, MUNRO and ABDUR RAHIM, JJ.

(7) *Remittance to Bank to the credit of payee—Payee not customer—Absence of instructions from payee—Nature of payment—Failure of Bank—Effect.*

M.R. Co., remitted money to A & Co., to the credit of R, the payee. A & Co., informed R, who was not one of their customers, that this had been done, and asked for his instructions. Before R could instruct, A & Co. suspended payment. *Held*, that it cannot be presumed that A & Co., received or were intended to receive the remittance as bankers. **The Official Assignee of Madras v. D. Rajam Aiyar**, 7 M.L.T. 401 (F.B.)—6 Ind. Cas. 383—33 M. 299.

MILLER, MUNRO and ABDUR RAHIM, JJ.

Reference :—(1) 32 M. 68, *not Appl.*

(8) *Banker and customer—Money paid under suspense account pending settlement of terms of investment—Nature of payment—Ownership—Meaning of “in suspense.”*

M. remitted money to A & Co. As M. and A & Co., could not agree as to the terms on which the latter were to hold the money in deposit, and pending further instructions from M. A & Co., said they would hold the money in suspense account.

Held, per Miller, J. (Munro, J., agreeing), that, when a man pays money into a Bank, whether he is a customer or not, the presumption, in the absence of other evidence, will be that he pays the money in to be held by the Banker, as Bankers ordinarily hold the moneys of their customers, irrespective of the fact that the claimant could have withdrawn the money if he could not come to terms of interest, period, or minimum amount of fixed deposit (a).

Money “in suspense” means no more than that the exact terms as to interest and period of deposit were not fixed, and that, once those were fixed, the arrangement would take effect from that date or possibly from the date of remittances (b).

Banker and Customer—(Continued).

Held, per Abdur Rahim, J. (contra) that money held by a banker to a special suspense account, even though under an agreement which entitles the banker to appropriate the money to his own use whenever he chooses, does not amount to payment to the banker, if the latter has not, in fact, appropriated the money to his own use (c). **The Official Assignee of Madras v. Mellaparangavur Sarvajana Sahaya Nidhi, Ltd.**, 7 M.L.T. 402 (F.B.)—6 Ind. Cas. 427.

MILLER, MUNRO and ABDUR RAHIM, JJ.

References :—(a) 32 M. 68, F. (b) (1893) A. C. 181, D. (Per Miller, J.) (c) (1893) A.C. 181, F. (Per Abdur Rahim, J.).

(9) *Current account deposit—Direction to banker to purchase Government pro-notes—Suspension of the Banker before purchase—Fiduciary relation, whether created—Indian Insolvency Act, S. 73—Letters Patent, Ss. 15, 18—Appeal from order of Insolvency Commissioner—Division of opinion between Judges hearing appeal—Further appeal, whether lies.*

Where the Judges of the High Court, hearing an appeal from an order of the Commissioner in Insolvency, do not agree in their opinion, a further appeal lies under S. 15 of the Letters Patent.

S. 18 of the Letters Patent confers the power which is given by S. 73 of the Indian Insolvency Act, but that does not of itself deny the right of further appeal, and there is nothing in the Letters Patent to prevent the application of S. 15.

A mere direction by a customer to his banker to apply money at his credit in a particular way does not alter their relation of banker and customer. There must be something to show that the banker not merely undertook to change his position in the future, but that, by taking some step to apply the money or otherwise, he did effect a change of position.

The respondent, who had a sum of money in current account with A & Co., Bankers, instructed them to purchase Government pro-notes for the amount. A & Co., replied that they would do so in due course. In the meantime they suspended payment :

Held, that the relationship of debtor and creditor was not affected, and that A & Co., did not become trustees to the respondent for

Banker and Customer—(Continued).

the amount. **The Official Assignee of Madras v. A.E.A. Lupprian**, 6 Ind. Cas. 387 = 8 M.L.T. 101.

MILLER, MUNRO and ABDUR RAHIM, JJ.

(10) *Banker and customer—Honouring a draft genuine to all appearance—Suit by customer for recovery of money—Burden of proof—Forged draft—Plaint, amendment of—Inconsistent pleadings—Handwriting—Value of expert evidence—Principal and Agent—Default of principal misleading agent into doing something—Negligence—Signing a blank form—Fraudulent conversion of the form into a cheque—Liability of Banker for honouring such a cheque.*

Where a banker pays money on a draft, signed by his customer, and the draft and the signatures thereon are to all appearance in order, the burden of proving, in a suit by the customer to recover the money from the Banker, that the draft was a forgery, lies on the customer.

The plaintiffs sued the defendants for the recovery of certain money paid by the defendants on a draft, the signatures on which plaintiffs alleged, were forged. After the plaintiffs' case was nearly concluded, the plaintiffs asked for leave to amend the plaint and to raise a plea to the effect that, even if the signatures on the draft were genuine, the draft was not issued by the plaintiffs and was thus not a proper draft.

Held, that the amendment could not be allowed, as it would have the effect of putting forward an entirely new case for the plaintiffs inconsistent with the plaint as originally framed.

The opinion of an expert in handwriting should be received with great caution and should not be relied upon unless corroborated.

A principal, who has misled his agent into doing something on his own behalf, which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done. The question to be determined in such cases is whether the agent was misled into doing the act by the default of the principal (a).

If A employs B on his behalf to deal with articles of a certain description in a particular way, and then A, through inadvertence or otherwise, introduces among the articles with which B is to deal a dangerous counterfeit, not

Banker and Customer—(Concluded).

distinguishable in appearance from its companions, A is bound to indemnify B against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment.

As between a customer and a banker, who is his mandatory, the duty on the part of the customer arises directly out of contractual relation subsisting between them to take care that any cheque which he should buy him is not in such a form as to offer facilities for being filled up in a way which would mislead the banker if reasonably vigilant.

It is negligence to sign a document which somebody else may convert into a negotiable instrument for the honouring of which the banker is to be held liable.

The defendants were authorized by plaintiffs to accept and honour cheques signed by M. M left in his office blank forms of drafts signed by him. Another person duly filled up a blank signed form and had the cheque cashed at defendants. Plaintiffs sued defendants for the recovery of the money paid on the cheque (b). *Held*, the defendants were not liable. **Punjab National Bank, Ltd. v. Mercantile Bank of India, Ltd.**, 8 Ind. Cas. 98.

RUSSELL, J.

References:—(a). (1891) A.C. at p. 114; 60 L.J. Q.B. 145; 61 L.T. 353; 39 W.R. 657; 55 J.P. 676; L.R. 5 H.L. 395; 41 L.J. O.B. 201; 27 L.T. 79; 15 W.R. 152, *Rel.* (b) (1896) A.C. 511; 75 L.T. 253; 45 W.R. 124; 65 L.J. Q.B. 593; (1906) A.C. 559; 75 L.J. P.C. 76; 22 T.L.R. 746; 26 S.J. 360, *D.*; 4 Bing. 253; 12 Moore 484; 54 L.J. (O.S.) C.P. 165; 29 R.R. 552, *Rel.*

(11) Lien of bankers for general balance of account under S. 171, Contract Act. See **INSOLVENCY ACT (11 AND 12 VIC., CHAP. 21)**, No. 5, 33 M. 53.

Barrister.

Practice.—Barrister and Pleader—Authority to represent client—Distinction between. See **CIV. PRO. CODE (1882)**, No. 61, 3 S.L.R. 208.

Begar.

Nature of.—Suit for. See **ACT XVIII OF 1881 (CENTRAL PROVINCES LAND REVENUE)**, No. 1, 6 N.L.R. 117.

Benami transactions.

- (1) *Benami purchase—Purchase in name of mistress—Not sufficient proof that she was intended to be benefited—Title of mistress—Evidence—Proof—Circumstances.*

Where money was advanced by a person for the purchase of a certain property, the mere circumstance that the conveyance was made out in the name of his mistress, living under his protection, is not sufficient to raise the inference that he intended to benefit the woman (a).

But the circumstances that the property was registered in the name of the woman who was, therefore, the only person legally entitled to collect the rents, that the person advancing the money possessed a number of other properties none of which was put in the name of the woman, that the value of the property in the woman's name was very small and that the woman's right to the property was not disputed until some six years after the man's death, are enough to show that the title passed to the woman. **Jitan Prasad v. Musammatt Manbarta Kuer**, 5 Ind. Cas. 95.

HARINGTON and CHATTERJEE, JJ.

References:—10 Ves. 360, *F.*; (1902) 1 Ch. 282, *D.*; 26 C. 227 (**P.C.**); 26 I.A. 38; 3 C. W.N. 113; 10 C.W.N. 570 (**P.C.**); 3 A.L.J. 353; 3 C.L.J. 484; 8 Bom. L.R. 379; 16 M.L. J. 166; 1 M.L.T. 197; 33 C. 773, *R.*

- (1-a) *Benamidar—Right of suit—Suit for possession by one co-sharer of his share, if maintainable—Evidence Act (I of 1872), Ss. 32 (5), 90, 115—Statements about birth and death of relatives, admissible—Presumption in favour of old documents—Copies, whether presumption applicable to copies when originals destroyed—Adverse possession—Assertion of absolute title by life-tenant—Estoppel—Contract without power of performance—Subsequent acquisition of power—Lessee having notice of deed forming part of title of lessor—Constructive notice of contents of deed—Transfer of Property Act (IV of 1882), S. 48—Specific Act (I of 1877), S. 18.*

A benamidar cannot maintain a suit for the recovery of the property (a).

A suit, which is not really for setting aside alienations, but for recovery of property on the ground that the life-tenant could not confer any title that would subsist after her death, and that the plaintiffs are entitled to possession since her death, is maintainable by one co-sharer for his share only.

Benami transactions—(Continued).

The wording of S. 32 (5) of the Evidence Act, "relation to the existence of any relationship," is wide enough to include statements about the birth and death of relatives, which events either commence or terminate the relationship (b).

The terms of S. 90 of the Evidence Act are wide enough to include copies within its mischief; therefore, the presumption allowed by the section may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available (c).

An assertion of absolute title by a life-tenant does not constitute adverse possession against the reversioners (d).

A person, who enters into a contract without the power of performing it at the time, is bound to perform it if he subsequently acquires the power (e).

A lessee or a purchaser, having notice of a deed forming a part of the chain of title of his lessor or vendor, has constructive notice of the contents of such deed (f). **Shoo Lal Singh v. Chowdhry Goor Narain**, 7 Ind. Cas. 218.

CHATTERJEE and VINCENT, JJ.

References:—(a) 16 C. 364; 25 C. 98; 3 C.W. N. 20; 25 C. 874; 3 C.W.N. 12; 30 C. 265; 7 C.W. N. 229, *F.* (b) 20 C. 758; 24 C. 265; 1st C.W. N. 270, *F.* (c) 5 C. 886; 6 C.L.R. 199; 22 A. 294 at p. 303, *F.* (d) 27 C. 156 (**P.C.**); 26 I.A. 216; 4 C.W.N. 274, *F.* (e) 8 C. 138; 10 C.L.R. 66; 2 C.L.R. 382; 5 C. 252; 4 C.L.R. 150; 4 B. 34; 3 A. 805, *Ref. to.* (f) 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L.T. 728; 29 W.R. 707, *F.*; 16 M. 301; 19 I.A. 221; 20 C. 1, *relied upon.*

- (2) *Suit on a bond—Benami transaction.*

When the obligor of a bond knew at the time of its execution that the obligee was only a benamidar for the real owner whose name was disclosed at the time, it is open to the obligor to set up the title of the real owner in answer to a suit on the bond (a). **Sesha-char v. Raghavendrchar**, 15 M.C.C.R. 200.

KRISHNA RAO and SETLUR, JJ.

Reference:—(a) (1907) 12 Mys. C.C.R. 157, *D.*

- (2-a) *Purchase by father in name of son—Benami purchase—Presumption.*

Benami transactions—(Concluded).

In India, when a piece of land is bought by a parent in the name of his son with his own money, the *prima facie* presumption is that it was bought *benami* in the name of the son, and if it is alleged to have been purchased for the advancement of the son, the burden of proving that fact lies on the party asserting it. **Meeyappa Chetty v. Maung Ba Bu**, 8 Ind. Cas. 450.

FOX, C.J., and PARLETT, J.

(2-b) Pre-emption—Suit against ostensible purchaser—Real purchaser not made party—Suit not maintainable. See PRE-EMPTION, No. 50, 8 Ind. Cas. 527.

(3) Pro-note—Plea of execution as benamidar—Validity. See CONTRACT ACT, No. 2, 7 M.L.T. 85.

(4) Benamidar, promissory note executed in the name of—Suit against executant and benamidar. See PROMISSORY NOTE, No. 1, 7 M.L.T. 178.

(5) Effect of—Rights of benamidar. See CIV. PRO. CODE (1882), No. 148, 8 M.L.T. 151.

(6) Purchase with one's own funds—Right to possession. See POSSESSION, No. 6, 8 M.L.T. 283.

(7) Decree-holder bidding through a benamidar—Misrepresentation of value—Substantial injury—Fraud—Setting aside sale. See CIV. PRO. CODE (1882), No. 141, 6 Ind. Cas. 135.

(8) Execution against stranger on the ground that judgment-debtor was benamidar for him—Legality. See EXECUTION OF DECREE, No. 11, 14 C.W.N. 774.

(9) Purchase by decree-holder without leave—Defendant a benamidar—Maintainability of suit for recovery of money. See CIV. PRO. CODE (1882), No. 163, 7 A.L.J. 623.

(10) Benamidar mortgagee—Right of suit. See PLEADINGS, No. 6, 7 Ind. Cas. 166.

(11) Purchase by one of joint decree-holders on behalf of all—Certificate in the name of the purchaser alone—*Benami* purchase. See CIV. PRO. CODE (1882), No. 161, 6 Ind. Cas. 374.

(12) Right of, to sue—Adverse order under S. 335, C.P.C.—Limitation. See LIMITATION ACT (1877), No. 42, 8 M.L.T. 977.

(13) Suit for rent—Tenant's defence that plaintiff is—Estoppel. See LANDLORD AND TENANT, No. 47, 7 Ind. Cas. 846.

Benefit of doubt.

—to be given to defendant. See CUSTOMS (PUNJAB—ALIENATION), No. 4, 8 P.W.R. 1910.

Bengal Estates Partition Act.

See ACT VIII OF 1876.

Bengal, N.W.P. and Assam Civil Courts Act.

See ACT XII OF 1887.

Bengal Survey Act.

See ACT V OF 1875.

Berar Inam Rules.

Rule V (2)—Inam to the lineal descendants of grantee for personal maintenance—Nature of interest conferred upon the claimant—Power of alienation.

An Inam granted under Rule V (2) of the Berar Inam Rules, to a grantee and his direct lineal heirs and undivided brothers, confers upon each holder, in turn, an estate for life only, which is absolutely alienable, by any process which might take the estate out of the family for whose perpetual maintenance it was made, or so as to defeat, delay or incumber the enjoyment thereof by any successor after the alienor. **Kristnaji v. Manwar Ali**, 6 N.L.R. 72—6 Ind. Cas. 821.

STANYON, J.C.

References.—2 B. 529 and 3 B. 186, R.

Berar Land Revenue Code.

(1) S. 79—*Ejectment suit—Notice to quit—Compliance with section—Whether plaint itself can be accepted as notice—Rights of a party to suit, how ascertained.*

The requirements of S. 79 as to notice must be strictly complied with, before a landlord will be entitled to sue to eject his tenant (a).

A plaintiff must succeed on the basis of his rights as they stood at the time he filed his suit, and not on rights subsequently acquired (b).

So where notice is necessary in a suit by a landlord to eject his tenant, the suit in itself will not be regarded as a notice (c). **Udebhan v. Jagannath**, 6 N.L.R. 17—5 Ind. Cas. 699.

SKINNER, A.J.C.

References.—(a) 8 B. 228; 9 C. 48; 24 C. 720 and 27 C. 570. R. (b) 21 M. 288 and 2 Q. B. 135 (142), F. (c) 25 W.R. 329, Appl.; 20 W. R. 401 and 23 W.R. 440, R.

Berar Land Revenue Code—(Concluded).

(2) S. 205—Co-occupant of land in Berar—When a co-sharer loses his right of pre-emption. See PRE-EMPTION, No. 28, 6 N.L.R. 86.

Betrothal.

Parties—Suit for damages for breach of a contract of betrothal.

Where the minor plaintiff sued through his next friend for breach of a betrothal contract entered into between the plaintiff's father and the defendants, the father and uncle of the girl betrothed, *held*, that the minor plaintiff, for whose benefit and on whose behalf the contract was made, could sue for damages in respect of that breach (*a*).

Held, also, that the party against whom the suit lay was the father of the girl, and not the girl herself, as she was no direct party to the contract, and the person guilty of the breach was the father. **Nabi Bakhsh v. Rahim Baksh**, 83 P.R. 1909 = 12 P.L.R. 1910.

JOHNSTONE and RATTIGAN, JJ.

References :—(*a*) 3 P.R. 1909; 174 P.R. 1882, 21 B. 23; 49 P.R. 1905, *P*.

Bhagdari Act.

See ACT V OF 1862 (BOMBAY).

Bid.

(1) Arrangement between persons not to bid against each other—No fraud. See CIV. PRO. CODE (1882), No. 153, 150 P.W.R. 1909.

(2) Court sale—Acceptance of bid by officer of Court—Effect. See CIV. PRO. CODE (1882), No. 148, 8 M.L.T. 154.

Bill of Exchange.

Holder and acceptor—Accommodation acceptor—Contract to treat the acceptor as surety. See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 7, 13 O.C. 206.

Bill of Lading.

(1) *Bill of Lading—Interpretation—"Not responsible for marks"—Effect and meaning—Endorsement in blank—Negotiability—Bill of Lading Act—Object of—Whether affects other rights.*

Plaintiff ordered from T. & Co., 165 Austrian Rough Boards of different sizes. The goods were shipped to Karachi per S.S. "Gisela." The Bill of Lading showed that the goods were consigned by T. & Co. "To order," and described the goods as "165 pieces white woods planks" marked "025 imported by E.A. Nathani, Karachi, produce in Austria." Added

Bill of Lading—(Concluded).

to the description are the words "Not responsible for marks" printed conspicuously in violet ink. The Bill is endorsed in blank by T. & Co. On the arrival of the ship at Karachi, several consignments of white wooden planks besides that of the plaintiff were delivered to the Port Trust, which granted receipts showing that altogether 803 "loose wooden pieces" with "marks various" were landed. The plaintiff obtained the Bill of Lading in respect of his goods from the Bank on payment of the money due to the shipper, and caused his name to be written on the back of the Bill. On presenting the Bill, he obtained delivery of 162 planks bearing his mark, and was offered 3 more not bearing his mark. The plaintiff refused to take delivery of the three planks and sued the Port Trust and the ship for the value of the planks. *Held*, that, by endorsing the Bill of Lading in blank, T. & Co., rendered it a negotiable instrument, and it could pass from hand to hand by mere delivery, so as to affect the property in the goods, and that the plaintiff who obtained delivery of the Bill accompanied by an endorsement became the owner of the goods and was entitled to sue.

Held, also, that, as owner of the goods, the plaintiff had open to him, under the common law, all the several forms of suit in tort. He could sue the Port Trust in "detinue" for wrongfully retaining the possession of the goods or for "conversion" if they had given to any other consignee.

The Bill of Lading Act was intended to meet the case where the goods in respect of which Bills of Lading purport to be signed, have not been laden on board, and does not affect the rights such as those of the plaintiff.

Held also, that the object of inserting the proviso "not responsible for marks" is to prevent the Bill of Lading having its ordinary effect of being evidence against the ship that goods marked as stated in the body of the bill were actually shipped, and it lies on the plaintiff to prove that the three planks bearing his mark were actually committed to the custody of the Port Trust or were delivered to some other consignee. **The Karachi Port Trust v. Ismailji Ameeji**, 3 S.L.R. 203.

KNIGHT and CROUCH, A.J.C.

Bill of Lading Act.

Object of. See BILL OF LADING, No. 1, 3 S.L.R. 203.

Birt.

(1) Meaning of—Registration of *birt* deed. See REGISTRATION, No. 3, 8 Ind. Cas. 725.

Board of Revenue.

Rule of, regarding assessment of *haths ultra vires*. See ACT IX OF 1880 (BENGAL CESS), No. 1, 5 Ind. Cas. 254.

Bombay City Municipality Act.

See ACT III OF 1888.

Bombay Civil Courts Act.

See ACT XIV OF 1869.

Bond.

Balance of account struck—Promise to pay interest—Bond. See CONTRACT ACT, No. 19, 135 P.W.R. 1910.

Boundaries.

(1) *Mokurari, pattah, construction of—Conflict between area and boundaries—It is only when the boundaries of a land can be ascertained with perfect certainty that an intention to convey all lands comprised within those boundaries can be inferred; if the boundaries are uncertain the intention should be taken to be to convey the specified quantity of land within those boundaries.*

Held, upon a construction of the *pattah* in the case, that the dimension specified were an essential part of the description of the land conveyed and not a cumulative description of it which was to be governed by the boundaries.

Held further that in the circumstances of the case the intention should be inferred to have been to pass the specified quantity of land only (a). **Kumar Rameshar Malia v. Ram Tarak Hazra**, 14 C.W.N. 268 = 1 Ind. Cas. 650.

DOSS and RICHARDSON, JJ.

References :—(a) 1 P.C. 436; 2 Ch. 164.

(2) *Boundary—Thak or survey map—Presumption—Dried up bed of river—Isolation from river—Fishery right—Civ. Pro. Code (Act XIV of 1882), S. 13—Changed state.*

It cannot be presumed as a matter of law that the boundaries of an estate as shown on the *thak* or survey map are identical with the boundaries as they stood at the time of the Permanent Settlement; but it is open to the Court to presume, in the circumstances of a particular case, that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue Survey (a).

Boundaries—(Concluded).

The dried up bed of a public navigable river, if not originally part of public domain, becomes private property so as to entitle the owner of the soil to all *beels* left therein completely isolated from the new course of the river.

As the right of fishery, in ordinary course follows the title to the soil, a stranger cannot claim a right of fishery in an inland sheet of water, the bed whereof is in private ownership.

The authorities on the Subject of how far a right of fishery is affected by a change in the course of a river, *reviewed*. **Sarat Chandra Singh v. Kshitish Chandra Roy**, 12 C.L.J. 216 = 7 Ind. Cas. 140.

MOOKERJEE and TEUNON, JJ.

References :—(a) (1902) 30 C. 291; 30 I. A. 41, R.

(3) *Onus of proof—Disputed boundary—Waste and jungle land.*

Where the lands in question are waste and jungle lands and are situated on the borders of the taluks of the plaintiff and the defendant, and no party has been exercising any act of possession for more than twelve years before the suit :

Held, that the ordinary rule regarding the *onus* incumbent on the plaintiff has no application, that the parties are in the position of counter-claimants, that it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary, and that it is necessary for the Court to take into consideration the evidence adduced by both sides (a). **Radha Kanta Basak v. Akhoy Chunder Dey**, 7 Ind. Cas. 165.

SHARFUDDIN, J.

References :—(a) 21 C. 504 (P.C.); 21 I.A. 39, *relied upon*.

(4) *Erroneous boundary—Acquiescence—Estoppel—Adoption of boundary in settlement of dispute—Effect.* See CONSTRUCTION OF DEEDS, No. 2, 6 Ind. Cas. 467.

(5) *Quantity of land sold exactly described—Boundaries uncertain—Intention of parties.* See SALE, No. 10, 7 Ind. Cas. 571.

Broker.

(1) *Same broker for both vendor and vendee—Liability of broker—Mistake of reuter in transmitting message—Effect.* See SALE, No. 11, 8 M.L.T. 353.

(2) *Position of.* See CONTRACT, No. 10-a, 8 Ind. Cas. 601.

Buddhist Law.**1.—ADOPTION.****2.—DIVORCE.****3.—ECCLESIASTICAL.****3-a.—INHERITANCES.****4.—MARRIAGE.****5.—PRE-EMPTION.****—1.—Adoption.****(1) Definition and rights of keittima and apatittha sons.**

The *keittima* son has the full rights of inheritance of a natural son whereas the *apatittha* son has only partial rights of inheritance. The *apatittha* son has nevertheless rights of inheritance. Looking at the definition of an *apatittha* son in the Digest of Buddhist Law, the term would seem to refer to a foundling, a child casually adopted whether its parents and relatives are known or not, a child casually adopted and brought up in the family of the adoptive parents being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted. The principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one, which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents, or some such similar cause.

Held, in this case, on a consideration of the probabilities and of the manner in which the boy was treated, that the adoption was *keittima* and not *apatittha*. **Tet Tun v. Ma Chain**, 5 L.B.R. 216.

HARTNOLL and PARLETT, JJ.

(1-a) Burmese law and custom.—Adoption—Mode of proof—Publicity—Inferences from the facts of the life of parties—Child—Adult.

According to Burmese Law, no formal ceremony is necessary to constitute adoption, and, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in the cases of the latter category, when no distinct occasion can be appealed to.

In many cases the inferences of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the

Buddhist Law—(Continued).**—1.—(Adoption)—(Concluded).**

facts of the life of the parties, apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the persons, friends and acquaintances. But in the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is specially necessary to insist on adequate proof of publicity or notoriety of the relationship. **Ma Ywet v. Ma Me**, 11 Bom. L.R. 1193 (P.C.) 5 L.B.R. 118-10 C.L.J. 253-6 M.L.J. 302-3 Ind. Cas. 797=36 C. 976 19 M.L.J. 577.

LORD MACNAGHTEN, LORD DUNEDIN,
LORD COLLINS, SIR ANDREW SCOBLE
and SIR ARTHUR WILSON.

—2.—Divorce.**(1) Suit for bare divorce—Maintainability.**

A suit for bare divorce, without and as distinct from partition of property, will not lie under Buddhist Law. **Nga Chit Nyo v. Mi Myo Tu**, L.B.R. (1910) 2nd. Cr. 30.

SHAW, J.C.

References:—L.B.R. (1897-01) 28, affirmed; L.B.R. 1902-03, II. Budd. Law, Divorce, 6 overruled; L.B.R. (1902-03) Budd. Law, Divorce, 12, superseded; L.B.R. (1904-06) II, Budd. Law, Divorce, 3, R.

(2) Right to guardianship of children after their parents' divorce. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 10, 5 L.B.R. 133.

—3.—Ecclesiastical.**(1) Authority of Thathanabaing—Jurisdiction of Civil Courts.**

Where a monastery is *thingika* property which was dedicated to the monastic body before the sect to which the defendants (schismatics) belonged came into existence, *held* that, according to ancient custom, the Thathanabaing had authority to decide disputes relating to it.

It is not the province of the Civil Courts to decide whether an order of the Thathanabaing or any other Ecclesiastical authority is strictly in accordance with the Vinaya or not.

Buddhist Law—(Continued).**—3.—Ecclesiastical—(Concluded).**

A defendant may object to the jurisdiction of a Civil Court, but if he declines to appear to contest the case on the merits, he does so at his peril, and, if, on appeal, the question of jurisdiction is decided against him, he will not be allowed to reopen the case on the merits. **U. Kuthala v. U. Sanda**, U.B.R. (1910), 2nd Qr. 35.

MCCOLL, J.C.

—3-a.—(Inheritance).

- (1) *Inheritance—Eldest representative of eldest child ranking with surviving uncles and aunts.*

In Buddhist law, a grand-child, whose parents have pre-deceased their parents, is entitled to rank with the surviving uncles and aunts, only if he is the eldest representative of the eldest child, the other grand-children taking only one-fourth of the share that their parents would have enjoyed had they survived. **Ma Thin v. Ma Nyein**, 8 Ind. Cas. 594.

PARLETT, J.

Reference:—1 L.B.R. 198, F.

—4.—(Marriage).

- (1) *Marriage of minor without parents' consent—Subsequent co-habitation in parent's house—Proof of consent.*

A, a minor girl, who eloped from her parents' house with B, returned to her parents' house and lived and co-habited there with B, and ate together with him there:

Held, that it was a perfectly valid marriage according to Burmese Buddhist law, and that the subsequent consent of the parents may be presumed from their conduct towards A and B.

Quere: Whether the consent of the parents is essential to the validity of the marriage of a minor child? (a) **Maung Chit Pe v. Ma Tin**, 8 Ind. Cas. 437.

ROBINSON, J.

Reference:—(a) 1 L.B.R. 297, doubted.

- (2) *Marriage—Custom—Chinese Buddhist—Validity of marriage with Burmese Buddhist—Necessary facts to be proved.*

Where it is sought to establish a marriage between a Chinese Buddhist and a Burmese Buddhist woman, it must be shown that the practices the husband followed differ from those followed by all Chinese Buddhists and are the peculiar characteristics of Burmese Buddhists.

Buddhist Law—(Concluded).**—4.—(Marriage)—(Concluded).**

No presumption as to his being a Burmese Buddhist can be drawn from the fact that he bears a Burmese name. For it is a matter of common knowledge and experience that Chinamen, long resident or born in Burma, adopt Burmese names.

In such a case the customary law applicable to Chinese Buddhists must be followed. **Maung Tun Tha v. Ma Pu**, 8 Ind. Cas. 452.

PARLETT, J.

Reference:—2 L.B.R. 95, F.

- (3) *House built during coverture on land belonging to wife alone—Presumption of ownership—Power of one of parties to marriage to deal with joint property.* See TRANSFER OF PROPERTY ACT, No. 12, 8 Ind. Cas. 606.

—5.—(Pre-emption).

Meaning of "physical possession." See LIMITATION ACT (1877), No. 10, 8 Ind. Cas. 603.

Building.

- (1) *Re-building—What is.* See MUNICIPALITIES, No. 1, 6 N.L.R. 53.
- (2) *—upon another's land—Right to compensation.* See LAND SLIT, No. 1, 78 P.W.R. 1910.

Bundle and Encumbered Estates Act.

See ACT I OF 1903 (N.W.P.).

Burden of proof.

- (1)—as to whether property in the hands of widow is part of her husband's estate or not. See CIV. PRO. CODE (1882), No. 4, 7 M.L.T. 59.
- (2) *In cases of negotiable instruments—Bar den thrown on wrong party—Revision.* See NEGOTIABLE INSTRUMENTS, No. 1, 25 P.W.R. 1910.
- (3) *Suit for resumption—Plea of service in lieu of land—Enjoyment of land for 40 years—Burden of proof.* See RESUMPTION OF LAND, No. 1, 8 M.L.T. 82.
- (4) *Importance of—Question of onus in Court of appeal—Practice.* See HINDU LAW (JOINT FAMILY), No. 10, 12 Bom. L.R. 801.

- (5) *Tenant in possession of some land of Zamindars—Land not contiguous to holding—Encroachment—Onus.* See LANDLORD AND TENANT, No. 41, 12 C.L.J. 376.

Burgadar.

- (1) *Burgadar, if tenant—Suit for burga rent, if maintainable in Small Cause Court—Small Cause Courts Act (IX of 1887), Sch. II, cl. (b).*

Settlement with a burgadar, under which he undertakes to cultivate the land for a half share of the produce, the remaining half going to the owner, does not by itself create the relation of landlord and tenant between the parties. A suit for recovery of the price of his share of the produce by the owner is maintainable in the Small Cause Court. **Kade Mandal v. Ahadali Mola**, 14 C.W.N. 639=6 Ind. Cas. 594.

JENKINS, C.J., and DOSS, J.

Calcutta Municipal Act.

See ACT III OF 1899 (BENGAL).

Cancellation of documents.

Suit for—Limitation. See LIMITATION ACT (MYSORE), No. 6, 15 M.C.C.R. 75.

Cantonment.

- (1) *Cantonment, land in—Presumption in respect of such land—Adverse possession—Limitation.*

In the beginning of the 19th century, one Lieutenant Young, having built a house to quarter his regiment, also appropriated a piece of land adjoining the same, situated within Cantonment limits and subject to Cantonment rules until 1874, when it was made over by the Military authorities to the Civil authorities. Sixty years had not elapsed since the acquisition of the land by the defendant:—*Held* that the suit was not barred by limitation.

A party who builds a house in Cantonments must be taken to have derived his title to occupy the land from the Military authorities, and their power to make a grant of it can only be co-extensive with their own tenure of the property and no assignment by them can subsist beyond the period the land might remain subject to Cantonment regulations. **Bank of Upper India v. The Secretary of State for India in Council**, 2 A.L.J. 1194.

STANLEY, C.J., and BANERJI, J.

Reference:—G All. 148, R.

Cantonment Committee.

—is a public servant—Notice of claim necessary. See CIV. PRO. CODE (1908), No. 6, 12 Bom. L.R. 615.

Cantonments Act.

See ACT XIII OF 1889.

Caste.

- (1) *Caste matters—Cognizance by Court—Principles of English law not applicable to castes—Autonomy of caste—When Court will interfere in caste matters—Trustee can only claim inspection of documents relating to trust.*

A person, who is a trustee of a caste fund, has no legal claim to a roving inspection of all caste documents, on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trust.

A right to inspection of documents belonging to a caste, existing in any person by virtue of his being a member of the caste, cannot be evolved by a reference to English law.

A Court will not grant a decree for the enforcement of a privilege granted by a caste, because such a privilege may be taken away by the caste at any time and the decree may be rendered nugatory. The proper tribunal in such cases is the caste itself and not a Civil Court.

“Autonomy of a caste” must at least mean that, where rights to property are not involved, all matters of internal management must be left to the decision of the caste.

Courts will not interfere where the rules of the caste make special provision of the question in dispute.

Where there is a question in dispute between the caste and a section of the caste, it is outside the jurisdiction of the Court.

The Hindu caste is a unique aggregation so wholly unknown to the English law that English decisions concerning English Corporations and partnerships tend rather to confusion than to guidance upon matters relating to caste. A Hindu caste may have points of resemblance to English Corporations and partnerships, but its points of difference appear more numerous and radical.

Where according to well-established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction, on the plea that the Court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court, but to meet the objection often raised that, in matters within the jurisdiction, the Court can only exercise

Caste—(Concluded).

such powers as are expressly given by the legislature and no others.

To give rise to a cause of action for refusing the inspection of documents, which a person has right to inspect, it must be established that an express demand was addressed to the proper quarter and was distinctly refused, or, at least, that the other party showed by his conduct that he was determined not to do what was required. **Jethabhai Nursey v. Chapsey Cooverji**, 11 Bom.L.R. 1014—34 B. 467.

BATCHELOR and MACLEOD, JJ.

(2) Meaning of the term. See HINDU LAW (MARRIAGE), No 1, 7 M.L.T. 17.

(3) Caste matters—Order of the spiritual head of a community restoring a person to caste—Claim for injunction restraining the person from entering temple—Cause of action. See CIV. PRO. CODE (1892), No. 3, 5 Ind. Cas. 57.

(4) Suit for declaration to be called the Ayya of Hirameth—Maintainability. See REG. II OF 1827, No. 1, 12 Bom.L.R. 358.

Cause of action.

(1) *Cause of action—Sale—Agreement by purchaser to pay price in discharge of incumbrances—Failure to pay for three years—Threat of suit by creditors of vendor—Vendor suing for payment of price—Whether gives to rise cause of action—Payment after suit—Award of costs to plaintiff—Propriety.*

The defendants purchased property from the plaintiff, undertaking to pay the price or part of it to his creditors. For three years, they failed to make any payment, and thus left the plaintiff in the position that property other than that sold was still under encumbrance when it ought to have been freed from encumbrance. Plaintiff filed a suit and the defendants thereafter paid the amount claimed.

Held, that, though the property had not been actually sold up as threatened by his creditors, still the plaintiff had a cause of action against the defendant.

Held, also, that costs were properly awarded to the plaintiffs on the ground that the defendants failed to do what they ought to have done before. **Ansuri Subba Naidu v. Bathula Bee Bee Sahiba**, 8 M.L.T. 188.

MILLER, J.

References:—(1) 23 M. 441; 5 M.L.T. 247; 14 M.L.J. 285, *Ref. to*.

Cause of action—(Concluded).

(2) *Decree—Cutting of 'bund' at fixed time by defendant—Wrongful omission on part of defendant, effect of—Cause of action—Suit for damages.*

A decree provided that the defendants should cut a certain *bund* every year on a certain date, and that, if they failed to do so, the plaintiff should cause the *bund* to be cut in execution of the decree. The defendants failed to cut the *bund* on the fixed dates in 1309 and 1310, and the plaintiff brought a suit for damages for the loss of his crop of those years owing to the wrongful omission on the part of the defendants.

Held, that the wrongful omission afforded a sufficient cause of action to the plaintiff, and in order to entitle him to recover damages, it was not essential that, in each year, the plaintiff should have essayed to cut the *bund* and should have been prevented from doing so. **Quamzai Huda v. Kumud Nath**, 7 Ind. Cas. 248.

BRETT and VINCENT, JJ.

(3) Separate invasions of plaintiff's rights—Distinct causes of action. See CIV. PRO. CODE (1908), No 20, 12 P.W.R. 1910.

(4) Existence of—How determined. See CIV. PRO. CODE (1882), No. 62, 7 M.L.T. 87.

(5) Objection as to want of, when may be taken. See LEASE, No 8, 5 Ind. Cas. 336.

(6) Suit for injunction—Subsequent suit for possession—Court can travel outside plaint in order to ascertain whether the, in the two suits was the same. See CIV. PRO. CODE (1882), No. 15, 6 Ind. Cas. 233.

(7) One cause of action cannot come into existence by instalments on different dates. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

(8) Arising where performance is to be completed. See ACT IX OF 1899 (ARBITRATION), No. 1, 4 S.L.R. 20.

(9) Joinder of. See LETTERS PATENT (BOMBAY), No. 1, 12 Bom. L.R. 988.

(10) Meaning of the term. See CIV. PRO. CODE (1882), No. 14, 8 Ind. Cas. 9.

Caveat emptor.

Doctrine of. See RAIYATI HOLDING, No. 1, 6 Ind. Cas. 761.

Cess Act.

(1) See ACT IX OF 1880 (BENGAL).

(2) See ACT IV OF 1861 (MADRAS).

Cesses.

Levying of market dues—Legality. See ACT 111 of 1901 (U.P. LAND REVENUE), No. 4, 7 A.L.J. 176.

Champertry.

- (1) *Champertry*—Maintenance—Wager—Guarantee—Conditional promise—Agreement to advance money for litigation—Consideration—Public policy—Contract Act (IX of 1872), Ss. 23, 30.

An agreement, by which a person, advancing money for conduct of a litigation, is promised the return of his money without interest and a share in the property, is not opposed to public policy; nor is it of the nature of a wager but ought to be treated as a conditional promise or guarantee. **Niamat Ali v Ilahi Bakhsh**, 8 Ind. Cas. 500.

EVANS, A.J.C.

References:—22 W.R. 148; 1 B.L.R. 509; 1 L.A. 211; 20 L.A. 112; 20 C. 813, R.

Change.

(1)—in law of procedure—Effect. See PROCEDURE, No. 1, 13 O.C. 151.

(2) Effect of change of law. See COURT FEES ACT, No. 2, 7 A.L.J. 516.

Charge.

- (1) *Charge—Indefiniteness—Partition deed—Stipulation to pay, and in default, to pay twice the amount from the properties—Whether a charge is created.*

In a partition deed it was stipulated that one of the parties should discharge a certain debt, and, in default, it was provided that, if either of the parties should fail to observe any of the provisions of the deed, the party in default should pay to the other party, who should have sustained loss, twice the amount from their properties (*a*). The question was as to whether the words "pay...the amount from their properties" created a charge.

Held that the words "properties" referred to the properties mentioned in the schedules to the deed, and consequently there was no indefiniteness. The words were sufficiently apt to create a charge.

Obiter.—Even if the language were general (and not specific as in this case) it does not follow that a charge is not created by reason of the fact that the language is general, since a distinction should be drawn between wideness of language

Charge—(Concluded).

and indefiniteness of language (*a*). **Manikkam Pillai v. Audinarayana Pillai**, 7 M.L.T. 158 5 Ind. Cas. 917.

SIR ARNOLD WHITE, C.J., and MUNRO, J.

Reference:—3 M. 35, doubted.

(2) Actionable claim, transfer of—Right to recover subscriptions, assignment of right of holder of a. See TRANSFER OF PROPERTY ACT, No. 94, 7 M.L.T. 125.

(3) Property burdened with a, for charity—Alienability See CHARITY, No. 1, 7 Ind. Cas 79.

Chariramna holdings.

- (1) *Pasture lands—Chariramna holdings—Tenancy of permanent Occupancy right, acquisition of, in—Using land for purposes of cultivation, if waste—Remedy of landlord Forfeiture Landlord and Tenant Act (X of 1859), S. 6—Bengal Tenancy Act (VIII of 1885), S. 5 (2) Notice—Service—Transfer of Property Act (IV of 1882), S. 106, 108 (a), 111 (g).*

The question being whether certain holdings situated in the tract known as *chariramna* or pasture lands in Mouzah Basantpur in Zillah Purnea were permanent tenancies, it was proved that sales by private treaty and by auction through Court of such holdings were frequent, that cases of ejectment were uncommon, that such holdings frequently passed to the heirs of the deceased tenants and that mutation of names in the *zemindar's sherista* had been frequently allowed sometimes on payment of *nazarana* and sometimes without:

Held that the proper inference to be drawn from these circumstances was that the tenants had a permanent right in the holdings and were not liable to ejectment on notice.

Per Doss, J.—That, assuming that the lands were settled with the tenants only for the purpose of grazing cattle, the tenants had acquired a right of occupancy in the lands, before the Bengal Tenancy Act came into force, under S. 6 of Act X of 1859 (*a*).

That it was not reasonable to hold that, at the inception of tenancies, it was intended by the parties that the lands were never to be used for cultivation, and the tenants were raiyats within the meaning of S. 5, Sub-sec. (2) of the Bengal Tenancy Act.

Charlramna holdings—(Concluded).

Per Richardson, J.—The tenants had failed to prove that the lands were left for purposes of cultivation, or that they had acquired occupancy right therein.

That, by using the lands, intended for grazing, for purposes of cultivation, the tenants did not incur forfeiture. **Sheik Latifar Rahman v. A.H. Forbes**, 14 C.W.N. 372-5 Ind. Cas. 783.

DOSS and RICHARDSON, JJ.

Reference :—(a) 11 W.R. 231, F.

Charity.

(1) *Property burdened with a charge for charity—Alienability.*

Where property is not merely dedicated to a charity, but burdened with a charge in respect of a charity, as where the founder's family has a beneficial interest in the surplus income, it can be alienated subject to the charge. **Muthu Nadan v. Shumoogatha Pillai**, 7 Ind. Cas. 79.

MUNRO and ABDUR RAHIM, JJ.

(2) *Public and private—Prerogative of the Crown.* See **MAHOMEDAN LAW (WAKF)**, No. 5, 6 Ind. Cas. 219.

(3) *Powers of Manager of Charitable Institution—Evidence and burden of proof of necessity for alienation.* See **ALIENATION**, No. 1, 13 O.C. 79.

Chinese Buddhist.

(1)—*residing in Burma—Law applicable.* See **BUDDHIST LAW (MARRIAGE)**, No. 2, 8 Ind. Cas. 452.

Chit fund.

(1) *Chit fund—Payment of part of prize to a subscriber—Agreement between starter and subscriber for payment of balance on subscriber's furnishing security—Failure of starter to pay balance of prize money—Whether relieves subscriber from obligation to pay future instalments—Default in payment of instalments—Action for recovery of last two instalments—Stipulation for payment of all future instalments in default of any one instalment—Waiver—Limitation.*

A *kuri* was started by plaintiff's predecessor in 1893. It was to consist of 14 tickets of Rs. 500 each and it was to continue for 13 years. Defendant, one of the subscribers, won a prize at the sixth drawing. A portion of the prize-money was paid to him by the plaintiff and the balance was reserved with the latter

Chit fund—(Concluded).

for payment to defendant when he gave security for payment of future subscriptions. It was found that defendant offered the security and that plaintiff defaulted to pay the balance reserved with him. It was also a condition that, in default of defendant's payment of any one instalment, all future instalments would become due at once. Plaintiff credited the unpaid prize money towards subsequent instalments, and sued defendant for the last two instalments. Defendant pleaded that he was not liable to pay the future instalments, as plaintiff did not give him the balance of his prize-money, and that, as he made default in payment of the instalment due for 1900, all the instalments became then due and the suit was barred by limitation :

Held, (1) that, apart from the special agreement, a default in payment of the prize-money did not relieve the defendant from liability to pay future subscriptions;

(2) that, as it was found that plaintiff had waived the benefit of the stipulation for payment of all overdue instalments in default of any one instalment, the suit was not barred by limitation (a). **Pazhancheri Panangat Blahayil v. Pazhancheri Mananthan**, 8 Ind. Cas. 510.

BENSON and KRISHNASWAMI AIYAR, JJ.

References :—(a) 3 M. 61; 12 M. 192; 18 M. 257 at p. 261; 13 C.W.N. 1010 at p. 1013; Ind. Cas. 17, R.

Chota Nagpur Encumbered Estates Act.

See ACT VI OF 1876 (BENGAL).

Landlord and Tenant Procedure.

See ACT I OF 1879 (BENGAL).

Tenancy Act.

See ACT VI OF 1908 (BENGAL).

Chowkidari Chakaran Lands.

(1) *Bengal Act, VI of 1870, S. 50—Lands resumed by Government and transferred to the Zemindar—Right of Darpatnidars—Suit for khas possession and execution of proper deeds—Frame of suit—Pleadings.*

Suit by plaintiffs, darpatnidars of a Mouza, against the Zemindar, for khas possession of certain lands and for the execution of a deed of transfer, on the allegation of the Zemindar having transferred all his rights to the patnidars, and the latter having similarly transferred their rights to the plaintiffs. Subsequent to

Chowkidari Chakaran Lands—(Continued).

the creation of the tenures, the Government resumed the lands, and transferred them to the Zemindar, who made raiyati settlement of the same with others. It was contended that the suit was wrongly framed and it ought to have been one for specific performance of a contract without any prayer for possession, inasmuch as the Zemindar had no title to the lands at the time of the *patni*, and could not have transferred the same, and that the jural relation was merely that of an agreement to grant, and that agreement must be specifically enforced before the plaintiff could have a title to sue for possession.

Held that the plaint was rightly conceived, and that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is not repugnant to any rule of law. **Ranjit Singh v. Kalidas Debi**, 37 C. 57 = 14 C.W.N. 527 = 5 Ind. Cas. 205.

HOLMWOOD and CHATTERJEE, JJ.

References:—18 B. 537; 22 M. 24; 33 C. 596; 34 C. 109; 34 C. 561; 35 C. 346, R.

(2) Resumption and transfer to zemindar—

Putnidar's right to claim settlement for zemindar—Suit, virtually for specific performance—Conditions which zemindar may impose—Equitable defence—Liability of putnidar to pay amount of assessment by Collector and part of the profits.

A suit by a *putnidar* against his *zemindar* for recovery of resumed *chowkidari chakran* lands, brought on the ground that under the terms of the *patni* the *putnidar* became entitled to the *chowkidari chakran* lands as soon as they were transferred by the Government to *zemindar*, is virtually a suit for specific performance of contract.

The *zemindar* would be equitably entitled to refuse settlement asked by the *putnidar*, unless the *putnidar* agreed to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits such as the *zemindar* would in the circumstances be entitled to impose on him.

Semle:—It is not correct to hold that the *putnidar* is not bound to pay to the *zemindar* more than the assessment made by the Collector (a). **Rajendra Nath Mukerjee v. Hira Lal Mukherjee**, 14 C.W.N. 995 = 7 Ind. Cas. 554.

GEIDT, ORMOND, BRETT and SHARFUDDIN, JJ.

References:—(a) 5 C.L.J. 33; 11 C.W.N. 201 (1906); 4 C.W.N. 814 (1900), R.

Chowkidari Chakaran Lands—(Concluded).**(3) Assessment by Collector—Settlement of resumed lands with putnidar—Landlord's right to claim fair and equitable rent—S. 49, Beng. VI of 1870 (Village Chaukidari).**

The rent which a landlord is entitled to claim when making a settlement of resumed *chaukidari chakran* lands with a *putnidar*, is not restricted to the amount of the assessment made by the Collector under S. 49 of the Bengal Act VI of 1870, but he is entitled to claim a fair and equitable rent (a). **Gopendra Chandra Mitter v. Taraprasanna Mukerjee**, 37 C. 598.

BRETT and SHARFUDDIN, JJ.

References:—(a) 4 C.W.N. 814; 34 C. 109 = 5 C.L.J. 33, R.

City Municipality Act.

See ACT III OF 1904 (MADRAS).

Civ. Pro. Code (1882).

(1) S. 2 Valuation by plaintiff if determines *forum* of appeal. See COURT FEES ACT, No. 14, 14 C.W.N. 343.

(2) S. 9—Right to hoist a flag—No exclusive privilege—Suit of civil nature.

Plaintiff in the suit claimed a declaration that he was entitled to hoist certain flag and that the defendant had no right to interfere with it. He alleged that the defendant had pulled it down and carried it away. *Held* that the plaintiff was only vindicating a common law right, and was entitled to maintain the action inasmuch as he did not claim any exclusive privilege. **Raja Shah v. Hussain Shah**, 7 A.L.J. 830 = 7 Ind. Cas. 314.

CHAMIER, J.

Reference:—7 A.L.J. 529, R.

(3) S. 11—Caste matters—Order of the spiritual head of a community restoring a person to caste—Claim for injunction restraining the person restored to caste from entering temple—Civil rights—Cause of action—Jurisdiction of Civil Courts.

The first defendant, who was ex-communicated from caste for having married a Numbudri girl, was restored to caste by the second defendant, the spiritual head of the community. The temple *moktesars* sued for a declaration that the second defendant's order did not bind the temple, and for an injunction restraining the first defendant from entering the temple:

Civ. Pro. Code (1882)—(Continued).

Held, (1) that the mere fact of the second defendant having passed the order did not give the temple moktesars any cause of action.

(2) That the right of entry into a temple for worship is a civil right and can be adjudicated on by Civil Courts. **Uppangala Subraya Bhatta v. Bedradi Subraya Bhatta**, 5 Ind. Cas. 57—7 M.L.T. 190.

BENSON, O. C. J., and KRISHNASWAMI IYER, J.

References:—13 M. 293; 31 M. 236; 12 C. W.N. 946; 4 M.L.T. 101; 8 C.L.J. 230; 10 Bom. L.R. 781, *R*.

(3-a) *S. 11—Suits cognizable by Civil Court—Suit to enforce right of worship in a temple—Right to make offerings at a particular place—Right to require idol to be stopped in front of plaintiff's house—Plaint—Amendment.*

The right to worship in a temple is enforceable in a Civil Court, but that right can be exercised only during hours of public worship (a).

Where the plaintiff in his suit merely alleges an immemorial custom to make offerings to an idol at a particular place, but does not prove that he has acquired any right thereunder, no relief can be given to him in respect of such a claim.

The plaintiff, in such a case, may be permitted to amend the plaint by inserting the necessary averments.

The right to enforce the stopping of an idol in front of a person's house is not part of the right of worship by a member of the community for whose benefit the temple has been dedicated, and such a right is not cognisable by the Civil Courts. **Sri Krishnaswami Iyengar v. Rangaswamy Iyengar**, 5 Ind. Cas. 76=19 M.L.J. 743=7 M.L.T. 248.

WHITE, C. J., and KRISHNASWAMI IYER, J.

References:—11 M.L.J. 215 (219); 6 M. 151, *R*.; 15 M.L.J. 458, *Expl*.

(4) *S. 13—Res judicata—Redemption—Second suit for—Conditional decree in the first suit not given effect to.*

Where a mortgagor brings a suit for redemption and obtains a conditional decree, but, omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption, unless the decree lays down that, if he fails to fulfil these conditions, the

Civ. Pro. Code (1882)—(Continued).

property will be sold or he will be debarred of all his rights to redeem. **Nakta Ram v. Chiranjil Lal**, 7 A.J., 185=5 Ind. Cas. 269=32 A. 215.

KNOX and PIGGOTT, JJ.

(5) *S. 13—Res judicata between co-defendants—Burden of proof that property in the hands of widow is part of her husband's estate.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. There must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se* (a).

He, who claims property through some other person, must show the property to have been vested in that person (b). **Narasimma Ammal v. Srinivasa Raghava Iyengar and others**, 7 M.L.T. 89=33 M. 112=5 Ind. Cas. 760.

MUNRO and ABDUR RAHIM, JJ.

References.—(a) 11 B. 216 (220), *F*.; 18 A. 165; 11 M. 201; 26 M. 337; 28 M. 157; 29 M. 515; 30 M. 117, *R*. (b) 26 I A. 226 (229).

(6) *S. 13—First suit for revocation of agency—Subsequent suit for dismissal on the ground of misconduct, maintainable—Agency when terminable—Duty of agent—Cause of action, existence of how determined—Abatement.*

First defendant was appointed agent of plaintiff for 18 years. Plaintiff brought a suit for revoking the authority, which was dismissed on the ground that the authority was irrevocable. He then brought the present suit for dismissing the first defendant, on the ground of misconduct.

Held that the suit was not barred on account of the decision in the former suit.

Held also that, in every contract of service, there is an implied condition that, if the service be not faithfully performed, the employer is entitled to put an end to the contract (a).

Held also that the agent was bound to act, in all matters left to his discretion, in good faith and to the best of his judgment, solely for the benefit of his principal.

Civ. Pro. Code (1882)—(Continued).

That the first defendant, whether regarded as a servant or as an agent, or as holding a fiduciary position resembling in respect of his duties the position of a trustee (*b*), his right to retain his position depends on the faithful performance of duties attached to it.

In considering the question of the cause of action, the allegations of misconduct set out in the plaint must be assumed as true.

Held further that the appeal would not abate owing to the death of the first defendant pending the appeal. **Mayil Nair v. Kundur Kuttala Madathil Pitchu Pattar's son Subramania Pattar**, 7 M.L.T. 87-33 M. 162 5 Ind. Cas. 758.

WALLIS and MILLER, JJ.

References:—39 Ch. D. 395; (1908) Ch. 537, F.; L.R. 5 Ch. 233, R.

(7) *S. 13 (—O.P.C., 1908, S. 11) — Defence not allowed to be taken in prior suit — Bar in a subsequent suit — Estoppel.*

Where, in a former suit, the defendant was not allowed to deny the plaintiff's title, but it was not found that the plaintiff had any title,

held that, in the present suit, no question of estoppel arises, and that the defence on title was not barred. **Bhadra Rajayya v. Machabathuni Lakshmi Devamma**, 7 M.L.T. 107 = 5 Ind. Cas. 815.

MILLER, J.

(8) *S. 13—Res judicata—Order refusing to file an award—Subsequent suit to enforce the award.*

An application was made to file an award, and the question of misconduct of the arbitrators was heard and decided in that proceeding, and an order was made refusing to file the award. In a subsequent suit for enforcing the award, the same question was raised. *Held* that the issue as to misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of S. 13, and the decision on the said issue could not operate as *res judicata*. **Kunji Lal v. Durga Prasad**, 7 A.L.J. 425-6 Ind. Cas. 127.

RICHARDS and TUDBALL, JJ.

References:—6 A. 186; A.W.N. (1904), 234; 28 A. 21, F.

(9) *S. 13—Res judicata—Suit for redemption of mortgage and also on title—Question of title excluded from consideration—Dismissal of suit—Subsequent suit on the strength of lease and title, whether sustainable.*

Civ. Pro. Code (1882)—(Continued).

A brought a suit for redemption of a mortgage and based his suit also on his title as *Jenmi*. The question of title was excluded by the Court from consideration, and the suit was dismissed, the Court having found that the property was held only under a lease. The present suit was then brought on the strength of the lease and also on title. The lease was not proved, and as to title the lower appellate Court found the claim was barred as *res judicata*.

Held, the fact that A prayed for relief on title in the previous suit for redemption makes no difference, as the Court has excluded the question from consideration, and treated the suit solely as one for redemption of mortgage, and that the present claim based on title is not barred as *res judicata*. **Kundur Chirukandan v. Manunath Kandi Chathu**, 7 M.L.T. 354-5 Ind. Cas. 262.

BENSON, O.C.J., and SANKARAN NAIR, J.

(10) *S. 13—Res judicata—"Under whom they or any of them claim" meaning of—Privily—Landlord and tenant—Estoppel*

For the purposes of *res judicata*, the ground of privily is property and not personal relation (*a*).

Though the words "under whom they or any of them claim" in S. 13 are wide, there seems to be no difficulty in the way of restricting them, so as to bind the party to the subsequent suit by the decision in the former suit, only in respect of interests represented by the party to the former suit at the time of suit.

Other interests, with which he had parted before the suit and which he had ceased to represent, could not properly be the subject of adjudication in the suit.

As regards the interests represented, however, it does not matter whether they vested in the privy before or after the former suit.

Quere:—Whether a tenant may be represented by his landlord in so far as his holding subordina.

Conduct to create an estoppel must be found to have misled the plaintiff. **Seshappaya v. Venkatramana Upadya**, 5 Ind. Cas. 732.

MILLER and SANKARAN NAIR, JJ.

Reference:—8 A. 324, R.

(11) *S. 13—Suit in representative character—Claim to office in temple—Decision in favour of one sect—Subsequent suit by*

Civ. Pro. Code (1882)—(Continued).

trustees of a shrine—Res judicata—Trustees not actually impleaded in the prior suit—Decision in execution proceedings in prior suit—Whether operates as res judicata in the subsequent suit.

In 1896 the members of T sect of a community sued the members of V sect, to have it declared that the right to Adhyapakam Office in a temple as well as in all the shrines attached thereto vested in the members of T sect. The plaintiffs and defendants in that suit represented respectively all the members of the rival communities under S. 30 of the Code of Civil Procedure. The plaintiffs were given the decree prayed for and, in the execution proceedings which followed that decree, it was held that a certain shrine was attached to the big temple.

In the present suit, the members of V sect sued for a declaration to the Adhyapakam Office in the shrine in dispute, and averred that this particular shrine was not attached to the big temple, the right to the office in which was adjudicated upon in the former suit. They also maintained that the decision in the previous suit as to the right to the office in the big temple as well as in the shrines attached thereto was not binding upon them, inasmuch as they were the trustees of the shrine in question and were suing in that capacity.

Held, (1) that, in the absence of fraud or collusion, the decision in the prior suit, in which the rights of both sections of the entire community were adjudicated upon, operated as *res judicata*, and that the circumstance of the subsequent suit having been brought by plaintiffs as trustees of the shrine in question did not affect the operation of the law (a).

(2) That the decision in the execution proceedings in the prior suit that the shrine in question was attached to the big temple was not *res judicata*, because the present plaintiffs were not impleaded *actually* as defendants in the previous suit. **Srinivasa Aiyengar v. Arayar Srinivasa Aiyengar**, 6 Ind. Cas. 229—8 M.L.T. 33—20 M.L.J. 546.

BENSON and MITLER, JJ.

References :—51 Am. Dec. 291; 2 N.Y. 269; 27 M. 243, R.

(12) *S. 13—Res judicata—Title—Suit for declaration—Title as absolute owner—Second suit as mortgagor not barred—Suit for declaration does not bar suit for possession.*

Civ. Pro. Code (1882)—(Continued).

K brought a suit for a declaration of his title as an absolute owner of a certain property against B. The suit was dismissed as time-barred. Subsequently a second suit was brought by the representative of K against B in respect of the same property as mortgagor : *Held*, that the second suit was not barred by *res judicata*.

Held, further, that a suit for a declaration of title does not bar a subsequent suit for possession. **Syed Abid Husain v. Mussamat Asuda**, 6 Ind. Cas. 696.

KARAMAT HUSAIN, J.

References :—5 A.L.J. 637 (640); A.W.N. (1908), 252; 4 M.L.T. 414, R.

(13) *S. 13—Res judicata—Manager of trust property must set out his title in an ejectment suit.*

Plaintiff filed a suit to eject defendant in possession of a room used as a temple in a house belonging to the plaintiff. The plaintiff's title to the property was not set out in the plaint, and no question was raised whether the whole of the property was not the subject of a religious trust. He got a decree in the Court of first instance, but the Appellate Court came to the opinion that the house was impressed with a religious trust, and that the plaintiff's claim should have been based upon his right as manager. The plaintiff was offered an opportunity of altering his claim as manager under the will of the person who established the trust. That offer was not accepted and the Appellate Court dismissed the suit.

The plaintiff subsequently brought another suit, as manager under the will of the owner of the house who established the trust, to eject the defendant from the room and to get an account of the profits and emoluments which the defendant had received as manager :

Held, that the second suit was barred as *res judicata*, for the plaintiff in both the suits was asserting a purely personal right in his own personal interest, and it was a right which might and ought to have been put forward in the first suit. **Hargovan Ramji v. Mulji Hargivan**, 11 Bom. L. R. 921—34 B. 416.

SCOTT, C.J. and BATCHELOR, J.

(13-a) *S. 13—See Nos. 51 and 178, infra.*

(14) *S. 13, Expt V—Tr. P. Act (IV of 1882), S. 85—Mortgage—Suit for redemption—Suit to redeem by alleged karnavan of Malabar Tarwad—Subsequent suit for*

Civ. Pro. Code (1882)—(Continued).

redemption by junior members—Bar of suit—Res judicata—Karnavan disputing title of junior members.

The Karnavan of a Malabar Tarwad sued for redemption and obtained a decree. In ignorance of his suit and before he had obtained the decree, the junior members filed another suit for the redemption of the same property with the permission of the Court under S. 30, C.P.C. In the first suit, however, the karnavan did not implead the plaintiffs in the latter suit and even disputed their title as members of his tarwad.

Held, that the second suit was not barred by reason of *res judicata*, and that Expt. 5 to S. 13 of Act XIV of 1882 did not apply. **Marattil Moosa v. Nampotan Kandril**, 8 Ind. Cas. 129.

MUNRO and KRISHNASWAMI IYER, JJ.

(15) *Ss. 13, 42, 43, 102, 103, 157, 158—Adjournment of suit—Absence of plaintiff or his pleader on adjourned date—Dismissal for default—Res judicata—Suit for injunction—Subsequent suit for possession—Cause of action—Multifariousness.*

After the settlement of issues, a case was fixed for final hearing on a certain date. On that date the plaintiff obtained adjournment on the ground that he had not sufficient time to summon his witnesses. On the adjourned date the plaintiff or his pleader, did not appear, though some of the witnesses summoned were present, and the Court dismissed the suit with the following order:—

"From the issues above mentioned it will be seen that the plaintiff's claim is completely denied by the defendants. I should, therefore, dismiss the plaintiff's suit with costs."

Held, that, as the plaintiff did not appear at the adjourned hearing, the order of dismissal was made under S. 102 read with S. 157, C.P.C. (1882) (a).

Held, further, that, where the plaintiff does not appear at the adjourned hearing of a suit, time having been granted at his instance, it is open to the Court to deal with the matter either under S. 157 or S. 158. There is nothing in the language of S. 158 to preclude its application to a case where the plaintiff does not appear (b).

In the suit, dismissed as aforesaid, the plaintiff had sued for a perpetual injunction restraining the defendant from interfering with the suit land on the ground of his (plaintiff's) relationship to one N.

Civ. Pro. Code (1882)—(Continued).

In the present suit, he stated that neither N nor his widow S was exclusively entitled to the property, and he prayed for possession also. In both suits the cause of action was alleged to be that Government, by mistake, had recognised the title of the defendant.

Held (1) that, in order to ascertain whether the cause of action in the two suits was the same, it was open to the Court to travel outside the four corners of the plaint, and to refer to the issues which were raised in the first action for the purpose of finding out what the plaintiff had to prove and undertook to prove in order to support his claim as alleged in the plaint.

(2) that the second suit was barred under S. 12, Civ. Pro. Code (XIV of 1882), as it was open to the plaintiff in the first suit to base his claim on the two alternative titles which he put forward in the second suit (c). **Naganada Iyer alias Eswarappier v. Krishnamurthi Aiyar**, 6 Ind. Cas. 233.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 12 M.L.J. 173, P. (b) 5 Ind. Cas. 23; 20 B. 736, dissented from. (c) 16 C. 98; 3 B. 137; 18 W.R. 163; 11 B.L.R. (P.C.) 158; 11 M.L.A. 551, R.; 8 M. 520; 26 M. 760; 8 C. 819, D.

(15-a) *Ss. 13, 43—Res judicata—Suit for permanent injunction—Second suit for possession barred—Cause of action—Object of res judicata—Suit for declaration.*

A suit by an owner, out of possession, for a permanent injunction against the defendant, who holds the property in dispute adversely to him, bars a subsequent suit for possession on the same cause of action (a).

The object of the rule of *res judicata* is always put upon two grounds:—(1) the public policy that there should be an end of litigation; (2) the hardship on the individual that he should be vexed twice for the same cause (b).

The expression cause of action means infringement of some right by some one, which entitles the owner of the right to seek the assistance of the Court.

S. 43 of the C.P.C., 1882, must apply to the facts as found by the Court and not to facts as alleged in the plaint (c). **Gokul Misir v. Bande Ali Beg**, 8 Ind. Cas. 9.

KARAMAT HUSAIN, J.

References:—(a) 5 A.L.J. 640; A.W.N. (1908) 252; 4 M.L.T. 444; 4 A. 261; 2 A. 356, D.; 1 A. 252; 8 C. 528; 14 A. 512; 8 C. 483, R. (b) 2 A.C. 519, R. (c) 18 B. 537, *Approved of*. 8 C. 819; 12 C. 291, R.

Civ. Pro. Code (1882)—(Continued).

(16) *Ss. 13, 43—Mortgage—Two simple mortgages—Suit on first mortgage—Second mortgagee not impleaded—Part of hypothecated property sold—Second suit for sale of remainder not barred against second mortgagee.*

Where there are two simple mortgages on certain property, in a suit upon the first mortgage, the second mortgagee should be impleaded in order to give him an opportunity to redeem that mortgage. If he is not so impleaded and a decree is obtained and a sale held in execution of the decree, the auction-purchaser may not be competent to maintain an action in ejectment against the second mortgagee, if the latter is in possession. But a person interested in the first mortgage is not precluded from bringing a second suit for the sale of part of the mortgaged property, for the sale of which a proper decree has not been passed against his second mortgagee. The object of the suit is to afford to the latter an opportunity to redeem this property from the first mortgage, and neither S. 13 nor S. 43, Civ. Pro. Code, 1882, is a bar to this suit, inasmuch as the second mortgagee was not a party to the first suit. **Mussammat Shamdei v. Ballit Singh**, 7 A.L.J. 29 = 32 A. 119 = 5 Ind. Cas. 451.

STANLEY, C.J., and BANNERJI, J.

(17) *Ss. 13, 43—Res judicata—Prior suit erroneously dismissed under S. 43, C.P.C.—Subsequent suit on the same cause of action—Object matter same.*

The decision in a former suit erroneously dismissing it under S. 43, C.P.C., will be *res judicata* in a subsequent suit brought for the same relief, on the same cause of action, between the same parties, as the object matter is the same. **Dasari Chellamma v. M. Chellayya**, 7 M.L.T. 84 = 5 Ind. Cas. 756.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

(18) *Ss. 13 and 43. See MORTGAGE (GENERAL), No. 10, 32 P.R. 1910.*

(19) *Ss. 13, 108 244, 255—Execution of decree—Mesne profits, assessment of—Mesne profits, decree for—Not proceeding in execution—Res judicata—What remedy open to defendant.*

According to the direction contained in a decree, mesne profits were assessed in the execution department, and an *ex-parte* final decree was made. The defendant then came in and applied in terms of S. 244, C.P.C. (1882),

Civ. Pro. Code (1882)—(Continued).

alleging fraud on the part of the decree-holder, and asking that the enquiries into mesne profits may be re-opened.

Held, that the final decree ascertaining mesne profits is *res judicata* between the parties until it is set aside, that, although the mesne profits were assessed by the executing Court, that procedure was not one in execution of any decree, for it resulted in a final decree being passed in continuation of the original suit, and that the remedy open to the defendant was by way of appeal from the *ex parte* decree, or by an application for review, or under S. 108 of the Code. **Sarat Chandra Roy Chowdhury v. Mahomed Khalil Mondol**, 5 Ind. Cas. 387 = 11 C.L.J. 501.

CASPERSZ and DOSS, JJ.

(20) *Ss. 13, 206—Decree not in accordance with judgment—Clerical mistake—Application to bring decree into conformity with judgment—Dismissal of application—Subsequent suit for declaration of the mistake whether maintainable*

The plaintiff sued for a declaration that he was entitled to certain lands, which were in the defendants' possession as the result of a clerical mistake in a decree in a previous suit to which he was a party. A previous application in that suit to bring the decree into conformity with the judgment was rejected by the District Judge which order was confirmed by the High Court in revision.

Held, that, as the said order was an adjudication on the very question which was raised in the present suit, the suit was barred as *res judicata*. **Thamballa Veeramma v. Thamballa Palur Subbamma**, 5 Ind. Cas. 119 = 7 M.L.T. 266.

WHITE, C.J. and KRISHNASWAMI IYER, J.

Refer to :—8 C.W.N. 473, D.

(21) *Ss. 13, 331—Claim of third party resisting delivery of possession—Investigation of claim by executing Court irrespective of value of property—Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 19—Res judicata—Decision of former suit by Court competent to try subsequent suit.*

S. 331, C.P.C. (1882) is not controlled by S. 19 of the Bengal Civil Courts Act.

Therefore, when a claim has been preferred under S. 331 of the Code, it must be investigated by the Court executing the decree, irrespective of the value of the property (a).

Civ. Pro. Code (1882)—(Continued).

S. 13, Civ. Pro. Code, 1882, bars the trial of a subsequent suit, by reason of the decision in a former suit, only when such decision has been given by a Court of jurisdiction competent to try the subsequent suit. **Kadambini Dasi v. Dayaram Das**, 5 Ind. Cas. 573 = 11 C. L.J. 478.

MOOKERJEE and TEUNON, JJ.

References :—(a) 6 Bom. L.R. 301, F.; 8 M. 518, not F.

(22) S. 15—Scope. See TRANSFER OF PROPERTY ACT, No. 18, 14 C.W.N. 322.

(23) S. 16, *Explanation*—*Property situate in foreign territory*—*Jurisdiction*.

British Indian Courts have no jurisdiction to entertain suits for possession of property in Cochin territory. **Erattakolam Melvittil Karnavan v K.P. Suppen Menon**, 7 Ind. Cas. (7 = 8 M.L.T. 244.

BENSON and KRISHNASWAMI IYER, JJ.

(14) S. 17, *Explanation 3* (2)—*Cause of action*—*Place where performance completed*—*Completion of sale of unascertained goods*—*Ss. 79 and 83, Contract Act*—*Arbitration Act, application of*—S. 2, *Arbitration Act*.

In case of a sale of goods, the ownership of goods is never transferred and the sale is not complete until they are ascertained (S. 79) ; and if they are to be ascertained, they must be appropriated by the sellers and such appropriation must be assented to by the buyers. A contract was entered into at Amritsar for sale of certain unascertained goods, and it was agreed that the seller should forward the goods on the due date to Karachi, obtain and hand over the railway receipt to the buyer's agent at Amritsar, and receive the balance of purchase-money after the goods are approved of and accepted by the buyers at Karachi.

Held, the goods not being ascertained at the time of agreement, the sale could be completed only at Karachi after the goods had been passed and accepted by the buyers at Karachi, and since the performance of the contract was to be completed at Karachi, the District Court of Karachi had jurisdiction (S. 17, *Explanation III* (2), C.P.C.) to entertain an application, under Arbitration Act, to file an award relating to some disputes arising out of the said contract.

The Arbitration Act would apply to this case, for, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, with leave or otherwise, be instituted in

Civ. Pro. Code (1882)—(Continued).

Karachi. **Louis Dreyfus & Co. v. Daulatram**, 3 Sind L.R. 156 = 4 Ind. Cas. 1147.

CROUCH, A.J.C.

(25) S. 24—*Transfer of case*—*High Court's power*—*Jurisdiction*—*District Judge determining question of jurisdiction after High Court had disposed of application for transfer*—*Return of plaint for presentation to proper Court*.

Under S. 24 of the Code of 1882, a High Court is not empowered to order that a suit instituted within its jurisdiction should proceed in the jurisdiction of another High Court (a).

On an application for transfer under S. 24 of Act XIV of 1882, the High Court ordered that the case should proceed in a certain Court within its jurisdiction. The suit was accordingly heard and decided by that Court.

On appeal, the District Judge held that the cause of action did not arise within the jurisdiction of the first Court, and returned the plaint for presentation to the proper Court : *Held*, that the order of the District Judge was right. **Thulsi Ram v. Shiam Sunder**, 5 Ind. Cas. 588.

KNOX and KARAMAT HUSAIN, JJ.

Reference :—(a) 5 A. 60, F.

(26) Ss. 25, 463—*Conditional order of attachment*—*Transfer of suit*—*Power of Court to deal with attachment*.

Where a conditional order of attachment, before judgment, of certain property within its jurisdiction, is passed by a Court, and before the final order is passed, the suit is transferred to another Court, the Court to which it is transferred acquires by implication jurisdiction to pass further orders regarding the attachment. **Arunachala Nadan v. Kandasami Pillai**, 6 Ind. Cas. 746.

WALLIS and MILLER, JJ.

(27) Ss. 25, 582—*Transfer of appeals*—*Power of appellate Courts*.

A District Court having heard an appeal in part and reserved issues for trial, it cannot transfer the appeal to the Subordinate Court. **Chinnathayammal v. Chikkanna Chetty**, 8 M.L.T. 347.

WHITE C.J., and MUNRO, J.

Reference :—23 M. 314, F.

(28) S. 28—*Misjoinder of parties and causes of action*—*Suit to determine to which of the defendants plaintiff is liable and to restrain the other from interfering with plaintiff*—*Interpleader suit*.

Civ. Pro. Code (1882)—(Continued).

Plaintiffs alleged that both first and second defendants claimed a charge for the use of certain water and prayed the Court to determine which of the defendants was entitled to it and to restrain the other from interfering with plaintiff and to make him refund the charge he had already collected :

Held, that the suit did not offend against the provisions of S. 28, C.P.C., 1882. **Komarappan Naicken v. Venkatchellam Pillai**, 4 Ind. Cas. 312 = 7 M.L.T. 16.

MUNRO and ABDUR RAHIM, JJ.

References :—31 M. 252 ; 18 M.L.J. 238, *applied*.

(29) S. 30—*Parties—Persons having the same interest in one cause—Code of Civil Procedure (Act XIV of 1882), S. 30.*

S. 30 of the old Code is an enabling section, and does not debar some of the members of a community from maintaining a suit in their own right.

Hence, where two persons belonging to the Lodh community, alleging interference with their rights, brought a suit for a declaration that a *chaupal*, mortgaged by the *mukaddam* of the community belonged to the entire community, and that the latter alone had no power to make the mortgage, *held*, that the suit was maintainable. **Gulba v. Basanta**, 7 A.L.J. 233 = 5 Ind. Cas. 547.

STANLEY, C.J., and BANERJI, J.

References :—5 A. 497 ; 24 C. 315, *approved*.

(30) S. 30—*Malabar Law—Decree against Karnavan—Suit against Karnavan under S. 30, C.P.C.—Right of an anandravan to avoid the decree by a separate suit—Fraud.*

Where a suit was brought against the *karnavan* of a Malabar *tarwad* in his representative capacity under S. 30 of the C.P.C., 1882, and the suit was decreed against *karnavan* after contest, it is not competent to an *anandravan* to avoid the decree by means of a suit, in the absence of allegations of fraud. **Olayat Govinda v. Damodaran**, 8 Ind. Cas. 435.

KRISHNASWAMI AIYAR, J.

Reference :—20 M. 129, *F.*

(30-a) S. 30—*Claim of private right by plaintiff over land—Claim of public right by defendants—Parties—Irregularity in not recording formal order—Effect. See SPECIFIC RELIEF ACT, No. 20, 6 Ind. Cas. 46.*

(31) Ss. 30, 539—*Suit for scheme and for declaring third defendant a duly appointed*

Civ. Pro. Code (1882)—(Continued).

Dharmakarta—Maintainability—Specific Relief Act, S. 42, whether controls S. 539—No denial of legal character or right to property—No consequential relief—Maintainability—Applicability of the new Code—Procedure.

Suit by plaintiffs as members of the Beri Chetty community, and followers and disciples of Sri Abhimana Sivachariar, and worshippers of the temple of Muthukumaraswami, against 1 to 3 defendants, *inter alia* for settlement of a scheme and for a declaration that third defendant had been duly and validly elected Dharmakarta. Permission to sue under S. 30, C.P.C., and sanction of the Advocate-General under S. 539, had been obtained by the plaintiffs. Objection was taken to the maintainability of the suit under S. 30, C.P.C., and also as to whether plaintiffs were entitled to sue for a declaration of the third defendant's rights.

Held that the case might be governed by the provisions of S. 539 of the old Code, and not by the corresponding but modified provisions of S. 92 of the new Code, as these provisions cannot be considered as dealing merely with procedure but affect the right of suit also.

That, as regard the third defendant's rights, the relief claimed whether under S. 30 or 539 is purely declaratory, and such declaratory relief cannot be granted under S. 42, Specific Relief Act, as the plaintiffs and all the other members of the Beri Chetty caste, being disciples of Sri Abhimana and other Hindu worshippers cannot be said to be entitled to any legal character or to any right to any property which the defendants have denied or are interested in denying within the meaning of S. 42, so as to give the Court jurisdiction to pass a purely declaratory decree.

That the suit is bad under S. 42, Specific Relief Act, also because the plaintiffs do not seek any further relief, such as an injunction restraining all or some of the defendants other than the third from interfering with the third defendant's rights to the office (a).

Held also, that the suit contemplated under S. 539 is a suit against a trustee, including under that term a person assuming to act as trustee, or a trustee *de son tort*, by persons having an interest in the trust, for one of the reliefs specified in the section. The suit for the assertion of the rights of one of the trustees taken by itself is not a suit for one of the reliefs specified in cls. (a) to (c) of the section. Nor can it be regarded as a suit "for such further

Civ. Pro. Code (1882)—(Continued).

or other relief as the nature of the case may require" (b).

That the declaration of the rights of the third defendant cannot be said to be incidental to a prayer for settling a scheme, as a scheme can be well settled without going into the question of the third defendant's right.

That S. 539 was neither intended to bar the assertion of private rights on the one hand, nor to afford a means of asserting them on the other.

That where S. 539 expressly provides for a declaratory relief, it cannot be cut down by S. 42, Specific Relief Act. Where however the case comes within the supplementary provision as to "such further or other relief as the nature of the case may require," the Court ought to be guided by the provisions of S. 42, Specific Relief Act, and to hold that the nature of the case does not require a merely declaratory relief to be given where further relief might have been sought for. **A. Muniswamy Chetty and others v. A. Murugappa Chetty and others**, 7 M.L.T. 15 = 5 Ind. Cas. 515.

WALLIS, J.

References:—(a) 33 C. 789, R. (b) 17 M. 462 (F.B.), R.

(32) *Ss. 30, 539—Suit for removal of trustee—Sanction under S. 539, not necessary—Trust in which others are interested—Suit regarding, by trustee—Permission under S. 30, C.P.C., 1882—Necessity.*

A suit, which prays for the removal of a trustee, is not one falling under S. 539, C.P.C., 1882 (= S. 92, C.P.C., 1908) and no sanction is necessary for instituting such a suit (a).

Where, in a suit relating to a trust, many others besides the plaintiff are interested, *held*, that, even if no sanction under S. 18, Religious Endowments Act, 1863, is necessary, permission to sue is necessary under S. 30, C.P.C., 1882. The fact that the plaintiff is a trustee does not exempt him from obtaining permission under S. 30, C.P.C., 1882. **Mohideen Khan Sahib v. Balai Khan Sahib**, 8 M.L.T. 357.

MUNRO and ABDUR RAHIM, JJ.

Reference:—(a) 17 M. 462, R.

(33) S. 31—Misjoinder of causes of action, effect of—Whether decree can be reversed on that ground. See **MISJOINDER**, NO. 2, 7 M.L.T. 364.

(34) S. 32—Addition of Receiver as party. See **RECEIVER**, No. 4, 14 C.W.N. 653.

Civ. Pro. Code (1882)—(Continued).

(35) *Ss. 36, 48—Plaint—Presentation to proper officer—Presentation by proper person—Plaint ordered to be registered after limitation—Effect of such order.*

The limitation for filing a suit was to expire on the 18th of February, 1908. The pleader for the plaintiff came to the proper Court on the evening of the 17th of February, after the Judge and his *munsarim* had both left the Court, and persuaded the suits clerk to receive the plaint. Next day the suits clerk handed over the plaint to the *munsarim*, who noted how the plaint had reached his hands, and on the following day, February 19th, put it before the Judge. The Judge ordered: "Registered, subject to objection as to limitation, if any, made by other party":

Held, that the making over of the plaint to the suits clerk on the 17th of February was no presentation within the meaning of S. 18 of the Code.

Held further, that the reaching of the plaint to the *munsarim* on the 18th February through the suits clerk could not be said to be a presentation by the pleader who had given the plaint to the suits clerk (a).

Held, also, that the order passed by the Judge on the 19th of February to register the plaint was irrelevant, and could not be considered as having any retrospective effect, so as to validate the proceedings of the two previous days. **Sri Maharaja Prabhu Narain Singh v. Sarju Misr**, 5 Ind. Cas. 330.

PIGGOTT, J.

Reference:—(a) 21 M. 111, F.

(35-a) S. 42. See No. 15, *supra*.

(36) S. 43—Test about the application of—Causes of action, identity of.

Held, that the test of the applicability of S. 43, Civ. Pro. Code, is not whether, at the date of the previous suit, the plaintiffs might or even ought to have alleged the existence of the cause of action upon which the second suit rests, but whether the causes of action alleged in the plaints in the two cases are one and the same or are distinct.

In a previous suit brought by the plaintiffs for a declaration that the defendants had no right in certain land beyond that of ordinary tenants, they alleged that their cause of action arose in 1904, when the Revenue Courts, in a suit brought by the defendants to contest a notice of ejectment, decided that they had

Civ. Pro. Code (1882)—(Continued).

rights superior to those of ordinary tenants. The suit was dismissed on the ground that the plaintiffs ought to have sued for possession. The plaintiffs, thereupon, brought the present suit for possession on the allegation that their cause of action arose in 1899, when the defendants, on the strength of an erroneous settlement entry recording them in possession of the lands, dispossessed the plaintiffs' tenants who were actually in possession.

Held, that the present suit was founded upon a cause of action which was essentially different from that on which the previous suit was based and was therefore not barred by S. 43 of the Code. **Abdul Kasim Khan v. Jaggu Singh**, 13 O.C. 19 = 5 Ind. Cas. 139.

CHAMBER and EVANS, J. CS.

References:—5 O.C. 173; 8 O.C. 389; 10 O.C. 44; 14 B. 537, R.

(37) S. 43—*Cause of action—Lessor and lessees—Omission of relief in the former suit—Subsequent suit for omitted relief barred.*

One R brought a suit in 1907 against the defendants for damages, on the ground that the defendants had dispossessed her from the lands in suit by ploughing up her standing crops on the said land and taking possession of the standing trees. She did not include then a claim for recovery of possession. Subsequent to the date of dispossession, but before the date of the suit in 1907, R executed a lease in respect of the land in favour of the plaintiff, who sued for recovery of possession and for mesne profits:

Held, that the suit was barred by S. 43, C.P.C., 1882, inasmuch as the plaintiff's lessor, R, omitted to include in her previous suit the claim for possession, which she was entitled to make at the date of instituting her suit. **Ram Lal v. Mir Jahangir Ali**, 5 Ind. Cas. 126.

KNOX and PIGGOTT, JJ.

(38) S. 43, if applicable to prior proceedings in Revenue Court—*Punjab Land Revenue Act, XVII of 1887, S. 158 (1) and (2)—Claim for additional share in respect of land already the subject-matter of partition proceedings, not maintainable in Civil Courts.*

Where the plaintiffs applied to the Revenue authorities for partition of a Khata, a partition was duly made and was formally accepted by plaintiffs, to whom one-sixth was allotted. The plaintiffs, brought the present suit claiming one

Civ. Pro. Code (1882)—(Continued).

one-twelfth share in addition, on the ground that previous mutation proceedings were wrong.

Held that S. 43, C.P.C., cannot be used to bar a suit in a Civil Court, because of something that has happened in a Revenue Court in the partition case.

The Revenue Court in the partition case was "empowered" to effect a partition, and, if it chose to decide any question of title that might arise. The Revenue Court being so "empowered," S. 158 (1) of the Land Revenue Act prevents any Civil Court from taking cognizance of the matter. **Inayet v. Nomang**, 8 P.R. 1910 = 6 P.W.R. 1910 = 5 Ind. Cas. 253.

JOHNSTONE, J.

(39) S. 43 (= O. 2, R. 2, C.P.C., 1908)—*Mortgage—Prior suit for interest after expiry of term fixed—Subsequent suit for principal or interest—Bar.*

Where a mortgagee was, under the terms of the mortgage-deed, empowered, after the expiry of five years from the date of mortgage, to sue at once, if default was made in the payment of interest due, for the recovery of the principal amount, or if no such default had been made, to allow the mortgage to continue and go on, receiving the interest as he had done in the past.

Held, that it was open, undoubtedly and admittedly, to the mortgagee, to sue, after the expiry of five years, for the recovery of the principal amount.

Where, therefore, the mortgagee sued, after the expiry of the five years, only for the interest, and failed to claim the principal which was also due,

held, that he was precluded by the provisions of S. 43, C.P.C., 1882, from bringing a subsequent suit for the recovery of principal, or of interest that accrued due after the decision of the prior suit.

If the plaintiff has no legal right to demand payment of the principal amount of his debt, he has, *a fortiori*, no right to claim interest thereon (b). **Chaudhri Kudan Mal and others v. Sardar Allah Dad Khan and others**, 19 P.R. 1910 = 36 P.W.R. 10 = 5 Ind. Cas. 821.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 28 P.R. 1907, F.; 7 B. 446 & 21 B. 237, not F. (b) C.A. No. 662 of 1902, F.; (1898) 2 Q.B. 400, R.

(40) S. 43—*Prior suit on the alleged entrustment for safe custody—Subsequent suit for rent—Bar.*

Civ. Pro. Code (1882)—(Continued).

Where a prior suit was brought on the basis of an alleged entrustment of the paddy by the Zamindar to the tenant, and a subsequent suit for arrears of rent was brought against the tenant.

held, that the cause of action for the non-payment of rent was different from that in the prior suit, and that the subsequent suit was not barred by S. 43, C.P.C., 1882, **Kadir Ibrahim Rowther v. Arunachalam Chettiar**, 19 M.L.J. 737—4 Ind. Cas. 1082.

BENSON and ABDUR RAHIM, JJ.

- (41) *Ss. 43—Prior suit—Claim as reversionary heirs and also on other grounds—Objections as to joinder of claims—Subsequent suit based on reversionary title—Whether S. 43 bars suit.*

Where, on account of objections taken in the written statement by the defendants in a prior suit, on the ground that the claims of the plaintiffs in that suit, as reversionary heirs, could not be joined with the other claims in that suit, and that only the nearest of reversioners could sue on that ground and not all the plaintiffs jointly, a subsequent suit was filed by the representatives of one of the plaintiffs, claiming title as the nearest reversioners, *held*, that the title set up in the latter suit was not only different from, but also adverse to, that of the other plaintiffs in the prior suit, and that the subsequent suit was not barred by the provisions of S. 43, C.P.C., 1882. **Rajah Kesava Venkatappiah alias Venkatappa Rao Garu v. Nayam Venkatranga Row Garu**, 7 M.L.T. 244.

MILLER and MUNRO, JJ.

- (42) *S. 43—Joint promisors—Suit against one barred under S. 43—Whether it is also a bar against the other—Contract Act, S. 43.*

R and S were tenants of a moiety each of certain lands, under separate Muchilikas, and they sold their interests to two persons A and B by separate deeds of sale. The plaintiff, the landlord, had instituted two suits in respect of each moiety against A only and recovered judgment. At the time of the first suit, the claim for rent up to 15th December, 1901 had accrued due, but was omitted to be included in the suit. At the time of the second suit, the claim for rent for faslis 1310 and 1311 in respect of S's moiety had accrued, but were not included in the suit. The present suit was against both A and B for rent for 6 faslis from

Civ. Pro. Code (1882)—(Continued).

1310 to 1315. The Sub-Judge dismissed the suit as regards the claim for faslis 1310 and 1311 in respect of S's moiety and the claim for rent up to 15th December, 1901 as regard R's moiety, as barred by S. 43, C.P.C., 1882. B was a member of the joint family with A, and liable with him to pay the rent.

Held that, under S. 43, C.P.C., the liability of A for the rent omitted to be claimed in the former suits is at an end; for that section provides that the plaintiff shall not afterwards sue in respect of the portion omitted.

Held also that B was liable for the rent of faslis 1310 and 1311.

Quere:—Whether the rule in *King v. Hoare*, 13 M. & W. 494, that a joint promisor is not liable in a subsequent suit, when judgment had been recovered against the co-promisor is applicable to the Mofussil in India, in view of S. 43 of the Contract Act.

Held, further that S. 43 of the Contract Act does not lay down a mere rule of procedure, but makes the liability of each co-promisor joint and several.

Under English law, however, the foundation of the rule in *King v. Hoare* is that the liability of the joint promisor is joint, and that the cause of action which is one and indivisible transit is *rem judicature*, and is therefore not available for a subsequent suit against a co-promisor.

Held, also that, as the claim for rent for faslis 1310 and 1311 was not the subject-matter of the previous suits, the cause of action for the same had not merged in the previous judgments.

Under S. 43, C.P.C., although a subsequent suit against the same defendant is barred for rents which had accrued due, it is by the force of a special rule that relief not claimed in respect of a cause of action shall not be claimed in a subsequent suit, and not on the principle of merger in a judgment recovered. **Ramanjulu Naidu v. Aramudu Ayengar**, 7 M.L.T. 373.

BENSON and KRISHNASWAMI IYER, JJ.

References:—13 M. & W. 494, *Cons.*; (1877) 4 A.C. 504; (1886) 31 Ch. D. 177; 10 P. 453; (1891) 1 Q.B. 781, *R.*; 22 A. 307; 5 M. 37; 5 M. 133; 8 M. 376; 21 M. 256; 30 M. 495; 7 M. 295; 3 C. 353 (361); (1898) 2 Ch. 295 (300); 21 M. 153 (157), *R.*

- (43) *S. 43—Applicability of—Subsequent suit must be between the same parties—Cause of action.*

Civ. Pro. Code (1882)—(Continued).

S. 43 of the Code of 1882 is directed against two evils, viz., the splitting of claims and the splitting of remedies in respect of one cause of action, and is founded on the maxim that no one shall be twice vexed for one and the same cause. In order that the section may apply, not merely must both suits arise out of the same cause of action, but they must be between the same parties or between parties under whom they or any of them claim. **Kunwar Gobind Krishna Narain v. Mussamat Sirajunnissa Begam**, 6 Ind. Cas. 226=7 A.L.J. 627.

STANLEY, C.J., and BANERJI, J.

References:—19 A. 379; 24 A. 553; 1 Agra 109, F.; 4 A.L.J. 121; A.W.N. (1907), 36; 29 A. 267; 30 A. 560; A.W.N. (1908), 235; 5 A.L.J. 647; 4 M.L.T. 392; 24 C. 831; 29 C. 871, D.

(44) S. 43—*First suit for settlement of accounts and profits against co-sharer—Second suit for profits against the same defendant as lambardar—Agra Tenancy Act (II of 1901), Ss. 164, 165.*

The plaintiff brought two suits against the same defendant. One suit was for settlement of accounts under S. 165, Tenancy Act, against the defendant in his capacity as co-sharer, and the other was for share of profits under S. 164 in the defendant's capacity as lambardar. *Held* that the suits were of different descriptions, and the causes of action for the two suits were not the same, inasmuch as the legislature, by enacting Ss. 164 and 165, Tenancy Act, contemplated two classes of suits. The second suit was not therefore barred by S. 43 of Act XIV of 1882. **Chunno Lal v. Parbhu Dial**, 7 A.L.J. 526.

STANLEY, C.J., and BANERJI, J.

(45) S. 43—*Dismissal of suit for declaration, whether bars subsequent suit for possession.*

The dismissal of a suit for declaration of A's title to land, on the ground that he ought to have sued for possession also, does not preclude him from subsequently bringing a suit for possession, since the causes of action in the two suits are different. The cause of action in the first suit is not an invasion of his possession but conduct throwing cloud on his title, while in the second suit the cause of action is an invasion of his possession. **Narayan v. Bhiwaji**, 6 N.L.R. 81.

SKINNER, A.J.C.

References:—8 C. 819; 12 C. 291; and 14 A. 512, F.; 22 M. 24 and 4 N.L.R. 14, R.

Civ. Pro. Code (1882)—(Continued).

(46) S. 43—*Portion of claim—Intentional omission—Act V of 1908, O. 2, R. 2 (2).*

A right which a litigant possesses, without knowing or having known that he possesses it, cannot be regarded as "a portion of his claim," within the meaning of S. 43 of Act XIV of 1882.

G, who was the tenant of a holding, died, leaving a mother and a daughter, both of the same name. The plaintiff sued the mother as representing G for arrears of rent for 1313 Fasli, and obtained an *ex parte* decree. In respect of the year 1314, he sued the daughter and obtained a decree. The decree in respect of 1313 was set aside, and at the re-hearing the daughter was made a party. It was found that, at the time the plaintiff brought the suit in respect of 1314, he was not aware that the daughter was the tenant in 1313. *Held* that the plaintiff, having no knowledge, when he brought his suit in respect of 1314, that the daughter was the tenant in 1313, could not be said to have omitted to sue in respect of that year, and the suit for 1314 was not barred by the provisions of O. 2, R. 2 (2) of Act V of 1908. **Batul Kuar v. Munni Lal**, 7 A.L.J. 738=7 Ind. Cas. 289.

STANLEY, C.J.

(46-a) S. 43—*Suit by mortgagee for possession—Failure to set up claim of pre-emption—Subsequent suit for pre-emption—Waiver. See PRE-EMPTION, No. 49, 99 P.R. 1910 (Civil).*

(47) S. 43—*Act V of 1908, O. 11, R. 2 (3)—Cause of action—Splitting claim—Mortgagee entitled to arrear of 'kasur' and possession on breach of condition of mortgage—Suit for kasur filed and decreed—Subsequent suit for possession barred.*

Where, under the conditions of a mortgage, on the mortgagor making default in the payment of *kasur*, the mortgagee was entitled to both possession of the mortgaged land and arrears of *kasur*, and he sued for arrears of *kasur* only:

Held, that a subsequent suit for possession of the mortgaged land was barred under S. 43 of the Code of 1882, or O. 11, R. 2 (3) of the Code of 1908 (a). **Malik Karim Baksh v. Jattu Ram**, 31 P.L.R. 1910.

JOHNSTONE, J.

References:—(a) 28 P.R. (1907); 19 P.R. 1910, F.; P.R. 79 of 1886 (overruled by P.R. 28 of 1907), R.

Civ. Pro. Code (1882)—(Continued).

- (48) S. 13—Act V of 1908, Sch. 1, O. 2, r. 2—*Leave to omit remedies or split causes of action—Pecuniary jurisdiction of Court—Surplus collection made by mortgagee—Limitation Act (IX of 1871), Sch. II, Art. 105—Act XV of 1877, S. 2, Sch. II, Arts. 105, 109—Act IX of 1908, Sch. I, Arts. 105, 109.*

Where a person is entitled to more than one remedy in respect of the same cause of action, the Court from which he should obtain leave to omit any of such remedies and bring a subsequent suit in respect thereof, is the Court before which the original suit is pending, even though the amount of the claim reserved for the subsequent suit be in excess of the pecuniary jurisdiction of this Court.

A suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, may be brought within three years from the time when the mortgagor re-enters on the mortgaged property, under Art. 105 of the Limitation Acts of 1877 and 1908, and there is no restriction as to the way in which the mortgagor may obtain possession. If permission to bring a subsequent suit for surplus profits has been given in accordance with S. 13, Act XIV of 1882, or Order 2, R. 2, Act V of 1908, Sch. 1, there is no conflict between the provisions of Art. 105 and those of the section and order respectively. Art 109, Limitation Act, does not apply to a suit by a mortgagor for surplus collection.

Where the right to recover surplus collections became barred under Art. 105, Sch. II, Act IX of 1871, the right was not revived by Act XV of 1877 or Act IX of 1908. **Muhammad Faiaz Ali Khan v. Kallu Singh**, 7 A.L.J. 1201.

STANLEY, C.J., and BANERJI, J.

Reference:—30 A. 225, *Discussed*.

(49) S. 43—Suit by reversioner to set aside deed of gift—Subsequent suit for possession of property. See **HINDU LAW (STRIDHAN)**, No. 1, 7 A.L.J. 153.

(50) S. 43—Subsequent mortgage—Payment of prior mortgages—Suit on subsequent mortgage—Separate suit for payments made under S. 74, Tr. P. Act. See **MORTGAGE (GENERAL)**, No. 23, 11 C.L.J. 551.

(50-a) S. 43. See Nos. 15, 15-a, 16, 17 and 18, *supra*.

(51) Ss. 43, 13—Claim for mesne profits—Separate suit. See **MORTGAGE (REDEMPTION)**, No. 13, 6 Ind. Cas. 336.

Civ. Pro. Code (1882)—(Continued).

(52) Ss. 43, 50—Allegations to be set out in the plaint—Suit for sale of mortgaged property—Right to personal decree. See **TRANSFER OF PROPERTY ACT**, No. 68, 12 Bom. L.R. 531.

(52-a) S. 48. See No. 35, *supra*.

(53) S. 50—Plaint, amendment of, by referring to a document not included in the list of documents annexed.

The amendment of a plaint, by referring to a document not included in the list of documents annexed to the plaint, is not such an amendment as will convert the suit into a suit of different and inconsistent character. **Gunna-ji Bhavaji v. Makanji Khushalchand**, 11 Bom. L.R. 498—6 M.L.T. 234=3 Ind. Cas. 159=34 B. 250.

SCOTT, C.J., and BATCHELOR, J.

(53-a) S. 50. See No. 52, *supra*.

(54) Ss. 53, 54, 67—Properties exceeding pecuniary jurisdiction—Plaint returned for presentation to proper Court—Representation to the same Court after amending, by striking off some items and properly valuing the rest—Jurisdiction.

Where the Munsiff returned the plaint for presentation to the proper Court, on the ground that the subject-matter of suit was undervalued, and that, if properly valued, it would exceed the pecuniary jurisdiction of the Court, and the plaintiff amended the plaint by correcting the valuation, and striking off some of the properties, so as to bring the rest within the jurisdiction of the Munsiff, and re-presented the plaint with a petition that he relinquished his claim to the properties struck out.

Held, in a petition for revising the order of the Munsiff, admitting the plaint on re-presentation,

that the action of the Munsiff fell within the letter of S. 57, C.P.C., read with S. 54. Since under S. 53, cl. (c), the Court may of itself amend the plaint at any time before judgment, it cannot be said that the Court has no power to allow or accept the amendment, when it is made by the plaintiff and sanctioned by the Court. **Karum Bayira Ponnupundan v. Authimoola Ponnupundan**, 6 M.L.T. 261=33 M. 262=3 Ind. Cas. 338.

RAHIM, J.

(54-a) S. 54. See No. 54, *supra*.

(55) S. 54 (d)—Order of Assistant Collector rejecting plaint—Appeal. See **ACT II OF 1901 (AGRA TENANCY)**, No. 18, 5 Ind. Cas. 371.

Civ. Pro. Code (1882)—(Continued).

- (56) *S. 57—Plaint, return of—Court's discretion to grant reasonable time to re-file plaint returned to be filed in proper Court—Limitation, saving of.*

In an order under S. 57 of the Code of 1882, returning a plaint to be filed in the proper Court, the Court returning the plaint has a discretion to grant a reasonable time for the purpose, and if the plaintiff re-files it in the proper Court within that time, his suit will not be barred by limitation, even though he had filed the plaint in the wrong Court on the last date for limitation. **Nibaran, Chandra Banerjee v. S.C. Mukerjee**, 6 Ind. Cas. 637.

HOLMWOOD and SHARFUDDIN, JJ.

- (56-a) *S. 57. See No. 54, supra.*

- (57) *S. 82—Substituted service—Defendant keeping out of the way.*

Where a defendant to a suit could not be found at his usual place of residence, and there was none to accept service of summons on his behalf, and the process-server, upon the third attempt to effect personal service, affixed the summons upon the door of house, *held*, that the defendant, under the circumstances, must be deemed to be keeping out of the way, and the service, as effected, was sufficient. **Abbas Husain v. Ashfaq Ahmad**, 7 A.L.J. 286 = 6 Ind. Cas. 282.

KNOX and KARAMAT HUSAIN, JJ.

- (58) *S. 82—Uncertain persons—Service of summons. See PARTITION, No. 8, 11 C.L.J. 580.*

- (58-a) *Ss. 98, 157—Hearing of suit after settlement of issues—Absence of parties and pleaders—Procedure—Decreeing plaintiff's suit without recording reasons—Dismissal of suit.*

Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders are absent, the suit should not be dismissed, but the Court, dealing with the claim, should pass an order under S. 98, C.P.C., 1882, and then record reasons for any decision it arrives at on the materials before it. **Ramanathan v. Karuppayee**, 8 Ind. Cas. 156.

MUNRO and SANKARAN NAIR, JJ.

- (58-b) *Ss. 98, 157—Hearing after settlement of issues—Parties and pleaders absent—Dismissal of suit—Proper course.*

Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders were absent, the Court ought not to dismiss the suit altogether, but ought to proceed under S. 98, C.P.C., 1882, and record its

Civ. Pro. Code (1882)—(Continued).

reasons for any decision it arrives at. **Ramanathan Chettiar v. Karuppayee**, 8 M.L.T. 450.

MUNRO and SANKARAN NAIR, JJ.

- (59) *S. 102—Portion of claim dismissed on the merits and the rest abandoned—Applicability of section thereafter—Dismissal as for default—Appeal on the merits, where section wrongly applied.*

Certain properties which were purchased by the plaintiff at public auction were attached in execution of a money-decree against his vendor. Plaintiff satisfied the decree under protest and then sued the decree-holder for recovery of the amount paid and for damages for wrongful attachment. The Court *held* that, as the payment was voluntary, the claim to recover it was not maintainable, but that the suit might proceed on the question of damages. Plaintiff prayed for the drawing up of a formal decree with regard to the portion of the claim which was dismissed, and also to withdraw the rest of the claim with liberty to bring a fresh suit under S. 373, C.P.C., 1882. Both prayers having been refused, plaintiff unconditionally withdrew the claim for damages. The defendant thereafter proceeded to give evidence on all the issues raised in the case, the plaintiff not appearing. In the result, the Court, purporting to act under S. 102, C.P.C., dismissed the suit for default. The plaintiff appealed to the Chief Court which *held* that, the suit having been dismissed under S. 102, C.P.C., no appeal lay. On further appeal to the Judicial Committee,

held, that the case was not one to be dealt with under S. 102, C.P.C., inasmuch as the claim for recovery of the money paid to discharge the attachment had been fully determined adversely to the plaintiff by the Court's previous order, and the rest of the claim had been abandoned, leaving nothing to be tried.

Held further that the case should go back to the Chief Court to decide the appeal on the merits. **Kanhaya Lal v. The National Bank of India Ltd.**, 14 C.W.N. 594 (P.C.) = 12 Bom. L.R. 430 = 11 C.L.J. 449.

LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

- (59-a) *S. 102. See No. 15, supra; and Nos. 75 and 213, infra.*

- (60) *Ss. 102, 103, 158—Adjourned hearing—Refusal of application for process—Intimation by pleader that he has no further instructions—Dismissal of suit, whether under S. 102.*

Civ. Pro. Code (1882)—(Continued).

Where, at an adjourned hearing of a suit, the witnesses on behalf of a party were not in attendance, and the party applied for the issue of warrants against them, but the Court refused the application, and the pleader thereupon intimated that he had no further instructions to appear, and the suit was dismissed :

Held, that the dismissal was not under S. 158, but under S. 103 of the Code. **Ganga Rai v. Gudar Rai**, 5 Ind. Cas. 499.

HOLMWOOD and CHATTERJEE, JJ.

References :—34 C. 235 ; 5 C.L.J. 260, *Rel. on*.

(61) *Ss. 102, 157—“Appearance,” meaning of—Application by pleader for adjournment—Refusal—Pleader stating that he had no instructions—Effect—Dismissal under S. 157, C.P.C.—Authority to represent client—Barrister and pleader, distinction between.*

On the date to which the plaintiff's suit was adjourned for hearing, an application was put in by his pleader for postponement owing to plaintiff's illness, and it was rejected. The Court then examined the plaintiff's pleader who stated that he was appointed to present the application and that he was not in any way acquainted with the facts of the case.

Held, that, where, at any adjourned hearing of the suit, there is no appearance by the plaintiff and there are no materials on record, the appropriate procedure is that laid down by S. 157, C.P.C., 1882, (*Per Crouch, A.J.C.*).

An appearance at an application for adjournment which is refused is not an appearance at the hearing of the suit (b).

An “appearance” is nothing more than physical attendance in the Court. If, therefore, when the hearing commences, the plaintiff or his duly appointed pleader is actually present in Court, there is an appearance of the plaintiff at the hearing. If it be desired that there should be no appearance, the result can, in reality, be attained only by the plaintiff and his pleader walking out of the Court when the case is called on for hearing. But it is considered sufficient for the pleader to do something or say something implying a request that the Court should regard him as absent, and for the Court to do something or say something to intimate that the request has been granted, or, at any rate, not been refused. The usual formula used by pleaders “I am not instructed” or “I have no instructions,” is perfectly

Civ. Pro. Code (1882)—(Continued).

well understood by most Judges ; and where no dissent is expressed, the general opinion seems to be that the pleader is fairly justified in assuming that he is being treated as not present (c).

Held, that, on the facts of the present case, the presumption that the order of dismissal was under S. 157, C.P.C., 1882, holds good.

The authority of a Barrister or Advocate to represent a party is based on the fact that he has “received instructions” from an Attorney or Solicitor. Instructions are not merely the information as to facts, but constitute his authority to represent the client. If, therefore, he states in Court that he has no instructions, that concludes the question of his representation. But a pleader's authority is based on the fact that a ‘vakalatnama’ has been filed. And his authority can be terminated only on a written application by the client and with the consent of the Court. **Fakir Mahomed v. Yiran, wife of Koji**, 3 S.L.R. 208.

KNIGHT, CROUCH and HAYWARD, A.J. CS.

References :—(a) 34 C. 235, R. (b) 1 S.L.R. 224 ; 34 C. 408 (F.B.), R. (c) 23 B. 414 ; 22 A. 66 ; 30 M. 374, R.

(62) *S. 103—Applicability—Plaintiff in former suit not plaintiff in the latter suit—Limitation Act (XV of 1877), Art. 120—Right to sue arises when cause of action is complete—Knowledge or ignorance immaterial in the absence of fraudulent concealment—Suit by junior members of tarwad—Limitation.*

Suit for declaring that a lease granted by the *karnavathi* was not binding on the tarwad and for other reliefs. A previous suit had been brought by some other members of the Tarwad to question the validity of another lease executed by the same *karnavathi*, and it had been dismissed for default. The plaintiff in the present suit was the 7th defendant in that suit.

Held that the suit was not barred by S. 103, C.P.C., inasmuch as the plaintiffs in the previous suit are not the plaintiffs in the present suit. S. 103 cannot apply to a case, unless the plaintiffs in the prior suit are also plaintiffs in the subsequent suit, or unless the plaintiff in the latter suit can be regarded as having been also a plaintiff in the former.

Held that, inasmuch as the present plaintiff was not only a defendant, but a contesting defendant in the previous suit, the present

Civ. Pro. Code (1882)—(Continued).

plaintiff cannot be held to have been represented by the plaintiffs in the prior suit.

A suit for declaration that an alienation by the karnavan of tarwad property is not binding on the tarwad is governed by Art. 120. In the absence of fraudulent concealment, the knowledge or ignorance of the plaintiff in regard to the alienation questioned is not material.

The right to sue accrues as soon as the cause of action is complete, *i.e.*, on the date of the alienation. **Ottappurakal Thazhate Soopi v. Cherichil Pallikal Uppathumma**, 33 M. 31 = 5 Ind. Cas. 698.

BENSON and MILLER, JJ.

Reference :—11 M. 378, F.

(63) S. 103, if applies to probate proceedings—*Probate and Administration Act (V of 1881), S. 83—Dismissal of application for probate for default—Executor if may propound will again—Res judicata—Deterrent costs sufficient remedy against vexatious conduct.*

A refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. But if probate has been refused, not on the merits, but merely by reason of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to probate, and therefore, it may be again propounded.

If, therefore, an application for probate by the executor of a Will has been dismissed for default, that fact itself cannot debar an application by any other person claiming an interest under the will, and therefore, necessarily also, by the executor himself.

An executor presenting an application for probate of a Will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. S. 103 of the Civil Procedure Code (Act XIV of 1882), would therefore be in terms inapplicable to such an application. **Ramani Debi v. Kumud Bandu Mookerjee**, 14 C.W.N. 924 = 7 Ind. Cas. 126 = 12 C.L.J. 185.

MOOKERJEE and CARNDUFF, JJ.

Reference :—21 Bom. 563, *relied on*.

(63-a) S. 103. See Nos. 15 and 60, *supra* and No. 75, *infra*.

(64) Ss. 103, 311, 312, 588, cl. (8) and cl. (16)—*Appeal—Confirmation of sale—Order refusing to set aside ex parte dismissal of application to set aside sale.*

If an application to set aside a sale is dismissed for default and the sale is confirmed, the order

Civ. Pro. Code (1882)—(Continued).

of confirmation is appealable under cl. (16) of S. 588, C.P.C., 1882. But there is no appeal from an order refusing to set aside the *ex parte* order of dismissal of an application to set aside a sale under S. 311 of the Code. **Mrinalini Chowdhurani v. Benode Chandra Mitra**, 6 Ind. Cas. 148.

MOOKERJEE and TRUNON, JJ.

References :—27 C. 414; 31 C. 207; 29 A. 596; A.W.N. (1907), 186, F.

(65) Ss. 103, 578, 591—*Order of Assistant Collector refusing to restore suit dismissed for default—Appeal—Order of remand in a case in which no appeal lies—Ultra vires—Proceeding after remand ineffective—Second appeal—High Court's power to interfere—Finality of remand order passed without jurisdiction.*

No appeal lies from an order of the Assistant Collector refusing to restore a suit dismissed in default. If an appeal is proffered and the appellate Court allows the appeal and remands the case to the lower Court for further hearing, the remand is *ultra vires*, and proceedings taken thereafter are all without jurisdiction.

Provisions of S. 578, Civ. Pro. Code, 1882, clearly indicate that the High Court can in second appeal enter into a question which goes direct to the jurisdiction of the Court deciding the appeal. S. 591 of the Code deals with the order which the Court had jurisdiction to make, but in the making of which the Court had committed an error or irregularity. **Babu Balj Nath Singh v. Gajraj Singh**, 6 Ind. Cas. 461 = 7 A.L.J. 675.

STANLEY, C.J., and GRIFFIN, J.

Reference :—12 A. 510, R.

(66) S. 108—*Ex parte decree against some defendants—Decree one and indivisible—Ex parte decree set aside—Decree set aside in its entirety.*

In a suit for a sale on the basis of a mortgage, some of the defendants did not appear, while the rest contested the claim. Finally a decree was given against all the defendants, it being *ex parte* against those who had not appeared. On the latter's application, the *ex parte* decree was set aside, and, on rehearing the suit, the Court restricted itself to the case of the defendants at whose instance the *ex parte* decree had been set aside. Ultimately a decree was passed against all the defendants, and, within three years of the last decree, the decree-holder applied for an order absolute. The defendants,

Civ. Pro. Code (1882)—(Continued).

against whom the first decree had been passed after contest, contended that the application was barred, as more than three years had elapsed from the date of the original decree against them :

Held, that the original decree, being one, and indivisible, was set aside in its entirety, and that the decree holder's application, therefore, was within time :

Held further, that the word "decree" in section 108, Civ. Pro. Code, meant the whole decree made in the suit and that a decree could not be set aside in part. **Samodh Dhar Dube v. Bhuladhar Dube**, 5 Ind. Cas. 284.

TUDBALL, J.

References : 24 A. 383 ; 29 A. 623 ; A.W.N. (1907), 204 ; 1 A.L.J. 552 ; 25 A. 155 ; 1 C.W.N. 652, R.

(67) *S. 108—Decree ex parte against one and on contest against other defendants—Appeal—Decree affirmed—Jurisdiction of first Court to set aside ex parte decree—Second appeal—Question of jurisdiction and important point of law allowed to be taken for the first time in second appeal.*

After an appeal is filed against a decree of a lower Court, which proceeds on a ground common to all the defendants, the power to set aside the original decree on an application under S. 108, Civ. Pro. Code, 1882, by any of the defendants, against whom the decree was passed *ex parte*, becomes vested in the appellate Court only, and the first Court does not continue to exercise jurisdiction in the matter (a).

A contention which involves a question of jurisdiction and an important point of law may be permitted to be taken for the first time in second appeal. **Dhanai Sardar v. Tarak Nath Chowdhuri**, 5 Ind. Cas. 525 = 12 C.L.J. 53.

CASPERSZ and DOSS, JJ.

References :—(a) 30 M. 535 ; 17 M.L.J. 436, F. ; 4 C.W.N. 456, D.

(68) *S. 108—Ex parte decree set aside—Trial of suit de novo.* See **MINOR**, No. 2, 6 Ind. Cas. 373.

(68-a) *S. 108.* See No. 19, *supra*.

(69) *Ss. 108, 591—Ex parte decree affirmed in appeal—Application to set it aside—Jurisdiction—Challenged in appeal against final decree.*

Civ. Pro. Code (1882)—(Continued).

When a decree originally passed by the Court of first instance is affirmed in appeal, the decree of the appellate Court becomes the decree in the cause, and the Court of first instance has no jurisdiction to entertain an application to set aside that decree.

A decree passed *ex parte* against one of the defendants was affirmed on appeal of the defendants who had appeared. On the application of the defendant who had not appeared, the Court of first instance set aside the decree. *Held* that the Court acted *ultra vires*, and the appellate Court could set it aside when an appeal was filed against the final decree, the orders referred to in S. 591 of the Code of 1882 being orders which the Court has jurisdiction to make, but in making which it commits an error or irregularity. **Palakdhari Rai v. Mankaran Rai**, 7 A.L.J. 588.

STANLEY, C.J. and BANERJI, J.

Reference :—5 Ind. Cas. 525, R.

(70) *Ss. 109, 244, 372—“Opposite party”—Attaching creditor—Whether included in the term—Not entitled to notice—Right to apply for execution—Representative of decree-holder.*

An attaching creditor of a decree has no interest in the decree within the meaning of S. 372, C.P.C., 1882 (=O. 22, R. 10, C.P.C., 1908), and is not entitled to be made a party to the appeal against the decree attached by him.

The term “opposite party” in S. 109, C.P.C., 1882 (=O. 9, R. 14, C.P.C., 1908), does not include an attaching creditor, and the only persons entitled to notice under that section are those who are already on record as parties (a).

Obiter.—An attaching creditor is entitled to apply for execution of the decree in satisfaction of his own decree, and, for that purpose, he may be deemed to be the representative of the decree-holder within the meaning of S. 244, C.P.C., 1882 (=S. 47, C.P.C., 1908) (b). **Sevugan Chetty v. Obla Munisami Aiyer**, 20 M.L.J. 521 = 7 Ind. Cas. 66 = 8 M.L.T. 237.

BEN 'ON and ABDUR RAHIM, JJ.

References :—(a) 20 A. 38, R. (b) 29 M. 311, R.

(71) *S. 111—Set-off—Technical and general—Plea of payment—Set-off of time-barred debts.*

The words “ascertained sum” in S. 111, Civ. Pro. Code, do not mean a sum admitted by the plaintiff, but a sum of money the amount of which is known.

Civ. Pro. Code (1882)—(Continued).

Where defendants sued upon an agreement to the effect that the rents payable on account of lands held by plaintiffs under defendants were credited to the plaintiff on account of rent due to him from the defendants.

Held that the plea was one of payment and of account and set-off in a general sense, and not one of technical set-off under S. 111, Civ. Pro. Code

Held further that, the true issue in the case being as stated above, the case could not be disposed of by saying that there could be no "set-off" in a technical sense of a time-barred debt. **Edward Dalglesh v. Ramdin Singh Chowdhury**, 14 C.W.N. 170 = 5 Ind. Cas. 67.

CHITTY and RICHARDSON, JJ.

(72) S. 111—Equitable set-off—Right to set off unascertained damages. See **CONTRACT**, No. 4, 37 C. 331.

(73) *Ss. 111, 216, 586—Set-off—Claim to—When allowed.*

A plea of set-off is available where the claims on both sides are in respect of liquidated debts which can readily and without difficulty be ascertained, and not only when a sum of money is found due to the plaintiff. **Goswami Chandra Deoji v. Durgapada Battacharya**, 7 A.L.J. 105 = 5 Ind. Cas. 211.

KARAMAT HUSAIN, J.

(74) *S. 157—Plaintiff and plaintiff's vakil absent—Plaintiff's absence satisfactorily explained—Restoration.*

Where the plaintiff has shown sufficient reason for his own absence, and where his presence is necessary, *held*, that he is entitled to ask for restoration, even if his vakil was in default. **Yencatachalapathi Chetty v. Periyasami Udayan**, 7 M.L.T. 308.

MILLER, J.

Reference:—19 M.L.J. 760, *F*.

(74-a) S. 157. See Nos. 15, 58-a and 61, *supra*.

(75) *Ss. 157, 158, 102, 103—Time given to plaintiff to produce evidence—Default in appearance on adjourned date—Statement by plaintiff's vakil that he had no instructions—Nature of order to be passed—What section to be applied—Scope of Ss. 157, 158.*

Plaintiff obtained time from Court to produce his evidence on a certain date. On that day he did not appear and his vakil stated

Civ. Pro. Code (1882)—(Continued).

that he had no instructions. The Munsiff, instead of dealing with the case under S. 157 of Act XIV of 1882, disposed of it under S. 158 on the issues raised.

Held, that there was clearly a default in appearance on the adjourned date, and that the Munsiff was wrong in disposing of the suit under S. 158, Civ. Pro. Code, as he should have disposed of it under S. 157.

S. 157 and 158 of Act XIV of 1882, should, if possible, be read as mutually exclusive. S. 157 deals with cases of failure to appear, and S. 158 with cases of failure to do the thing for which time has been granted; neither can be treated as an exception to the other, for there may be failure to do the thing for which time has been granted, the parties themselves being present, and there may be failure to appear even when no time is granted to do anything in particular.

When a case is set down for hearing, whether it is on the original or the adjourned date, the first question for the Court is, are the parties in attendance? If both or either of the parties have or has failed to appear, the Court is bound to deal with the matter under Ch. VII, or S. 157 read with Ch. VII, as the case may be. Any other defect in the case or default of any party is a matter for investigation and orders, only after the question of default in appearance has been settled. The appearance of the parties or more correctly the determination of the consequences of non-appearance has a natural precedence over the disposal of matters arising in the trial of the case.

Therefore, if there be default in appearance on the adjourned date of hearing, S. 157 should alone be applied, no matter whether there has or has not been default of the kind referred to in S. 158. It is only in case the parties are in attendance and there is a failure to do what a party is given time to do, that S. 158 is to be put in requisition. **Chandramathi Ammal v. C.S. Narayanasami Iyer**, 5 Ind. Cas. 23 = 19 M.L.J. 760 = 7 M.L.T. 369.

WALLIS and KRISHNASWAMI Aiyer, JJ

References:—23 B. 414; 18 M.L.J. 51; 3 M.L.T. 225; 22 A. 66; 34 C. 235; 5 C.L.J. 260, *F*; 20 B. 736, *F*; 4 M.H.C.R. 251 and 4 M.H.C.R. 56, *Disapp*.

(75-a) S. 158. See Nos. 15, 60 and 75, *supra*.

(76) *Ss. 158, 558, 623—Limitation Act (XV of 1877), Schedule II, Article 168—Suit dismissed in default—Appeal against dismissal*

Civ. Pro. Code (1882)—(Continued).

also dismissed in default—Application to restore appeal made after expiry of 30 days—Application treated as review—Review.

A suit was dismissed under S. 158, C. P.C. The plaintiff appealed, but the appeal was dismissed by the Divisional Judge in default of prosecution. An application to restore the appeal was made after the expiry of 30 days prescribed by the Limitation Act for such applications. Notice was issued to the defendants to show cause against the granting of the applications, and the Divisional Judge after issue of the notice was succeeded by another Judge, who re-heard the appeal and upheld the order of the original Court. The plaintiff applied for revision.

Held, that the order passed under S. 158 of the Code was illegal and the case must be tried on the merits (a).

It was contended that, the application to re-hear the appeal having been made after the expiry of 30 days and the period not being extendible, the order of dismissal became final.

Held, that, treating the application as one for review, there was no irregularity in the proceedings of the lower appellate Court. **Kashi Ram v. Gopi Mal**, 7 P.L.R. 1910.

SHAH DIN, J.

Reference :—(a) 23 A. 462, R.

(77) *Ss. 160, 162, 235 (C.P.C., 1908, O. 16 R. 2; O. 16, R. 4 and O. 21, R. 11)—Additional sum "allowed" to defray additional expense of witness—Transmission of "bill" to another Court "ordered"—Whether constitutes order for payment executable by attachment and sale—C.P.C., 1882, S. 622 (C.P.C., 1908, S. 115)—Refusal by Court to execute order transmitted—Revision.*

Where an application by a witness, who claimed an additional sum for defraying his expenses and prayed for an order directing the plaintiff to pay him that amount, was "allowed" by the Munsif, and another application which contained a prayer that, to realise the amount, an order might be passed directing that "the bill might be sent" to the Court of the Munsiff of P, was "ordered," but the application was rejected by the Munsiff of P, on the ground that there was no order directing payment and for attachment and sale on default of payment.

Held, that the first order was an order for payment and that the second taken together with the first application was an order that such sum may be levied by attachment and

Civ. Pro. Code (1882)—(Continued).

sale of the property of the plaintiff within the jurisdiction of the Court of the Munsiff of P.

Held, also, that the order of the Munsiff of P is open to revision under S. 622, C.P.C., 1882, because the law allows no course open for the Judge to follow on the admitted facts of the case, and the Munsiff erroneously thought that he had no power. **Manavikraman styled Ettan Ettan Rajah v. Veerarayan styled Amiyan Yalia Rajah**, 7 M.L.T. 76=5 Ind. Cas. 742.

SANKARAN NAIK, J.

(77-a) S. 162. See No. 77, *supra*.

(78) S. 170—Order—Appeal—Auction sale when complete—Confirmation.

An order under S. 170 of the Code of 1882 is not appealable.

An auction sale does not become complete until it is confirmed by the Court. **Badri Prasad v. Tej Singh**, 7 Ind. Cas. 100.

GEORGE KNOX and GRIFFIN, JJ.

(75) S. 203—Judgment of appellate Court, contents of—Judgment of reversal.

In reversing a decision of the first Court, the lower appellate Court should state the facts and also the points which are raised before it, and then its decision on such points and the reasons for that decision. The High Court should not be left to spell out the meaning of the lower appellate Court by gathering together portions of findings both from the judgment of the first Court and the judgment in appeal. **Basarat Ali v. Mahomed Roshan**, 7 Ind. Cas. 421.

WOODROFFE and THUNON, JJ.

(80) S. 206—Decree—Appeal—Amendment.

A decree, an appeal against which has been dismissed, cannot be amended by the Court which made it. The application for amendment must be presented to the Court of appeal.

No appeal lies against an order amending a decree, but if such order has been made without jurisdiction, the High Court can set it aside on revision.

An appeal may lie from the decree as amended. **Kumar Rameswar Mallia v. Bhaba Sundari Debi**, 11 C.L.J. 81=5 Ind. Cas. 304.

MOOKERJEE and VINCENT, JJ.

(80-a) S. 206. See No. 20, *supra*.

(81) S. 210—Inherent power of Court to order stay of execution when passing decree. See CIV. PRO. CODE (1908), No. 115, 7 M.L.T. 151.

Civ. Pro. Code (1882)—(Continued).

(81-a) Ss. 211, 212—Amount when exceeds Court's pecuniary jurisdiction—Course to follow. See *MESNE PROFITS*, No. 6, 8 Ind. Cas. 84.

(82) Ss. 215-A, 216—Suit for accounts by principal—Claim for set-off by agent, necessity for. See *PRINCIPAL AND AGENT*, No. 3, 7 A. L.J. 543.*

(82-a) S. 216. See Nos. 73 and 82, *supra*.

(83) Ss. 223, 226—*Execution—Transfer of decree—Order of transfer signed by sheristadar as "by order," validity of—Pecuniary limits of District Munsif's jurisdiction for purposes of execution.*

An order of the District Court, transferring a decree for execution to a District Munsif, signed by the *sheristadar* of the former Court as "by order" of the District Judge, is a valid endorsement and fulfills the requirements of Ss. 223 and 226, Civ. Pro. Code, 1882.

The jurisdiction of a District Munsif in regard to the execution of a decree transferred to him for execution is not subject to any pecuniary limit. *Vlazorath Kibula v. Syed Ghulam Ghouse Shal Sahib Kadiri v. Sunni Lal Agarwala*, 5 Ind. Cas. 155=7 M.L.T. 132.

BENSON and ABDUR RAHIM, JJ.

References:—7 M. 397; 17 M. 309, *F.*; 16 C. 457; 16 C. 465; 12 B. 155, *not F.*

(83-a) S. 226. See No. 83, *supra*.

(84) S. 230—*Abatement of appeal—Calculation of time.*

An appellant died while his appeal was pending in the High Court. The High Court made an order to the effect that the appeal had abated and that the respondent was entitled to his costs.

Held that the order was in effect an order confirming the decree of the lower Court, and the decree-holder was entitled to the benefit to twelve years' limitation calculated from the decree of the appellate Court. *Mahammad Razi v. Karbalai Bibi*, 7 C.L.J. 58=32 A. 136=5 Ind. Cas. 473.

KNOX and PIGGOTT, JJ.

References:—23 A. 124, *D.*; 34 C. 874, *F.*

(85) S. 230 (*= S. 48, C. P. C., 1908*)—*Previous applications for execution praying for attachment and sale of moveables—Subsequent application for attachment and sale of houses—Whether latter application is in continuation of the previous one—Prior application neither struck off nor disposed*

Civ. Pro. Code (1882)—(Continued).

of otherwise on account of appeal by judgment-debtor—'Fraud or force' within the terms of S. 230—Right to raise questions of fraud for the first time in appeal.

Held, that applications for execution made on 10th March and 15th June, 1908, praying for the attachment and sale of houses belonging to the judgment-debtor, cannot be held to be in continuation of a prior execution application made on 11th May 1906, praying for the attachment and sale of moveables belonging to the judgment-debtor, even when the moveables were attached and sold, but the money was not paid to the decree-holder in consequence of an appeal filed by the judgment-debtor, and the application had not been formally consigned to the record room or struck off the file (a).

Where the judgment-debtor was justified in obtaining an adjudication from the Courts in respect of the very difficult question of his relations with his father, and where his appeal was thrown out merely on the ground of his failure to discharge the burden of proof that lay on him, he cannot be held to be guilty of frivolous or vexatious obstruction to the execution of decree, and his act did not constitute 'fraud' within the terms of the last sentence of S. 230, C.P.C., 1882 (b). It is doubtful whether the decree-holder can raise questions of fraud and claim the benefit of the last sentence of S. 230, for the first time in appeal. *Hiru and others v. Garcharu*, 17 P.R. 1910=22 P. W. R. 1910=20 P. L. R. 10=5 Ind. Cas. 815.

JOHNSTONE, J.

References:—(a) 18 A. 482 (*F.B.*); 45 P. R. 1909; 21 A. 155; 33 C. 689, *D.*; 27 P.R. 1905, *Expl.* (b) 11 C. W. N. 440; 6 M. 365, *D.*

(86) S. 230—*Decree—Application for execution of—Limitation—Order passed on application after expiry of 12 years.*

If the last application for execution of a decree be made within 12 years from the date of decree or order, the order on the application may be made even after the expiry of 12 years. *Sivaswamy Aiyar v. Sivalingam Pillay*, 7 M. L.T. 353=5 Ind. Cas. 474.

MUNRO and ABDUR RAHIM, JJ.

Reference:—6 M. 359, *F.*

(87) S. 230—*Prior application for attachment—Subsequent one for sale—Continuation of former application—Effect of S. 230.*

An application for sale is a continuation of a former application for attachment.

Civ. Pro. Code (1882)—(Continued).

S. 230, C.P.C., 1882, only bars fresh application after expiry of 12 years (a). **Suraja Venkata Narasimha Appa Row Bahadur v. Nanduri Venkatasubrayudu**, 8 M.L.T. 367.

WALLIS and KRISHNASWAMY IYER, JJ.

References :—18 M.L.J. 46 ; 12 M.L.J. 24, R.

(87-a) S. 230—Application for arrest of judgment-debtor. See LIMITATION ACT (1877), No. 112, 6 P.L.R. 1910.

(88) Ss. 230, 235, 295, 490—*Application for rateable distribution Not conforming to requirements of S. 235—Whether amounts to execution application under S. 295—Attachment before judgment under S. 490—Whether presupposes an application for execution—Effect of the words "shall not be necessary to re-attach" in S. 490.*

A mere application for rateable distribution, which does not comply with the requirements of S. 235 in form or substance, cannot be treated as the sort of application falling within the scope of S. 295 (a).

S. 230 provides for an application for execution and S. 235 specifies the form and contents of that application.

S. 490, which gives validity and effect to the attachment before judgment even after decree for certain purposes, does not give rise to the implication that that attachment was made on a constructive application for execution of a decree that had not been passed (b).

The section does not make the application to execute the decree a second application to execute it, because it says re-attachment is unnecessary.

The subsisting attachment before judgment has its use in invalidating alienation by the judgment-debtor and dispensing with the need of a further attachment before sale, without necessitating the fiction, after a decree is passed, that there was a pre-existing application for execution. **A.L.A.R. Arunachallam Chettiar v. P.S.K. Haji Sheikh Meera Rowther**, 8 M.L.T. 226.

BENSON and KRISHNASAMI IYER, JJ.

References :—(a) 11 C.L.J. 69, *relied on*. (b) 31 M. 502, *not F.*; 12 B. 400; 33 C. 639, R.

(89) S. 232—*Execution of decree—Assignment of decree—Execution by assignee—Notice to transferor and to judgment-debtor.*

No execution of a decree can proceed at the instance of an assignee from the judgment-creditor unless notice has been served both

Civ. Pro. Code (1882)—(Continued).

upon the transferor and the judgment-debtor. The provision as to such notice in S. 232 is imperative and makes such service a condition precedent to the execution. It is not enough if notice has been served upon the judgment-debtor alone. **Sreenath Das v. Achutananda Mahanti**, 11 C.L.J. 354 = 6 Ind. Cas. 262.

GHOSE and PRATT, JJ.

(90) S. 232—*Transfer of portion of maintenance decree, validity of.*

Where only a portion of a maintenance decree, viz., that relating to the arrears of maintenance already accrued due, was transferred, and the question was whether such transfer ought to be recognised.

Held, that such transfer of a portion of a decree can be recognised, if the Court thinks the case a proper one (a); and that the assignment of a maintenance decree in respect of arrears due was valid. **Yencataramaniah v. Venkata Chinulu**, 6 M.L.T. 242 = 6 M.L.T. 294 = 33 M. 80.

MUNRO and ABDUR RAHIM, JJ.

References :—(a) 17 C. 341; 19 M. 306, F.

(91) Ss. 232, 273, 486 and 487—*Decree—Assignment—When property passes under—Attachment before judgment—Application by assignee for execution—Dismissal—Proper course—Assignee's remedy—Repudiation of assignment—Suit by assignee on original debt—Maintainability.*

The first defendant owed money to the plaintiff. To discharge the debt, the first defendant, on 28th January, 1901, transferred to the plaintiff, by an assignment in writing, two decrees which he had obtained in his favour in the Court of the District Munsiff of V. On 22nd April, 1901, these two decrees were attached before judgment by the Subordinate Judge's Court of K, in a suit brought by a third party against the first defendant. The plaintiff applied in 1905 for execution of the decrees to the District Munsiff of V. The application was dismissed on the ground that the decrees had already been attached by the Sub-Court of K. Plaintiff thereupon repudiated the assignment and brought a suit to recover the original debt.

Held, that the suit was not maintainable, because the District Munsiff dismissed the plaintiff's application, for execution, not on any ground affecting the validity of the decrees, but simply because he had no power at the time to allow execution.

Civ. Pro. Code (1882)—(Continued).

The District Munsiff was bound, in the circumstances of the case, under the second paragraph of S. 272, C.P.C., 1882, to stay execution until the attachment was cancelled.

Under S. 487, C.P.C., 1882, it was open to the plaintiff to present a claim to the attaching Court to withdraw the attachment, and if he had done so, it would have been the duty of the attaching Court to withdraw the attachment, in which case it would have been open to the plaintiff to apply again under S. 232, C.P.C., 1882, for execution of the decrees.

By the assignment of the decree in writing, the property in the decrees passed to the plaintiff, so that they were no longer liable to be attached as the property of the first defendant (a). **Sadagopachariar v. Raghunatha Chariar**, 6 M.L.T. 273=33 M. 62=3 Ind. Cas. 938.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 20 M. 157, *discussed*; 16 A. 483; 25 M. 383; C.M.S.A. No. 60 of 1899 (*Unreported*), *It*.

(92) S. 234—*Hindu Law—Joint family—Decree obtained against uncle executed against nephews—Succession by survivorship—Nephews not the legal representatives—Application bad—Limitation Act (XV of 1877, Art. 179—Application against persons not the legal representatives.*

In an application for execution of a simple money decree against the nephews of a deceased judgment-debtor, it was held that the decree could not be executed, inasmuch as the property sought to be attached was the joint family property to which the nephews succeeded by right of survivorship. A second application was then made against the nephews and the widow of the deceased, for attachment and sale of property alleged to be the self-acquired property of the judgment-debtor. *Held* that the nephews were not the legal representatives of the deceased for the purposes of execution of the decree, and that the execution proceedings taken against them were consequently bad (a).

Held further that the nephews not being the legal representatives of the judgment-debtor, the execution proceedings taken against them were bad, and could not keep the decree alive as against the widow who was the legal representative of the deceased judgment-debtor (b). **Janendra Nath Basu v. Rani Nehalo Bibi**, 7 A.L.J. 512.

KNOX and KARAMAT HUSAIN, JJ.

References:—(a) 27 M. 106, *R.* (b) 3 A. 517; A.W.N. 1892, 241; 12 Bom. 427, *D.*

Civ. Pro. Code (1882)—(Continued).

(93) Ss. 234, 248—*Plea of limitation regarding a previous application for execution.* See EXECUTION OF DECREE, No. 13, 13 O. C. 90.

(93-a) S. 235. See Nos. 77 and 88, *supra*.

(94) Ss. 235, 238, 245 Applications under—Steps in aid of execution. See LIMITATION ACT (1877), No. 110, 14 C.W.N. 181.

(94-a) S. 238. See No. 94, *supra* and No. 116, *infra*.

(95) S. 244—*Decree, execution of—Interpretation.*

S. 244 of the Code pre-supposes a decree enforceable by the decree-holder, against a person between whom and the decree-holder the question has arisen, and does not apply to a question arising between a decree-holder and a person against whom there is no decree to be executed (a).

Hence, where, in a suit for sale upon a mortgage, a person was impleaded as defendant against whom no relief was claimed, *held* that a subsequent suit for redemption by him was not barred by S. 244, C.P.C., 1882. **Sheo Pargas Singh v. Nawab Singh**, 7 A.L.J. 264=5 Ind. Cas. 496.

RICHARDS and TUDBALL, JJ.

Reference:—(a) 23 A. 346, *F.*

(96) S. 244—*Evidence Act (I of 1872), S. 44—Suit and proceeding—Compromise—Fraud—Subsequent proceeding—Right to show that previous proceeding and compromise were in fraud of applicant's right.*

An application for setting aside a sale purported to have been signed by the appellant and her brothers. In that application, a compromise petition purporting to have been signed by all of them was presented. Subsequently the appellant presented this application for setting aside the sale.

Held, that she is entitled in this application to show that she had no part in the former proceeding, that the compromise was obtained behind her back and in fraud of her rights, and that it was not binding upon her, without having the compromise set aside either on review or in a regular suit. **Sreematy Asaban Banu v. Ananda Chandra Dutt**, 3 Ind. Cas. 116=14 C.W.N. 823.

CHITTY and CARNDUFF, JJ.

Reference:—27 C. 11=3 C.W.N. 660, *R.*

Civ. Pro. Code (1882)—(Continued).

- (97) *S. 244—Suit barred under S. 244—Plaint whether can be treated as execution application.*

A plaint in a suit barred under S. 244, C.P.C., 1882, can be treated as an execution application within the meaning of that section. **Poonthothath Ammalu Amma v. Othalakattil T. Mammi Kuttal**, 7 M.L.T. 428 = 6 Ind. Cas. 776.

SANKARAN NAIR and KRISHNASWAMI AIYAR, JJ.

- (98) *S. 244—Prior suit by father as trustee held barred by S. 244—Subsequent suit by sons to cover same property—Decision in prior suit—Whether concludes latter suit.*

Where a prior suit brought by the father as trustee to recover certain property was dismissed as having been barred by S. 244, C. P. C., 1882.

Held that a subsequent suit brought by the sons in the same capacity after the father's death was concluded by the decision in the prior suit. **Ramapayya v. Aitha Melanta**, 8 M.L.T. 221.

WALLIS and KRISHNASWAMI IYER, JJ.

- (99) *S. 244 and execution proceedings, whether applicable to cases under Act X of 1859—Suit by judgment-debtor whose property has been illegally sold, whether maintainable—Revenue Court, jurisdiction of, to sell under-tenure before selling moveables of judgment-debtor in execution of rent decree—Landlord and Tenant Procedure Act (X of 1859), S. 108.*

S. 244 of the C.P.C., 1882, and the sections which deal with proceedings after sale have no application to cases arising under Act X of 1859, and, therefore, the only remedy open to a judgment-debtor under that Act, whose property has been illegally sold, is by suit.

S. 108 of Act X of 1859 provides that an application for the sale of an under-tenure shall not be received, unless execution shall have been first taken out against any moveable property which the judgment-debtor may possess in the district, and the sale of such property shall have proved insufficient to satisfy the judgment. If there be a failure to follow the provisions of this section, the Court selling the property acts without jurisdiction. **Damodar Misra v. Iswar Chandra Chowdhury**, 7 Ind. Cas. 387.

WOODROFFE and TEUNON, JJ.

Reference:—10 W.R. 341 relied upon.

Civ. Pro. Code (1882)—(Continued).

- (100) *S. 244—Stranger auction-purchaser, suit against, to set aside sale not maintainable—Auction-purchaser not representative of decree-holder.*

It is well settled that, as between the judgment-debtor and the decree-holder, an objection to the sale in execution can only be taken in execution, and S. 244, C.P.C., prohibits a suit by a party or his representative against an auction-purchaser to raise a question which, as between the judgment-debtor and the decree-holder, must have been determined under that section. The auction-purchaser derives his rights from the sale, which the party to the execution proceeding should not be permitted to impeach except by application to the executing Court. A suit against an auction-purchaser is not maintainable, as S. 244 is a bar to set aside the sale except in a proceeding between the parties.

A stranger purchaser in execution of a money decree can never be treated as representative of the decree-holder. He purchases the rights of the judgment-debtor in the property attached, and not those of the decree-holder between whom and himself there is no privity of estate.

The true rule is that, where the decree is a mortgage-decree, the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money decree, a stranger purchasing the property obtains the rights of the judgment-debtor in the property, but is not the representative even of the judgment-debtor; still less can he be the representative of the decree-holder. **Nadamuni Narayana Iyengar v. Yeerabhadra Pillai**, 8 Ind. Cas. 429.

WALLIS and KRISHNASWAMI AIYAR, JJ.

- (100-a) *S. 244—First suit against one member of joint Hindu family—Subsequent suit against widow—Maintainability. See HINDU LAW (JOINT FAMILY), No. 6, 7 M.L.T. 211.*

- (101) *S. 244—Decree against father—Execution against son—Survivorship. See EXECUTION OF DECREE, No. 16, 6 Ind. Cas. 582.*

- (101-a) *S. 244—Validity of decree cannot be questioned in execution—Mortgage decree—Notification as to claim. See EXECUTION OF DECREE, No. 22-c, 8 Ind. Cas. 610.*

- (102) *S. 244—Application to set aside sale on ground that holding was not transferable—Limitation. See EXECUTION SALE, No. 2, 7 Ind. Cas. 48.*

Civ. Pro. Code (1882)—(Continued).

(102-a) S. 244—Application for setting aside sale—Fraud—Second appeal whether competent—Change in Code of 1908—Effect. See EXECUTION SALE, No. 5-a, 8 Ind. Cas. 3.

(102-b) S. 244. See Nos. 19 and 70, *supra* and Nos. 224 and 225, *infra*.

(103) Ss. 244, 248, 311—Non-service of notice on judgment-debtor, if ground for setting aside the sale—Effect of confirmation of sale. See RECEIVER, No. 3, 14 C.W.N. 560.

(104) Ss. 244, 252, 267—Decree—Execution proceedings—Legal representatives of the judgment-debtor—Plea that the property, survived to them by survivorship—The plea should be raised in execution proceedings—Sale—Purchaser cannot be met with the plea in a separate suit.

C sued M on a money bond. During the pendency of the suit, M having died, his widow R and his brother N were brought on the record as his legal representatives. The suit proceeded to a decree, which awarded the claim out of the property of M. Before, however, the decree was executed, both R and N died. C thereupon brought on the record the defendants as the legal representatives of M, and applied for execution of the decree by attachment and sale of the property in dispute. The defendants denied that they were legal representatives of M, and that they had any property of M which could be liable for the decree. The Court negatived the objections and sold the property which was purchased by the plaintiff. The plaintiff sued to recover possession from the defendants. The defendants contended that the property was joint family property of M and defendants, and that at his death it survived to the defendants. The plaintiff contended that the defendants were debarred by S. 244 of the Code of 1882 from asserting their title. The lower appellate Court disallowed the contention. On second appeal;—

Held, that, so far as the sale of the property by the Court at the decree-holder's instance as that of the deceased was concerned, the question was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under S. 252 of the Code. It was, therefore, a question in relation to them falling within S. 244 of the Code by reason of the explanation to S. 647. The defendants, were, therefore, bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

Civ. Pro. Code (1882)—(Continued).

On further contention that, whatever might have been the result if the decree-holder had been a party to the suit, the dispute now was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that, therefore, S. 244 did not apply.

Held, negativing the contention, that, though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed, and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor should not be allowed to attack the sale in a suit, because he was precluded by S. 244 from raising the question by, or relying upon it as a defence in, any proceedings other than those under S. 241 (a).

The test in all such cases is, whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser, affects the parties to the suit, and could have, as between them, been raised and determined under S. 244, and whether the auction-purchaser, though not a party to that suit, is a party interested in the result (b). **Gokulsingh Bhikaram Pardeshi v. Kisansingh Guru Laxmangir**, 12 Bom. L.R. 539=7 Ind. Cas. 457.

CHANDAVARKAR and KNIGHT, JJ.

References:—(a) L.R. 19 I.A. 166; 7 M. 255, F. (b) 25 Bom. 631; 3 Bom. L.R. 255, *Expl.*

(105) Ss. 244, 273, 276, 295—Mortgage of decree by decree-holder—Attachment of decree on same date by decree-holder's creditor—Subsequent attachments by other creditors—Priority—Withdrawal of first attachment—Rateable distribution—Rights of mortgagee of decree—Tien—Burden of proof.

The first defendant mortgaged a decree to the plaintiff on 3rd November, 1904. The tenth defendant, who had obtained a decree against the first defendant, on the file of the Sub-Judge's Court, attached the decree, and the order of attachment was communicated to the Munsiff

Civ. Pro. Code (1882)—(Continued).

on the same day as the date of the mortgage, viz., 3rd November, 1904. Subsequently defendants Nos. 11 and 12 also attached the same decree. The tenth defendant having afterwards withdrawn his attachment, the first defendant executed his own decree, and the amount realised was kept in deposit in Court. The plaintiff sued for the recovery of his mortgage amount from the amount in deposit in Court. Defendants Nos. 11 and 12 claimed priority :

Held, (1) that S. 244, Civ. Pro. Code, 1882, was no bar to the plaintiff's suit ;

(2) that the mortgage by first defendant to the plaintiff was not made " during the continuance of the attachment " so as to invalidate it under Ss. 273 and 276, C.P.C., 1882 ;

(3) that the receipt by the Munsif of the notice of attachment by tenth defendant was not a judicial act to justify the presumption that it was received at the earliest point of time on the date of receipt, and to cast on the private alienor the burden of proving that his transaction was prior ;

(4) that eleventh and twelfth defendants were not entitled to a rateable distribution of the amount in deposit in Court, as it is essential to a valid claim for rateable distribution that the assets should have been realised by the tenth defendant executing the first defendant's decree by way of executing his own decree ;

(5) that the plaintiff had a lien on the amount in deposit in Court and not merely a personal claim against the first defendant ; as a mortgagee is entitled to a charge upon the property which, through no fault of his, takes the place of the mortgaged property. **Yenkatrama Iyer v. Esumsa Rowthen**, 5 Ind. Cas. 92 = 7 M.L.J. 143 = 20 M.L.J. 330.

WHITE, C.J., and KRISHNASWAMI AIVAR, J.

(105-a) Ss. 244, 278—*Execution proceedings—Parties unnecessarily impleaded—Failure to prefer claim—Estoppel.*

Some persons, who were wrongly impleaded as defendants in execution proceedings, did not prefer any claim to plaintiff's attachment and sale of property therein :

Held, that they were not estopped, by the said circumstance, from making a claim in any subsequent suit or proceedings. **Akkamad Mohideen v. Sowmya Narayana Aiyengar**, 8 Ind. Cas. 161.

MUNRO and SANKARAN NAIR, JJ.

Civ. Pro. Code (1882)—(Continued).

(106) Ss. 244, 283—*Property attached in execution of decree—Property purchased while under attachment—Decree set aside—Separate suit maintainable—Representative.*

Where property is purchased during the continuance of an attachment, but the decree in pursuance of which that attachment was made is subsequently set aside, *held* that everything done in pursuance of that decree comes to an end and the purchaser cannot be said to be a purchaser pending a subsisting attachment so as to be the representative of the original judgment-debtor within the meaning of S. 244 of Act XIV of 1882. **Ghafoor Uddin v. Hamid Husain**, 7 A.L.J. 26 = 4 Ind. Cas. 406 = 32 A. 129.

STANLEY, C.J., and BANERJI, J.

(107) Ss. 244, 287, cl. (e)—*Application for amendment of sale proclamation—Appeal.*

An application by the judgment-debtor against a proceeding under S. 287, clause (e), C.P.C. (1892), to have the sale proclamation amended by inserting in it the proper value of the property advertised for sale, falls under S. 244, and is as such open to appeal (a).

Where an application is made by a debtor objecting to the value of the property as stated in the sale proclamation, it is certainly the duty of the Court executing the decree to make an enquiry and to satisfy itself that the amount stated in the sale proclamation is substantially correct. **Lachman Pershad Singh v. Ganga Pershad Singh**, 6 Ind. Cas. 180.

BRETT and SHARFUDDIN, JJ.

References : —(a) 30 C. 617 ; S C.W.N. 257 ; 12 C.W.N. 542, B'.

(108) Ss. 244, 305, 311—*Admission by judgment-debtor that sale proclamation had been issued—Time not granted to him—Subsequent application by him for setting aside sale—Estoppel.*

In an application by the judgment-debtor, under S. 305, C.P.C., 1882, he stated that a sale proclamation had been issued, and he offered to have the sale held, without the service of a fresh sale proclamation, if time was given to enable him to raise money to pay the judgment-debt. The application was refused and the sale took place. He then made an application for setting aside the sale on the ground of irregularity :

Civ. Pro. Code (1882)—(Continued).

Held, that there was no relinquishment of his right to question the validity of the sale, because the terms on which he offered to do so were accepted neither by the Court nor by the decree-holder, and that the application was, therefore, maintainable. **Enamuddin Jama-dar v. Abdul Jaffar Duftri**, 5 Ind. Cas. 489.

MOOKERJEE and TEUNON, JJ.

References:—2 C.L.J. 584; 25 W.R. 34, D.; 6 C.L.J. 62; 9 C.L.J. 251; 2 Ind. Cas. 338; 36 C. 422, R.

(109) *Ss. 244, 313—Saleable interest—Auction purchaser—Sale, set aside on what ground.*

An execution sale can be summarily set aside on the application of the auction purchaser under S. 313, C.P.C., only when the judgment-debtor has no saleable interest therein. No order can be made under that section when the judgment-debtor has an interest, however small, in the property sold.

In the absence of fraud or misrepresentation, an execution sale cannot be set aside under S. 244 merely on the ground that the auction purchaser thought that A and B were the judgment-debtors and he purchased the interest of both, whereas in fact A was the sole judgment-debtor and his interest alone passed at the sale. **Makhanchore Sarkar v. Nishind Gonai**, 10 C.L.J. 492 = 3 Ind. Cas. 433.

MOOKERJEE and VINCENT, JJ.

Reference:—28 G. 8, Appl.

(110) *Ss. 244, 629 Execution-proceedings—Review—Appeal.*

An order, passed on review of a previous order in an execution proceeding, is open to appeal, as it is an order under S. 244, C.P.C. (1882) relating to the execution of a decree. **Adhar Mandal v. Keshab Chandra Mana**, 5 Ind. Cas. 483.

BRETT and SHARFUDDIN, JJ.

(111) *Ss. 224, 612—Execution of decrees—Order negating exemption from arrest—Appellability—Powers of Court to release.*

An order dismissing the petition of a judgment-debtor, pleading exemption from arrest under S. 612, C.P.C., is an order under S. 244, C.P.C., as it determines a question between the parties to the decree relating to the execution of the decree, and is appealable.

A Judge, who has power to issue a warrant for the arrest of a judgment-debtor, has also power to issue orders for his release, if he is

Civ. Pro. Code (1882)—(Continued).

found to have been illegally arrested at a time when he was exempt from arrest. **Nayana Nalcken v. Hajaret Kibulai Syed Gulam**, 20 M.L.J. 136 = 5 Ind. Cas. 909 = 8 M.L.T. 122.

MUNRO and ABDUR RAHIM, JJ.

(111-a) S. 245. See No. 94, *supra*.

(112) *S. 248—Mortgage decree—Execution—Step-in-aid of execution—Assignment of mortgage—Application by assignee plaintiff to be brought on record—No prior application for order absolute—Transfer of Property Act (IV of 1882), S. 89—Civil Procedure Code (Act XIV of 1882), S. 248—Application in accordance with law.*

An application by an assignee of a mortgage decree-holder to be brought on the record, and for the issue of notice to the judgment-debtors under S. 248, Civ. Pro. Code, is a step-in-aid of execution, and is an application in accordance with the Law, though there was no application for an order under S. 89, Transfer of Property Act.

Obiter.—Applications praying for sale of property in execution of a mortgage decree, though not preceded by an application for an order under S. 89 Transfer of Property Act, may properly be regarded as applications impliedly asking for such an order. **Sreeakulam Venkatasubbiah v. Layaaru Dade Sahib**, 2 Ind. Cas. 133 = 8 M.L.T. 232.

SIR RALPH BENSON and MILLER, JJ.

Reference:—47 A. 625, R.

(113) *S. 248—Execution of decree—Limitation—Objection by judgment-debtor—Notice, service of, under S. 248, C.P.C., effect of—Opportunity to contest validity of order Estoppel.*

Mere service of notice upon a judgment-debtor under S. 248, C.P.C. of 1882, is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice (a).

Again, if an order for execution has been made without notice to the judgment-debtor, it is not sufficient to debar him from urging the objection of limitation (b).

The principle is that a party to an execution proceeding, who allows an order for execution to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of the order, cannot be

Civ. Pro. Code (1882)—(Continued).

permitted at a subsequent stage of the proceedings to re-open the whole matter in controversy (c).

Even though a notice may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent for him to appear and contend at that stage that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous.

A notice under S. 248 is not required to be issued upon an application for transfer of a decree. It must be issued by the Court which has seisin of the application for execution.

Consequently upon receipt of a notice under S. 248 irregularly issued, it was not only not the duty of the judgment-debtor to appear and urge the objection of limitation, but under the law it was impossible for him to take that step.

The judgment-debtor is not debarred from urging his objection on the ground of limitation in a subsequent application for execution. **Sripati Charan v. Belchambers**, 8 Ind. Cas. 22.

MOOKERJEE and SHARFUDDIN, JJ.

References :—(a) 10 W.R. 8 (F.B.); 3 C.L.J. 193. 14 C.W.N. 114; 3 Ind. Cas. 47, *Rel.* (b) 5 Ind. Cas. 59; 11 C.L.J. 357; 14 C.W.N. 433; 7 Ind. Cas. 55; 12 C.L.J. 312, *Rel.* (c) 8 C. 51; 11 C.L.R. 113; 8 I.A. 123; 6 A. 269; 7 A. 102, *R.*

(113-1) S. 248—Notice to show cause against enforcement of decree—Effect. See LIMITATION ACT, (1877), No. 102, 8 Ind. Cas. 663.

(113-a) S. 248—Application for time to prove service of notice under—Step-in-aid of execution. See LIMITATION ACT, (1877), No. 115, 5 Ind. Cas. 147.

(114) S. 248—Notice under—Whether process in execution. See ACT IX OF 1887 (PROV. SMALL CAUSE COURTS), No. 4, 7 M. L.T. 303.

(115) S. 248—Notice based upon defective application—Limitation. See CIV. PRO. CODE (1908), No. 170, 13 O.C. 303.

(115-c) S. 248. See Nos. 93 and 103, *supra*.

(116) *Ss. 248, 238—Transfer of Property Act (IV of 1882), S. 101—Rules made by High Court—Execution—Mortgage decree—S. 241 not extended to execution of mortgage decree.*

After the issue by the High Court of the Rules under S. 104 of the Transfer of Property

Civ. Pro. Code (1882)—(Continued).

Act, the provisions of S. 238, C.P.C., 1882, cannot be held to apply to proceedings in execution of mortgage decrees, that section not having been extended to such proceedings.

Therefore, a sale of the mortgaged property cannot be set aside on the ground that no notice, as required by S. 248, had been served on the judgment-debtors prior to the taking of proceedings in execution. **Keshab Chandra Kar v. Rajendra Nath Ghosh**, 5 Ind. Cas. 101.

BRETT and SHARFUDDIN, JJ.

References :—25 C. 703; 2 C.W.N. 353; 12 C. W.N. 282; 3 M.L.T. 202; 7 C.L.J. 590, *Rel. on*; 8 C.W.N. 1102; 25 C. 133; 31 C. 373, *R.*

(117) S. 252 (S. 52 of the present Code)—Decree obtained against wrong legal representative, whether executable against the estate in the hands of the true one—Execution of decree.

Where the plaintiff sued the widow on a promissory note executed by her husband and obtained a decree against the assets in her hands, but subsequently a will by the deceased was established, bequeathing the estate to his daughter's son.

Held, that, when a person is sued as the legal representative of a deceased person for the recovery of debt due by him, and the decree is given for money to be paid out of the assets of the deceased in the hands of the legal representative, the decree is none the less a decree against the legal representative. Under S. 252 of the Code of 1882, the decree can be executed against the legal representative, who was the defendant in the suit or his or her representatives.

Held, also, that, as the daughter's son is not a representative of the widow, the decree obtained against her cannot be executed against him (a). **Kallippan Servaikaran v. Varadarajulu**, 6 M.L.T. 199-33 M. 75-19 M.L.J. 651=3 Ind. Cas. 737.

MUNRO and ABDUR RAHIM, JJ.

References :—(a) 11 M. 408, *F.*; 9 M. 80, *D.*; 28 B. 215 (-23); 13 M.I.A. 270 (274); 15 B.L.R. 318 (330); 9 B. 169; 12 B. 247; 1881 P.R. 337, *R.*

(117-a) S. 252. See No. 104, *supra*.

(117-b) S. 253. See No. 196, *infra*.

(117-c) S. 255. See No. 19, *supra*.

(118) S. 257—Death of decree-holder, if relies judgment-debtor of duty of payment—Mode of payment—Delay in payment of instalment—Interest.

Civ. Pro. Code (1882)—(Continued).

The death of the decree-holder does not relieve the judgment-debtor of the duty of paying up the decretal debt in one of the several modes specified in S. 257, C.P.C., 1882. He should either deposit the amount in Court as directed in cl. (a) or should take directions from the Court under cl. (c).

Where the judgment-debtor, upon the death of the decree-holder, failed to deposit the balance due under an instalment decree till long after the date fixed for the payment of the instalment.

Held that the judgment-debtor was liable to pay interest for the period during which the instalment remained unpaid. **Narendra Chandra Lahiri v. Charu Chandra Singh**, 14 C.W. N. 146=5 Ind. Cas. 63.

SARFUDDIN and COXE, JJ.

(119) *S. 257-A—Agreement contained in an application signed by the parties but not verified before the Court, sanction of—Verification of an agreement under S. 257-A, necessary before sanction of Court—Complete agreement necessary before sanction.*

A decree was passed in favour of R.D. against M.B. in July, 1908. In November, 1908 an application was presented, signed by the parties and their pleaders, giving time to judgment-debtor and allowing a higher rate of interest than that provided in the decree. No action was taken upon this application on the date it was filed, but subsequently the decree-holder asked for time to summon the judgment-debtor personally in order to verify the application. No further action was taken on the application and the agreement remained unverified. In July, 1909, the decree-holders again applied for execution, entering therein a calculation based upon the terms of the agreement of November, 1908. The judgment-debtor objected to the enforcement of the agreement on the ground that it had been obtained from him under undue influence and could not be enforced, because it had not been verified by him in Court and also because the Court had not sanctioned it as required by S. 257-A of the C.P.C., 1882. The Court executing the decree held on evidence that the plea of undue influence was not made out and sanctioned the agreement.

Held that, as the decree-holders had not obtained the presence of the judgment-debtor in order to verify the agreement in Court, there was no such complete agreement between the parties as should have been sanctioned by the

Civ. Pro. Code (1882)—(Continued).

Court passing the decree after a period of more than eighteen months. **Raja Nureshar Baksh Singh v. Raghuber Dayal**, 7 Ind. Cas. 337.

EVANS and LINDSAY, JJ.

(129) *S. 257-A—Agreement by person other than judgment-debtor or his representative—Death of debtor—Representative not on record.*

Where the judgment-debtor is dead and his representative has not been brought upon the record, S. 257-A of the Code does not strike at an agreement to pay more than the judgment-debt by a person other than the judgment-debtor or his representative. **Lod Govinda Doss Krishna Doss v. Potti Naicken**, 8 M.L. T. 326.

ABDUR RAHIM and KRISHNASWAMI IYER, JJ.

References:—28 B. 383 (387) ; 23 B. 502, *F*.

(121) *Ss. 257-A, 259—Application under S. 258—Step-in-aid of execution—Applicability of S. 257-A to S. 88, Transfer of Property Act. See LIMITATION ACT (1877), No. 117, 7 A. L.J. 251.*

(122) *S. 258 (O. 21 R. 2, C.P.C. 1908)—Satisfaction of decree not certified—Pendency of proceedings in execution by decree-holder—Suit to declare that decree was satisfied and therefore non-executable—Maintainability—Revision.*

Held that a suit by a judgment-debtor to declare that the decree against him was satisfied by an uncertified adjustment out of Court, and that the decree can no longer be executed is maintainable, even during the pendency of execution proceedings started in the face of the uncertified adjustment (a).

Where the lower Court held that such a suit was not maintainable and dismissed the suit, *held*, that the Chief Court can interfere in revision (b). **Diwan Singh v. Amur Singh**, 16 P.R. 1910=18 P.W.R. 1910=5 Ind. Cas. 814.

REID, C.J., and ROBERTSON, J.

References:—(a) 21 C. 437, *not F.* ; 23 B. 502 ; 3 A. 598 ; 21 M. 409 ; 18 M. 26 ; and 26 P. R. 1908 (**F.B.**), *R.* (b) 75 P.R. 1900 (**F.B.**), *F.* and *Expt.*

(123) *S. 258—Decree—Execution—Adjustment of decree outside the Court—Adjustment not certified to the Court—Decree-holder acting under adjustment and receiving money under it for several years*

Civ. Pro. Code (1882)—(Continued).

—*Estoppel by conduct—Indian Evidence Act (I of 1872), S. 115—Fraudulent execution of decree—Criminal law.*

In execution of a decree, an adjustment of it outside the Court was pleaded. The adjustment not having been certified to the Court under S. 258 of the Code of 1882, it was contended that the Court could not recognise it as valid. The Court overruled the contention, holding that, as the decree-holder had acted upon the adjustment and received moneys under it, he was estopped by conduct under S. 115, Evidence Act, 1872. On appeal :—

Held, the view of the lower Court give the go-by to the plain language of the last paragraph of S. 258 of the Code.

S. 258 says that a Court, which is asked to execute a decree for money, shall not recognise for the purposes of execution any adjustment of it, whole or partial, or any payment, made outside the Court and not certified to it as required in the preceding part of the section. When the law directs that such an adjustment or payment "shall not be recognised" for the purposes of execution, it means that the adjustment or payment, as the case may be, should be treated as an invalid or void transaction, so far as the executing Court is concerned. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of S. 258 of the Code, enacts a special law for a special purpose, whereas S. 115, Evidence Act, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

Per Chandavarkar, J.—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law.

Per Heaton, J.—The purpose of S. 258 of the Code, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise, in this sense, that it, at the outset, assumes that what is not recorded as paid or adjusted, still remains unpaid or unadjusted. But it is still

Civ. Pro. Code (1882)—(Continued).

open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due, having been paid or adjusted; and it is still incumbent on the Court to go into the matter, if a contest on the point is raised. To state the result briefly, the final clause of S. 258 raises a presumption, but does not limit the jurisdiction of the Court. **Trimback Ramkrishna Ranade v. Hari Laxman Ranade**, 12 Bom. L.R. 666.

CHANDAVARKAR and HEATON, JJ.

(124) S. 258—Applicability of, to mortgage decree. See LIMITATION ACT, (1877), No. 120, 6 Ind. Cas. 43.

(125) S. 258—Nature of application under S. 87 or S. 89, Transfer of Property Act—Applicability of S. 258, C.P.C. See TRANSFER OF PROPERTY ACT, No. 62, 13 O.C. 137.

(126) S. 258—Applicability to mortgage decrees. See MORTGAGE (GENERAL), No. 27, 12 C.L.J. 65.

(127) S. 258—Payment out of Court before and after order absolute—Duty of Court. See MORTGAGE (GENERAL), No. 47, 7 Ind. Cas. 625.

(127-a) S. 258. See No. 121, *supra*.

(128) S. 260—Applicability of—Breach of an injunction.

Where the appellant was restrained by an injunction from taking water which the respondents carry through a *thodu*, but violated the injunction, and his property was consequently placed under attachment under S. 260, C.P.C.

Held that S. 260, C.P.C., applies equally to cases where a party is directed to carry out something, as well to cases where he is directed to abstain from doing an act. The terms of the first clause clearly refer to cases where a party is restrained from doing an act, and the operation of that clause is not limited to cases contemplated by the second clause. **Yelu Manikaran v. Pakarvoor Manakal Jatavedan Nambudrivad's**, L.R. Narayana Somayajipad, 7 M.L.T. 227 = 6 Ind. Cas. 289.

BENSON and SANKARAN NAIR, JJ.

Reference :—29 M. 314, *P*.

(129) S. 263—Occupation by judgment-debtor after execution—Fresh cause of action.

A defendant, who remains in actual occupation notwithstanding execution, must be regarded as a trespasser who commits a fresh

Civ. Pro. Code (1882)—(Continued).

act of dispossession and thus gives a fresh cause of action. **Maung Lu Gyi v. Maung Nyun Bu**, 8 Ind. Cas. 463.

LEWIS, J.

Reference :—(a) 8 C.W.N. 49, F.

(129-a) S. 266—Right to maintenance when attachable. See MAINTENANCE, No. 5, 12 C.L. J. 146.

(130) Ss. 266 (b) and 273—Attachment of right to future maintenance—Decree for maintenance, whether money-decree—Proper procedure in execution—Practice.

The decree for maintenance, is a right to future maintenance and cannot therefore be attached under S. 266 (b), nor can it be attached under S. 273 as a money-decree.

The proper procedure to be followed would be that laid down in *Monessur Dass v. Beer Pratap Sahu* (a). **Nanammal v. The Collector of Trichinopoly**, 20 M.L.J. 97=5 Ind. Cas. 579.

MUNRO and ABDUR RAHIM, JJ.

Reference :—(a) 15 W.R. 188.

(130-a) S. 267. See No. 101, *supra*.

(130-b) Ss. 268, 272, 278, 280 and 283—Attachment by prohibitory order—Removal of attachment—Declaratory suit—Discretion of Court, when to be interfered with—Specific Relief Act (I of 1877), s. 12.

S. 272 of the Code applies to the investigation of claims arising out of attachment by prohibitory order under S. 268, and, therefore, a party aggrieved by an order passed in the circumstances under S. 272 has a remedy under S. 283 of the Code (a).

The only difference between a suit under S. 283 of the Code and S. 42 of the Specific Relief Act is that, in the former case, the period of limitation is shorter.

Where a Court has exercised its discretion and granted a declaratory decree, the Appellate Court errs in interfering with the exercise of that discretion merely on the ground that the plaintiff had a remedy open to him other than the suit for a declaration. The appellate Court should not interfere with the exercise of that discretion, unless it is satisfied that the lower Court had not good grounds for exercising it. **Pitche Pillay v. Maung Pet**, 8 Ind. Cas. 608.

PARLETT, J.

References :—(a) 27 M. 67; 13 M.L.J. 467, approved, 4 B. 323, Disapproved.

Civ. Pro. Code (1882)—(Continued.)

(131) Ss. 268, 295—Execution—Attachment—Rateable distribution.

An allowance due to a judgment debtor was attached in execution of a decree, and the disburser of the allowance was directed to pay the amount of allowance into Court. But the disburser having failed to comply with the direction of the Court, the execution was struck off. Subsequently the allowance was realised in execution of the decrees of other creditors of the judgment-debtor, and the decree-holder, whose execution had been struck off, claimed rateable distribution.

Held, (1) that the direction of the Court to the disburser to pay the allowance into Court did not amount to an attachment of the allowance under S. 268 of Act XIV of 1882;

(2) that as the execution application was finally struck off, there was no right to rateable distribution of assets realised at the instance of other creditors. **Seeni Asan Usan Rowthen v. Karuppan Chetty**, 5 Ind. Cas. 145.

MILLER and SANKARAN NAIR, JJ.

Reference :—1 M. 383, F.

(132) Ss. 268, 295—Attachment—Injunction ordered—Execution application struck off, whether pending Claim for rateable distribution.

Plaintiff applied in April, 1900 for attachment of 1st Defendant's right to receive a monthly allowance and for an injunction directing the disburser of the allowance to pay it into Court as it fell due. The Court did not attach the right, but directed notice to issue as regards injunction and, on 4th May, 1900, made the order, as regards the injunction, absolute. Subsequently, payment not having been made, the Court struck off the plaintiff's execution application, on 18th July.

Held, that the order of 4th May cannot be taken as an order effecting an attachment under S. 268, C.P.C., 1882, and that the last order dated 18th July disposed of the application finally, and that consequently plaintiffs had no right to claim rateable distribution. **T. Ranganatha Tawkar v. T. Seetharama Chetty**, 7 M.L.T. 110=5 Ind. Cas. 820.

MILLER and SANKARAN NAIR, JJ.

Reference :—1 M. 383, F.

(133) S. 273—"Decree for money"—Mortgage decree, if is a decree for money.

Civ. Pro. Code (1882)—(Continued).

An ordinary mortgage-decree is not a decree for money within S. 273 of the Code. **Macnaghten v. Surja Prasad**, 11 C.L.J. 78=5 Ind. Cas. 302.

(GHOSE and HILL, JJ.)

(134) S. 273—*Assignment of decree Attachment, effect of, on execution application by assignee.*

Where a decree of the District Court was transferred to A. and he applied for execution of the same, but it was in the meanwhile attached under S. 273, C.P.C., by a Munsiff's Court, and the District Court consequently rejected the execution application on the ground that the decree could not be executed owing to the attachment.

Held, that the order was right. The terms of second para. of S. 273 are imperative, and the District Court had no alternative but to stay execution and refuse A's application. A's remedy was to profer a claim in the Munsiff's Court. **Chittaloor Yerra Musala Reddi v. Pathangi Ramaiya and others**, 7. M.L.T. 83.

(MUNRO and ABDUR RAHIM, JJ.)

(134-a) S. 273. See Nos. 91, 105 and 130, *supra*.

(134-b) S. 273 (b)—Application by decree-holder to have attached decree executed—Step in-aid of execution. See LIMITATION ACT (1977), No. 113, 8 Ind. Cas. 675.

(135) S. 276—*Attachment—Private alienation, what is—Its effect—Alienation in performance of a direction by the Court, whether private alienation—Sale in pursuance of a contract anterior to attachment—Its validity—Collusive decree—Proceedings in execution—Alienation pending attachment, how far affected.*

1. Under S. 276, a private alienation of property attached during the continuance of the attachment is void against all claims enforceable under the attachment.

2. An alienation, though strictly an act of parties, is deemed to be not a private alienation, if it is in performance of a direction, of the Court (a). But, where there is no such direction, the mere fact of there being a prior agreement which obliges a party to carry it out by the execution of a conveyance cannot render the alienation other than private (b).

3. A sale in pursuance of a contract anterior to the attachment of property (under S. 276) is

Civ. Pro. Code (1882)—(Continued).

not void against claims under the attachment which are not enforceable against a prior contract to sell (c).

4. Where a decree was collusive, and the decree itself was brought about with a view to defraud A who has contracted to purchase the property of B, then A's purchase of the property must be unaffected by proceedings under a collusive decree obtained against B. **Bapineedu v. Venkayya**, 8 M.L.T. 197.

(DENSON and KRISHNASWAMY IYER, JJ.)

References:—(a) 4 A. 219, R. (b) 8 I.A. 65, R. (c) 14 L.J. Ch. 8 and 7th Edition, Vol. II, p. 1030, R.

(135-a) S. 276. See No. 105, *supra*.

(135-b) S. 278. See No. 105-a, *supra*.

(136) Ss. 278, 280—Investigation under S. 280—*Ex-parte* order—Adjudication on the merits—Regular suit—Limitation. See LIMITATION ACT (1977), No. 41, 26 P.R. 1910.

(137) Ss. 278, 281, 283—*Claim proceedings, order in—Suit by aggrieved party instituted after a year—Judgment-debtor not a party in claim proceedings—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 11.*

Where the judgment-debtor was not a party to claim proceedings, the party aggrieved by the order therein can institute a suit to establish his right after the expiry of a year from the date of the order, and the suit will not be barred under Art. 11, Limitation Act. **Sadaya Pillai v. Amurthachari**, 8 M.L.T. 417.

(ABDUR RAHIM and KRISHNASWAMI IYER, JJ.)

References:—15 C. 674; 3 C.L.J. 381; 15 C. 521 (525); 15 I.A. 123, R.; 29 M. 225; 16 M.L.J. 136; 25 M. 72; 12 M.L.J. 411, R. and *Expl.* 4 M.H.C.R. 47-, D.

(138) Ss. 278, 281, 283—*Claim by mortgagee—Adjudication in favour of claimant—Failure of unsuccessful party to file suit within one year—Suit by mortgagee—Impeachment of mortgage on grounds urged in claim proceedings and found against—Ex-stoppel—Scope of order under S. 283—Adjudication as to right to physical possession—Title.*

A simple money decree-holder having got attached property subject to a mortgage in favour of plaintiff, the mortgagee put in a claim under S. 278, C.P.C. (Act XIV of 1882). The decree-holder impeached the mortgage on the ground

Civ. Pro. Code (1882)—(Continued).

that it was invalid for want of sanction under S. 257-A, C.P.C., and that it was a sham transaction. These points were found against the decree-holder and the claim was allowed. To these proceedings the mortgagor was not a party. No suit was brought by the decree-holder against the said order. But he purchased the property at the Court sale and then assigned his rights to the appellant. In a suit by the mortgagee to recover money due on his mortgage,

Held, (1) that it was not open to the appellant to impeach the mortgage on grounds urged by his assignor in the claim proceedings; (2) that the fact that the appellant's assignor became the representative of the judgment-debtor who was no party to the claim proceedings, did not override the estoppel or relieve against the disability imposed by S. 283, C.P.C. (a).

(3) that an order in claim proceedings is not restricted to the determination of rights relative to physical possession, but can also determine questions of title. **Ramu Aiyar v. Palaniappa Chetty**, 8 M.L.T. 381.

WHITE, C.J., and AYLING, J.

References:—(a) 15 C. 521; 15 I.A. 123; 28 M. 87; 31 M. 177; 3 M.L.T. 306; 30 M. 335; 17 M.L.J. 95; 2 M.L.T. 116 (F.B.); 31 M. 163; 3 M.L.T. 256; 18 M.L.J. 26, *F. & Expt.*; 23 M. 227; 21 I. A. 17; 4 C.W.N. 227; 16 C. 682; 16 I. A. 107, *It*.

(138-a) S. 280. See No. 136, *supra*.

(138-a-i) S. 281. See Nos. 137 & 138, *supra*.

(138-b) S. 283—Suit under—Dispossession—Discontinuance of possession—Extinguishment of title—Decree for possession barred—Effect. See LIMITATION ACT, (1877), No. 95, 12 Bom. L.R. 956.

(139) S. 283—Decree against father alone—Partition prior to decree—Attachment of joint family property—Son's share released—Right of suit under S. 283. See HINDU LAW (DEBTS), No. 13, 8 M.L.T. 349.

(139-a) S. 283. See Nos. 106, 137 & 138, *supra*.

(140) Ss. 285, 295—Rateable distribution—Simultaneous execution of decree—"Shall determine claim and objection to attachment" meaning of—Scope of S. 285, C.P.C., 1882.

R got a decree for money against I in Sub-Judge's Court at Faridpur, and, on the 21st

Civ. Pro. Code (1882)—(Continued).

November, 1908, purchased the attached property of the judgment-debtor, and the amount realised by the sale was set off against the decree. In the meanwhile, G had got a decree for money against I in the Munsiff's Court at Goalundo, and applied for execution against the same property. On the 19th September, 1909, he applied to the Sub-Judge at Faridpur for an order on the Munsiff at Goalundo not to sell the property, and also for rateable distribution of the assets which might be realized by sale in the Faridpur Court. The first prayer was rejected, and it was ordered that the second prayer might be considered when assets were realised. G then applied to the Goalundo Court for transmission of his execution case to the Faridpur Court, which application was refused. He then applied to the Faridpur Court for rateable distribution. That application was granted, and R was directed to refund the sum which was set off against his decree.

Held, that, as G had made no application, prior to the realization of the assets, for execution of his decree, to the Faridpur Court, he was not entitled to a rateable distribution under S. 295, C.P.C., 1882, and that his application to the Faridpur Court for an order on the Goalundo Court not to sell the properties cannot be deemed to be an application for execution of his decree (a).

A decree cannot be executed simultaneously against the same property in more than one Court.

S. 285, C.P.C., 1882, is governed by the immediately preceding sections with which it must be read, and the words "shall determine any claim thereto and any objection to the attachment thereof" mean any claim or objection of the sort, which can be summarily enquired into and decided in execution proceedings (b).

Therefore, an application for rateable distribution cannot be deemed to be an application for determination of any claim to attached property, or of any objection to the attachment thereof, within the meaning of S. 295, Civ. Pro. Code.

If, in contravention of S. 285, an inferior Court, in ignorance of the proceedings pending before the superior Court, proceeds with execution, and brings a property to sale, the superior Court can adopt the proceedings as if they were taken by itself, and is competent to

Civ. Pro. Code (1882)—(Continued).

determine any claim for rateable distribution of the assets realised by the sale (c). **Ramajash Agarwala v. Guru Charan Sen**, 3 Ind. Cas. 105 = 13 C.W.N. 396 = 11 C.L.J. 69.

MUKERJEE and VINCENT, JJ.

References:—(a) 21 C. 200; 2 C.W.N. 126, R. (b) L. Bur. Judgments (1893-1900), p. 161. (c) 12 C. 333; 29 C. 773 = 1 C.L.J. 97, F.

(141) *Ss. 287, 311—Misrepresentation of value of property in sale proclamation—Decree-holder bidding through benamidar—Substantial injury—Fraud—Setting aside sale.*

Held, that the conduct on the part of the decree-holder, who has obtained leave to bid at the auction, in offering bids through a benamidar, considerably in excess of the value which he deliberately stated in the sale proclamation, is calculated to mislead and is consequently fraudulent. **Nanda Kumar Saha v. Gobind Mohan Das**, 6 Ind. Cas. 135.

MOOKERJEE and TEUNON, JJ.

References:—20 A. 112; 2 C.W.N. 550, (P.C.); 25 L.A. 116, R.

(141-a) S. 287 cl. (c). See No. 107, *supra*.

(142) *S. 291—Mortgage-sale, application of the section to, if ultra vires—Guardian ad litem, if may waive issue of fresh sale-proclamation for adjourned sale—Transfer of Property Act (IV of 1882), Ss. 89, 101.*

S. 291 of the Code of 1882, which was applied to mortgage sales by rules framed by the High Court under S. 101, Transfer of Property Act, is not in conflict with the provisions of S. 89 of the Transfer of Property Act. (a).

Where the Court ordered postponement of a mortgage sale for two months, upon the judgment-debtors undertaking to pay Rs. 200 to the decree-holders as compensation and waiving all right to the issue of fresh sale-proclamation;

Held—That the order was not passed without jurisdiction.

A guardian *ad litem* of minor judgment-debtors may, with a view to obtaining postponement of a sale, consent to waive the publication of fresh sale-proclamation. **Bepin Behary Mitter v. Jotindra Nath Gosh**, 14 C.W.N. 1019.

JENKINS, C.J., and DOSS, J.

References:—(a) 31 C. 373 (1904), explained; and 8 C.W.N. 684; s.c. 31 C. 803 (1904), R.

Civ. Pro. Code (1882)—(Continued).

(143) *S. 291—Power of Court to adjourn sale—Application by guardian of minor judgment-debtor—Guardian acting in good faith, whether has power to consent to waive fresh proclamation—Transfer of Property Act (IV of 1882), S. 89—Conflict with S. 299, Civ. Pro. Code—Estoppel—Party obtaining benefit of order not to ask same to be disregarded.*

There is nothing to prevent the guardian *ad litem* of a minor judgment-debtor, acting in good faith, from giving the consent contemplated by S. 291, Civ. Pro. Code (1882), so as to bind the minor thereby; that is, the guardian acting in good faith has the power to waive a fresh proclamation and have the sale adjourned.

There is no conflict between S. 89 of the Transfer of Property Act and S. 291, Civ. Pro. Code, 1882.

It is not ordinarily open to a party, who has obtained and enjoyed the benefit of an erroneous order, afterwards to turn round and ask that the order should be treated as a nullity and disregarded. **Bepin Behary Mitter v. Jotindra Nath Ghosh**, 6 Ind. Cas. 813.

JENKINS, C.J., and DOSS, J.

(144) *S. 295—Rateable distribution—Meaning of "against the same judgment-debtor"—New ground taken in appeal.*

The words "against the same judgment-debtor," in S. 295, C.P.C., do not include the judgment-debtor of the judgment-creditor against whose property rateable distribution is claimed. Where a decree-holder claimed rateable distribution in the lower Court, he will not be allowed before the appellate Court, to shift his ground and contend that he was a prior attaching-creditor and so entitled to the whole sale-proceeds. **Ellusah v. Ruppū Rangayyan**, 18 M.L.J. 562 = 7 M.L.T. 126.

WHITE, C.J., and SANKARAN NAIR, J.

(145) *S. 295—Decree—Execution—Rateable distribution—Order—Appeal from order.*

No appeal lies from an order passed under S. 295. **Maganlal Mulji v. Bhogilal Naranji**, 12 Bom. L.R. 365.

CHANDAVARKAR and KNIGHT, JJ.

(145-a) S. 295. See Nos. 89, 105, 131, 132 and 140, *supra*.

(146) *Ss. 295, 315—Rateable distribution—Suit for recovery of amount—Consideration, failure of—Limitation.*

Civ. Pro. Code (1882)—(Continued).

S. 315, C.P.C. is wide enough to entitle a person to recover money rateably distributed.

A suit for recovery of purchase money on a failure of consideration is within time, if brought within three years from the date on which the consideration failed. **Ramakrishna Iyer v. A.L.R.M.N. Palaniappa Chettiar**, 7 M.L. T. 232.

MUNRO and SANKARAN NAIR, JJ.

(147) Ss. 295, 622—*One decree against the sons of a deceased debtor, and another against the deceased—Whether judgment debtor same under S. 295.*

Where the petitioner obtained a decree against the sons of M to be satisfied out of the assets of the family in their hands, and the respondent obtained a decree against M himself, held that the judgment-debtors under both the decrees were not the same within S. 295, C.P.C. (1882) (a). The fact that the two decrees are to be realized out of the family property is not decisive of the question against whom the decrees are made. When a decree is obtained against the legal representatives of a deceased man, the legal representatives are the judgment-debtors, and not the estate of the deceased (b). **Srinivasiengar v. Kanthimathi Ammal**, 7 M.L.T. 157 5 Ind. Cas. 917.

ABDUR RAHIM, J.

References:—(a) 25 B. 494, applied. (b) 19 M.L.J. 651, F.

(147-a) S. 305. See No. 108, *supra*.

(148) Ss. 306 to 317—*Auction sale vitiated by fraud and misrepresentation—Suit by certified purchaser to set aside sale—Maintainability—Rights of benamidar—Limitation Act (1877) Arts. 12, 95, 120—Acceptance of bid by court-officer—Effect.*

Where the description of property in the sale proclamation is false and misleading and was deliberately so given with a view to obtain a much greater price for the property than what it could have fetched if the true nature of the judgment-debtor's tenure was disclosed, this may amount to fraud and misrepresentation vitiating the sale.

A benami transaction does not vest any title to an immoveable property, the subject of such a transaction, in the benamidar, and therefore such a person cannot maintain a suit which is based on title, such as a suit in ejectment (a).

Civ. Pro. Code (1882)—(Continued).

A benamidar properly so called is not a trustee, for he is not the owner of the legal estate, although he holds the property for the benefit of the real owner; nor can a trustee, in whom the legal estate is vested, properly be called a benamidar. Similarly it would be a misnomer to call an agent, who has entered into a contract but without disclosing the fact that he is an agent, benamidar of his principal in the sense of S. 551 (b).

Though the sale is *in invitum*, there is no reason why the acceptance of the bid by the officer of the Court should not have the effect of a contract with such officer, simply because the rights and liabilities arising under it are regulated in many respects by the special provisions of the Civ. Pro. Code.

The policy underlying Ss. 306 to 317 of the Code of 1882 is to recognise the certified purchaser as the proper person to seek to set aside a fraudulent sale (c).

A suit by the certified purchaser to set aside a fraudulent sale is governed by Art. 95, Limitation Act (d). **Yenkata Suryanarayana Jagapathiraju v. Goluguri Bapiraju**, 8 M. L.T. 151.

ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 16 C. 364; 35 C. 551; 34 C. 717; 30 M. 215; 20 M. 195; 30 C. 265; R. (b) 30 M. 215, R. (c) 22 B. 672; 12 B. 594, R. (d) 5 C.L.J. 385, 1 *app.*

(148-a) S. 307. See No. 148, *supra*.

(148-b) S. 308. See No. 148, *supra*.

(148-c) S. 309. See No. 148, *supra*.

(148-d) S. 310. See No. 148, *supra*.

(149) S. 310.1—*Sale, setting aside of—Notice necessary or not—Auction-purchaser entitled to notice.*

A sale in execution of a decree ought not to be set aside under S. 310-A, C.P.C. (1882), without notice to the auction purchaser and an opportunity afforded to him to contest the validity of the application. **Kripali Singh v. Pairoo Raut**, 11 C.L.J. 86—5 Ind. Cas. 305.

MOOKERJEE and VINCENT, JJ.

References:—1 C.W.N. 114; 5 C.W.N. 63, *appl.* 1 C.W.N. 161; S.N. *Expl.* and *doubted*.

(150) S. 310.1—*Civil Procedure Code (Act V of 1908), O. XXI, R. 89—Sale of occupancy holding—Possession of tenant of portion of holding—Rent decree against purchaser—Sale of holding—Right of old tenant to save by deposit of decretal amount.*

Civ. Pro. Code (1882)—(Continued).

The purchaser of an occupancy holding, in execution of a rent decree, succeeded in getting possession of only a portion of the holding, the other portion continuing to be occupied by the old tenant. In execution of another rent decree against the purchaser, the holding was again sold :

Held, that the old tenant, who retained a portion of the holding in his possession, is entitled to make a deposit under S. 310-A, Civ. Pro. Code, 1882, and to have the sale set aside. **Janoki Nath Chakravarti v. Kali Kumar Chakravarti**, 5 Ind. Cas. 561.

CASPERSZ and DOSS, JJ.

Reference :—8 C.W.N. 232, R.

(151) S. 310-A—Deposit by co-tenant—Sale set aside—Liability of other co-tenants to contribution. See CONTRACT ACT, No. 27, 14 C.W.N. 945.

(152) S. 310-A—Order setting aside sale—Purchaser's right to sue for possession more than a year after the order. See LIMITATION ACT (1877), No. 1, 7 A.L.J. 937.

(153) S. 311—Auction-sale—Fraud—Irregularity and fraud in conducting sale in execution of decree—Proof of fraud to be clear and specific—Onus of proof—Inadequacy of price fetched no proof of fraud—Arrangement between persons not to bid against each other no "fraud"—Incompetency of Division Bench to re-open questions decided by a Single Bench in the order of reference to a Division Bench.

Certain property of J was attached and sold in execution of a decree passed against him in favour of M, and purchased by S in auction. J applied for cancellation of the sale on two grounds—

(1) Irregularities in connection with the proclamation and conduct of the sale.

(2) Collusion between the purchaser S who was a relation of the Nazir, the Nazir and the decree-holder M, as a consequence of which two causes it was alleged the property which was not less than Rs. 18,000 in value was knocked down to S for only Rs. 1,500.

The District Judge found against J as to ground (1) and dismissed the application.

On appeal to the Chief Court, Chatterji, J. concurred in this finding, but remanded the case for enquiry as to ground No. (2) relating to the alleged fraud.

Civ. Pro. Code (1882)—(Continued).

The District Judge in his return found :—

(1) That the Nazir was really ill on the day of the sale.

(2) That the Nazir and the auction-purchaser S were connections by marriage, and that the allegation that there was enmity between the Nazir and the objector was false.

(3) That the intrinsic value of the property was about Rs. 18,000 at the time of sale, though it was knocked down for Rs. 1,500 only.

(4) That there were reasons why this property should have been sold at a sum which *prima facie* appears to be very inadequate.

(5) That, despite all these facts, there is no proof of the fraud alleged.

On the return coming up again before Chatterji, J., the learned Judge referred the case to a Division Bench.

Held, by the Division Bench—

(1) That it had no power to re-open the question of the alleged irregularities upon which Chatterji, J. had given his decision sitting as Single Bench.

(2) The onus of proving fraud rests upon the party alleging it, and that in every case a plea of fraud must be precise and definite in its particulars.

(3) Fraud is not to be lightly presumed, but must be established by clear and definite evidence. And in the present case, though it is impossible to deny circumstances which suggest collusion and fraud on the part of the auction-purchaser, the decree-holder and the District Nazir, still positive proof of such fraud is wanting.

(4) That there were many reasons why bidders should not have been forthcoming at the sale, and therefore the price fetched (Rs. 1,500) could not be considered as an inadequate price.

(5) Assuming for the sake of argument that M, the decree-holder, and S, the auction-purchaser, actually conspired together not to bid against each other (a fact which is by no means established on the evidence), fraud would not thereby be established. In such cases all that can be required of purchasers is that they should abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. **Pt. Sewa Dat Pershad v. Ghulam Nabl**, 150 P.W.R. 1909.

ROBERTSON and RATTIGAN, JJ.

Reference :—23 M. 233 (P.C.) F.

Civ. Pro. Code (1882)—(Continued).

- (154) *S. 311—Execution of decree—Contribution suit—Decree passed severally against debtors—Sale of joint property of debtors in execution—Irregularity.*

In execution of a decree passed against several persons severally, a property held by them jointly was sold: *Held*, that this was a material irregularity and, if substantial loss was the result of it, the sale ought to be set aside. **Surendra Nath Pal v. Akhoy Kumar Pal**, 5 Ind. Cas. 647.

BRETT and SHARFUDDIN, JJ.

- (155) *S. 311—Sale in execution—Interim stay by appellate Court—Sale completed before stay order communicated—Effect.*

In an application to set aside a sale under S. 311, C.P.C., the appellate Court ordered stay of the sale on petitioner depositing Rs. 75,000 within a month. Before the order of stay of sale was communicated to the lower Court, the sale was completed. On objection being taken that the power of the lower Court was suspended on the High Court passing the order, *held*, that the order only become effective when communicated to the lower Court and that the sale was valid and not liable to be set aside (*a*). **Muthu Kumarasamy v. Kuppusamy**, 6 M.L.T. 159 = 3 Ind. Cas. 82 = 33 M. 74.

WHITE, C.J., and ABDUR RAHIM, J.

References:—(*a*) 1 C.W.N. 226, *F.*; 33 C. 927, *D*.

- (156) *S. 311—Application to set aside sale—Dismissal for default—Appeal—Adjournment—Illness.*

An order dismissing an application under S. 311, C.P.C., on the ground of the non-appearance of the applicant, is appealable.

Where the parties were ready with their witnesses, but the case was adjourned for want of time, and, on the date fixed for hearing, the applicant wanted time on the ground of illness supported by a medical certificate from a Civil Hospital Assistant, but the Court refused the application.

Held—That, in the circumstances of the case, the order was bad, and the case was remanded. **Broja Sundar Roy Chowdhury v. Moti Lal Mozumdar**, 14 C.W.N. 573 = 5 Ind. Cas. 493.

MUKERJEE and TEUNON, JJ.

- (157) *S. 311—Formalities to be observed preliminary to sale, non-compliance with—Effect—Error in warrant of attachment, effect of—*

Civ. Pro. Code (1882)—(Continued).

Application to set aside sale on the ground of irregularity—Limitation. See **EXECUTION OF DECREE**, No. 2, 40 P.R. 1910.

- (158) *S. 311—Application to set aside sale—Effect of minority.* See **LIMITATION ACT**. (1877), No. 9, 5 P.L.R. 1910.

(158-*a*) *S. 311.* See Nos. 64, 103, 108, 141 and 148, *supra*.

(158-*b*) *S. 312.* See Nos. 64 and 148, *supra*.

(158-*c*) *S. 313.* See Nos. 109 and 148, *supra*.

- (159) *Ss. 313, 315—Sale set aside, judgment-debtor having no saleable interest—Suit for refund of purchase-money—Maintainability—Doctrine of caveat emptor—Limitation—Limitation Act (XV of 1877), Sch. II, Art 62.*

When a sale of immoveable property in execution of a decree is set aside on the ground that the judgment-debtor had no saleable interest in the property sold, a suit by the purchaser to recover the purchase-money is maintainable. 12 W.R. (**F.B.**), Rul. 8 and 3 C. 806 have no application to cases arising under the Civil Procedure Code of 1882.

S. 315 of the Code of 1882 is no bar to a suit by the purchaser to recover his purchase-money (*a*).

Such a suit would be governed by Art. 62, Sch. II, Limitation Act (1877) (*b*). **Ram Kumar Shaha Poddar v. Ram Gour Shaha Chowdhury**, 13 C.W.N. 1080 = 2 Ind. Cas. 559 = 10 C.L.J. 558 = 37 C. 67.

COXE and CHATTERJEE, JJ.

References:—(*a*) 5 C.W.N. 240; 7 C.W.N. 105, *F.*; 17 M. 228, *not F.* (*b*) 19 O. 123, *relied on*.

- (159-*a*) *S. 314.* See No. 148, *supra*.

(159-*b*) *S. 315.* See Nos. 146, 148 and 159, *supra*.

- (160) *S. 316—When title rests in auction purchaser—Confirmation of sale—Sale certificate.*

In an auction purchase the title vests on the date of the confirmation of sale, no matter when the sale certificate may issue. There is no period fixed during which the auction purchaser has to make an application to obtain a sale certificate (*a*). **Saig Ram v. Narain Das**, 5 Ind. Cas. 263.

TUDBALL, J.

References:—(*a*) 19 A. 188; 27 B. 334, *R*.

Civ. Pro. Code (1882)—(Continued).

(161) *S. 316—Auction-purchaser—Title commences from the date of sale certificate—Right to realize rents and profits falling due before confirmation of sale.*

Under S. 316 of the Code of 1882, title to the property sold vests in the auction-purchaser from the date of the certificate of sale and not before. Therefore an auction-purchaser is not entitled, under the old law, to recover rent of premises purchased by him falling due before the confirmation (a). **Shiam Lal v. Nathe Lal**, 7 Ind. Cas. 65.

JOHN STANLEY, C. J., and GRIFFIN, J.

References :—(a) 24 A. 475 ; (1902) A.W.N. 145 ; 15 C. 516, P.

(161-a) *S. 316—Title of auction-purchaser—Sale by judgment-debtor after auction sale but before confirmation—Effect. See MORTGAGE (GENERAL), No. 53, 8 Ind. Cas. 657.*

(162) *S. 316—Scope and effect—Change of law in S. 65 of the Code of 1908. See PRE-EMPTION, No. 34, 7 A.L.J. 893.*

(162-a) *S. 316. See No. 148, supra.*

(163) *S. 317—Purchase by decree-holder without leave—Defendant a benamidar—Suit for recovery of money, maintainability of—Suit for money had and received.*

The plaintiffs put up certain property of their judgment-debtor to sale. They applied for leave to bid, but the Court refused the application. They then, according to the finding of the Court, purchased the property in the name of the defendant who promised to convey it to them. Upon the defendant's refusal to convey, they brought this suit for specific performance of the contract of sale, or in the alternative for recovery of the money advanced. The first relief was subsequently withdrawn. *Held* that the money could not be recovered as money lent, as in fact no money was lent. *Held* further that even if the suit could be treated as a suit for money received by the defendant for the plaintiffs, the plaintiffs could not succeed except by showing that the defendant made the purchase on their behalf. Such a suit being prohibited by S. 317, C.P.C. (1882), was not maintainable. **Raghunadan Lal v. Matru Mal**, 7 A.L.J. 623—6 Ind. Cas. 404.

RICHARDS and TUDBALI, JJ.

(164) *S. 317—Auction sale—Purchase by one of joint decree-holders on behalf of all—Certificate in the name of the purchaser alone*

Civ. Pro. Code (1882)—(Continued).

—Benami purchase—Non-applicability of S. 317.

The plaintiff and the defendant were both joint decree-holders. The plaintiff being a minor, execution was taken out by the defendant, and the property purchased in his name alone. The plaintiff, alleging that the purchase had been made on behalf of both of them, claimed a moiety of his share from the defendant :

Held, that the suit was not barred by S. 317, C.P.C. (1882) as the purchase could not be deemed to be a *benami* one, and the object of the section was to put an end to such purchases only. **Naipal Sonar v. Sheo Narain Sonar**, 6 Ind. Cas. 374.

BANERJI, J.

References :—29 A. 557 ; A.W.N. (1907) 166, P.

(164-a) *S. 317—Auction-purchaser—Mortgagee of the auction-purchaser—Mortgagee can claim protection of S. 317—Plea of bona fide purchaser for value without notice—Transfer of Property Act (IV of 1882), S. 11—Reasonable Cause—Constructive Notice.*

H, a party to the decree in execution of which the property in dispute was sold at a Court auction, purchased it *benami* in the name of A, and advanced him Rs. 9,600, from which Rs. 9,300 were paid as the price of the property. The remainder Rs. 300 and Rs. 1,100 more which A obtained from H were spent in repairs to the house. The house underwent extensive repairs, to meet the costs of which A mortgaged it to M, who claimed to be a *bona fide* purchaser for value without notice of H's title. All through the time H remained in possession of the house. Subsequently she sued both A and M for a declaration that she was entitled to the property free of all encumbrances. During the pendency of the suit A, and later on his legal representative, his widow, died ; and no one was brought on the record to represent him.—

Held (1) that the suit was not maintainable in view of the provisions of S. 317 of the C. P. C. of 1882, for M, the mortgagee, claiming under the Court-sale purchaser A, enjoyed the same immunity from suit as his mortgagor A (a).

(2) That M's plea of *bona fide* purchaser for value without notice was also a good defence to the suit.

Civ. Pro. Code (1882)—(Continued).

The doctrine of constructive notice applies in two cases : first, where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an enquiry after the charge on incumbrance of which he actually knew ; and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged and designedly abstained from enquiring for the very purpose of avoiding notice (b).

The expression "reasonable care &c." in S. 41 of the Transfer of Property Act, 1882, means that, although a purchaser of property is under no legal obligation to investigate his vendor's title, yet, in dealing with real property as in other matters of business, regard is had to the usual course of business ; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.

The occupation of property which has not come to the knowledge of the party charged is not a constructive notice of any interest in the property (c). **Manji Karimbhai v. Hoorbai**, 12 Bom. L.R. 1014.

SCOTT, C.J., and ROBERTSON, J.

References:—(a) 8 Bom. L.R. 873, R. (b) (1813) Hare, 43, R. (c) (1874) 2 Vest. Jr. 437 ; (1809) 16 Ves. Jr. 219 ; (1816) 1 Mer. 282, R.

(164-a-i) S. 317—Suit for specific performance and possession against certified purchaser—Amendment of plaint—Damages.

Plaintiff, a minor, sued by his next friend for specific performance of an agreement by defendant, who had promised to purchase certain lands in a Court auction for the minor and to deliver the same to him, and also for possession of those lands.

Held, that the suit for specific performance and possession was barred by S. 317, C.P.C.

Held, also, that, as the plaintiff was a minor, the plaint should be allowed to be amended by the insertion of a prayer for damages. **Ponnu-sami v. Vithilingam Pillai**, 8 Ind. Cas. 258.

MUNRO and SANKARAN NAIR, JJ.

(164-a—ii) S. 317. See No. 148, *supra*.

Civ. Pro. Code (1882)—(Continued).

(164-b) S. 318—Auction-purchaser—Obstruction of counter-petitioners—Claiming under judgment-debtor—Right of purchaser.

In this case the counter-petitioners, who obstructed delivery of property to the auction-purchaser, derived their title from the judgment debtor subsequently to the attachment, under which the sale was held. *Held* that the Court is bound to order delivery to the purchaser. **Subramania Aiyar v. Srñivasa Aiyar**, 8 M. L.T. 376.

MUNRO and SANKARAN NAIR, JJ.

(165) S. 325—Alienate, meaning of—Will whether an alienation—Mahomedan Law—Will—Operation of.

The word "alienate" in S. 325-A, C.P.C., was used *ejusdem generis* with the words preceding, viz., mortgage charge, and lease, and contemplates a transfer which would have present effect, and not a demise which can only have operation after the death of the testator. A judgment-debtor, therefore, in respect of whose property the Collector could perform all powers or duties conferred or imposed upon him by Ss. 322—325, could make a will in respect of such property.

A gift made during death-illness is a will under the Mahomedan Law and is valid as regards one-third of the property comprised in it. **Muhammad Sayeed v. Muhmmad Ismail**, 7 A.L.J. 1176.

STANLEY, C.J., and BANERJI, J.

(166) S. 325-A—Transfer of decree before Collector for execution—Time occupied before Collector—Limitation—Deduction—Court of Wards Act, 1902, S. 47—Effect upon last clause of S. 325-A.

S. 325-A, C.P.C., 1882, expressly excludes from calculation the period during which the decree is before the Collector for execution, and the exclusion is made applicable to proceedings for execution in the Civil Court.

There is nothing in the language of S. 47 of the Court of Wards Act to support the contention that the last clause of S. 325-A, C.P.C., 1882, is one made applicable, and it would be contrary to the manifest intention of the legislature so to hold. **Umade Rajaha Raju Damara Kumara Thimmanayannu Bahadur Yaru v. Sri Ranga Bhupala Bali Row Garu**, 8 M.L.T. 235.

WALLIS and KRISHNASWAMI IYER, JJ.

Civ. Pro. Code (1882)—(Continued).

(167) *S. 327—Sale in execution—Sanction of Commissioner.*

The special rule, which was in force under the 2nd clause of S. 327 of the Code of 1882, having become inoperative, as that section was not re-enacted in the Code of 1908, the sanction of the Commissioner of the Division is no longer required as a condition precedent to the sale in execution of decrees of land applied to agricultural or pastoral purposes. **Girdhari Ram v. Mehr Khan**, 4 P.R. 1910 (Rev.).

DOUIE, F.C.

(168) *Ss. 328—331, and 373—Execution of decree—Obstruction—Complaint after one month—Registration as a suit and dismissal—Legality.*

Where an application was presented complaining of an obstruction to execution, more than one month after the obstruction, and the Judge registered the same as a suit, and dismissed it as barred by limitation.

Held that the application can be entertained and registered as a suit, only if it is presented within one month. As it was not presented within one month, it should not have been registered as a suit, as it is manifestly unfair to the applicant decree-holder that his application should be wrongly registered as a suit, and then dismissed so as to make it a bar to a fresh suit, while if his application had been originally dismissed, such dismissal would not have barred a subsequent suit.

When a suit is barred by limitation, it is not open to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit, if the fresh suit is one which would be barred by the decision in the earlier suit. **Valliammal v. Raja Shunmugam Pillai**, 7 M.L.T. 223 = 6 Ind. Cas. 285.

SANKARAN NAIR, J.

(169) *S. 329—Re-sale to judgment-debtor—Resistance by judgment-debtor to possession—‘Just cause.’*

A re-sale by the decree-holder purchaser to the judgment-debtor is ‘just cause’ within the meaning of S. 329 of the C.P.C. for resistance by the judgment-debtor purchaser to obtain possession in execution of the decree. **Rudramma v. Nagi**, 8 M.L.T. 388.

WALLIS and KRISHNASWAMI IYER, J.J.

Reference :—13 M. 504, F.

Civ. Pro. Code (1882)—(Continued).

(169-a) *S. 329. See No. 168, supra.*

(169-a-i) *S. 330. See No. 168, supra.*

(169-a-ii) *S. 331. See Nos. 21 and 168, supra.*

(169-b) *Ss. 332, 335—Order under, made without investigation—Effect. See ACT XV OF 1856, (HINDU WIDOW RE-MARRIAGE), No. 1, 14 C.W.N. 346.*

(169-c) *Ss. 33 and 622—Revisional jurisdiction when exercised—Ejection of one not a party to suit.*

Where, in an application, under S. 332 of the Code, by one who has been ejected from property of which he was in possession, the Court does not confine itself to the question whether or no applicant was a party to the suit, under the decree in execution of which he was dispossessed, but goes into and decides the question whether the applicant could show a good title to the property, the High Court will interfere in revision, although the person aggrieved may have another remedy by regular suit. The High Court will interfere in revision in such a case, because the lower Court “infringed the extrinsic conditions of its legal authority.” **Periasawmy Pillay v. Hyder Hoosain**, 8 Ind. Cas. 613.

PARLETT, J.J.

References :—7 B. 311, *app.*; 12 B. 221; 21 B. 731; 6 A. 172; 16 A. 163; 11 A. 383; 15 A. 405, R.

(170) *S. 325—Limitation—Order passed under S. 335, C.P.C., 1882—Suit within one year from the date of—Whether barred—Party subsequently added—Right to raise plea of limitation—Art. 11, Limitation Act, XI of 1877, Sch. II.*

A suit brought within a year of the date of an order passed under S. 335, C.P.C., 1882 is not barred by limitation. A person subsequently added as a party can raise the plea of limitation. **Guruvappa Chetty v. Srinivasa Row and others**, 7 M.L.T. 306 = 6 Ind. Cas. 680.

MILLER and KRISHNASWAMI IYER, J.J.

(170-a) *S. 335—Suit by benamidar within one year of adverse order under—Limitation—Right of suit. See LIMITATION ACT (1877), No. 42, 8 M.L.T. 377.*

(170-a-i) *S. 335. See No. 169-a, supra.*

(170-b) *S. 336—Arrest of judgment-debtor—Bound by surety—Insolvency petition by judgment-debtor—Dismissal of petition—Liability of surety—Limitation.*

Civ. Pro. Code (1882)—(Continued).

Defendant No. 2 was arrested in execution of a decree for money obtained by the plaintiff against him. Defendant No. 1 stood surety for him by executing the Bond in suit, by which he covenanted that, if defendant No. 2 did not apply to be declared an insolvent within one month or if the said application was rejected, he would produce defendant No. 2 when required by the Court, or pay Rs. 500. Defendant No. 2 applied for insolvency within the time specified but his application was dismissed. The plaintiff made a fresh application for execution and the defendant No. 1 failed to produce defendant No. 2. Then the bond having been assigned to him, he sued to enforce the bond :

Held, that the bond was not opposed to public policy or without consideration, and was enforceable (a).

The defendant No. 1 was directed to produce the defendant No. 2 on September 27th, 1904. The time was subsequently extended to September 30th, on which date he failed to produce the judgment-debtor, and became liable on the bond : *Held*, that, as the suit was brought within three years from that date, it was not barred by limitation. **Mir Musar Ali Khondkar v. Guru Charan Sen**, 7 Ind. Cas. 917.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 16 A. 37 ; 31 C. 242 ; 19 B. 694 ; 5 C. 437, *Rel.*

(171) *Ss. 336 and 337-A—Surety—Judgment-debtor failing to apply for insolvency—Non-appearance—Discharge of surety.*

On 10th July, 1908, judgment-debtor applied under S. 336, Civ. Pro. Code. The surety agreed that, if the judgment-debtor did not either apply within one month to be declared an insolvent or appear in Court on the due date, he would be liable to the decree-holder. Before the due date fixed for judgment-debtor's appearance in Court, he applied under S. 337-A instead of applying for insolvency. The Court heard the application when the judgment-debtor was present in Court, and postponed its further consideration to a date subsequent to the date originally fixed for the judgment-debtor's appearance; but on this date the judgment-debtor remained absent. The Executing Court at first discharged the surety, but on review it made him liable.

Held, that the surety was absolved from his liability, as, from the proceedings of the Court, it appeared that the original date fixed for the judgment-debtor's appearance was no longer to

Civ. Pro. Code (1882)—(Continued).

be regarded as the date fixed for his appearance, and no proceedings took place on that date, and consequently, the Executing Court had no power to review its order releasing the surety from the obligation undertaken by him. **Bhagwan Dass v. Bhagat Ram**, 61 P.W.R. 1910.

RATTIGAN, J.

(171 a) S. 337-A. See No. 171, *supra*.

(172) *Ss. 355, 356, 358—Insolvency—Discharge of insolvent—Order not expressly made—Appeal—Revision.*

The insolvent applied to the Insolvent Estates Court, Delhi, for an order to the Receiver to pay him the surplus in his hands. The application was rejected and the order was confirmed on appeal.

Held, that it must be assumed that the Court did pass an order of discharge under S. 355, of the C.P.C., 1882, as soon as the conditions laid down in that section had been complied with, that S. 358 would therefore apply, and under S. 356 the petitioner was entitled to receive the surplus in the hands of the Receiver.

Held, also, that the Divisional Judge was right in holding that no appeal lay to him from the order of Insolvent Estates Court, but, as the order appealed against was obviously wrong, it must be set aside on revision. **Harji Mal v. Receiver of the Insolvent Debtor's Estate**, 26 P.L.R. 1910.

SHAH DIN, J.

Reference :—43 P.R. 1894, *F.*

(172-a) S. 356. See No. 172, *supra*.

(172-b) S. 358. See No. 172, *supra*.

(173) *Ss. 361, 582—Suit for injunction—Dismissal—Defendant's death-pending appeal—Abatement—Whether right of action as regards costs survives to representative.*

A brought a suit against S for an injunction restraining him from standing at a particular place in temple at S. The suit was dismissed both in the Court of first instance and in that of first appeal, and a second appeal was filed in the High Court. Pending second appeal S died, and his widow K was brought on record as his legal representative.

Held, that the second appeal could not be prosecuted as regards the injunction against the legal representative K, and that it abated.

If the appellant cannot prosecute his appeal for the injunction, he cannot be allowed to

Civ. Pro. Code (1882)—(Continued).

show that the decree refusing the injunction was wrong, for the mere purpose of getting rid of the direction as to costs. **Josiam Thiruvengadachariar v. Sami Iyengar alias Yenkatachariar**, 7 M.L.T. 195 = 5 Ind. Cas. 937.

BENSON and KRISHNASWAMI IYAR, JJ.

References :—26 B. 597 ; 21 Ch. D. 439 ; 9 A. 131 (134) ; 9 Q.B.D. 110 ; 31 C. 406, R.

(174) S. 365—*Execution proceedings—Mesne profits, assessment of—Continuation of original suit—Death of decree-holder—Substitution—Limitation.*

An application for the assessment of mesne profits is not a proceeding in execution of the decree, but merely a continuation of the original suit (a).

Therefore, S. 365, Civ. Pro. Code, 1882, is applicable to such an application ; and consequently, if no proceedings in order to substitute the representatives of the deceased decree-holder, or to have the mesne profits assessed, be taken within six months from the date of the death of the original decree-holder, an application for the purpose will be barred. **Debendra Nath Goswami v. Khirode Chandra Bandopadhyaya**, 5 Ind. Cas. 272.

BRETT and SHARFUDDIN, JJ.

Reference :—(a) 19 C. 132 (F.B.), F.

(175) S. 368—*Deceased defendant's representatives not brought on record—Decree against defendant who was dead and others—Decree indivisible—Abatement of entire suit.*

During the pendency in the High Court of an appeal in a pre-emption suit, one of the respondents died, and his representatives were not brought on the record within limitation. Judgment was passed against the respondents in ignorance of his death. Execution was applied for by the successful appellant and was allowed as against the surviving respondents :

Held, that the decree being one for pre-emption, in which possession of the entire property might have been taken in execution, and the representatives of one respondent not having been brought on the record, the cause of action did not survive as against the remaining respondents. **Imam Uddin v. Sadarat Rai**, 7 A.L.J. 228 = 5 Ind. Cas. 797.

KNOX and RICHARDS, JJ.

References :—3 C. 487 (P.C.), *relied upon* ; 17 A. 478, D.

Civ. Pro. Code (1882)—(Continued).

(176) S. 368—*Dispute as to who is legal representative—Execution proceedings against person afterwards found not to be legal representative—Interest identical with that of true legal representative—Validity of proceedings.*

A creditor must be permitted to apply for execution against that one of the rival claimants, whom he honestly and reasonably believes to be the legal representative ; and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceedings are identical with those of his rivals and if he acts without fraud or collusion, it is hard to see why his representation should not be held sufficient.

The proposition that substantial injury is the necessary result, to the true legal representative, of a sale of his property behind his back, is not universally true, and does not apply to a case, where a person, perfectly competent and *prima facie* anxious to protect the interests of the legal representative, was a party to the proceedings. **S. R. M. A. R. Ramaswami Chettiar v. Oppiamani Chetti**, 6 M.L.T. 269 = 33 M. G. = 19 M.L.J. 671 = 4 Ind. Cas. 1059.

WHITE, C.J., and MILLER, J.

References :—14 M. 454 ; 26 M. 230 ; 30 C. 1044 (1058) ; 15 M. 899 (400), R. ; 32 C. 296 (P.C.), *Expl.* ; 17 M. 186 and 28 M. 361, D.

(176-a) S. 368—*Ejectment suit against several trespassers—Death of one of the defendants—Abatement of suit—Withdrawal of suit with consent of surviving defendants—Subsequent suit against representatives of deceased defendant—Whether barred.*

In an action for ejectment against several trespassers, the death of one of the defendants, whose legal representatives were not brought on record within the time allowed by law, does not cause the suit to abate against the surviving defendants. The right to sue survives against them so far as their interests are concerned (a).

Where, after the death of one of the defendants, the suit was withdrawn with the consent of the remaining defendants, and the Court granted leave to plaintiff to bring a fresh suit : *Held*, that the leave was not *non est* by reason of the second defendant's representatives not

Civ. Pro. Code (1882)—(Continued).

having consented to the withdrawal, but was operative till set aside on review or revision. **Perumal v. Pichan**, 8 Ind. Cas. 268.

ABDUR RAHIM and KRISHNASWAMI AIYAR, JJ.

References:—33 C. 580; 34 C. 1020; 11 C. W.N. 1100; 6 C.L.J. 715, F.; 31 C. 487; 8 C. W.N. 442; 31 I.A. 71, D.

(177) S. 371 (=O. 22, r. 9, C.P.C., 1908)—*Decree in previous suit passed after plaintiff's death—Subsequent suit by plaintiff's legal representative on the same cause of action—Maintainability—Proper remedy—Intention of legislature—Judgment rendered against party after his death—Effect.*

R brought a suit against A. R died in the morning of the day when the suit was posted for hearing. The suit was taken up, heard and disposed of that day after R's death. R's legal representative, alleging that the decree passed after R's death was a nullity and could not operate as a bar to a subsequent suit, now sued the legal representative of the defendant in the prior suit, on the same cause of action and for the same relief.

Held, that the suit abated on the death of the plaintiff, and that, after the abatement of a suit, it is not open to his representative to bring a fresh suit on the same cause of action. (S. 371, C.P.C., 1882, and O. 22, r. 9, C.P.C., 1908) (i).

His only remedy under the same provision of law is to apply for an order to set aside the abatement, and it shall be set aside, only if it is proved that he was prevented by any sufficient cause from continuing the suit.

The intention of the legislature is clear that no fresh suit on the same cause of action is to be permitted, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending.

Held, also, that, where the Court has acquired jurisdiction of the subject-matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack (b). **Gada Coopooramier v. M. Soondarammall**, 6 M.L.T. 271=33 M. 167.

BENSON, O.C.J., and SANKARAN NAIR, J.

References:—(a) 4 H. & N. 488; 19 B. 807 and 21 B. 314, R. (b) 17 A. 478 and 26 B. 317, D.

Civ. Pro. Code (1882)—(Continued).

(178) Ss. 371, 544, 13—Meaning of "Cause of action" in S. 371. See PARTITION, No. 3, 5 Ind. Cas. 325.

(178-a) S. 372. See No. 70, *supra*.

(179) S. 373—*Withdrawal of suit—Order conditional—Condition not fulfilled—Fresh suit, if maintainable.*

Where leave to withdraw a suit with liberty to bring a fresh suit was conditional on the plaintiff paying the costs of the former suit on or before a specified date, and the time fixed for the performance of the condition had expired without the condition performed.

Held that a fresh suit was rightly dismissed. **Robert Fischer v. Nagappa Mudaly**, 7 M.L. T. 226=6 Ind. Cas. 288.

WHITE, C.J., and KRISHNASWAMY IYER, J.

References:—31 C. 965; 29 M. 370, D.

(180) S. 373—*Plaint amended by omission of certain parties—Subsequent suit against omitted parties—Leave to sue.* See CIV. PRO. CODE (1908), No. 166, 11 C.L.J. 161.

(180-a) S. 373. See No. 168, *supra*.

(181) Ss. 373, 374—*Law as to withdrawal of Suits.* See LIMITATION ACT (1908), No. 11, 6 Ind. Cas. 700.

(182) Ss. 373, 375, 525—*Award—Compromise amending award—Delay in acting upon its conditions.*

Held, that:—(1) It is competent to the parties to compromise the proceedings under S. 525 of the old para. 20 of second schedule to the new Code of Civil Procedure, by altering, amending or adding to the award. S. 375 as well as S. 373 of the former (Rules 3 and 4 of the Order XXIII of the latter Code) is as applicable to these proceedings as to other cases (a).

(2) Where the compromise distinctly provides that, as regards matters not expressly dealt with therein, the terms of the award should apply, the decree should embody all the conditions of the compromise as well as all the subsisting terms of the award.

(3) When time is not so essentially a part and parcel of a compromise that even a short delay in not acting upon it is fatal to the interests of either side, a delay of one or two days in not complying therewith, especially when the defaulting party does not seem to be responsible therefor, cannot be regarded as such a serious breach of its conditions as to entitle

Civ. Pro. Code (1882)—(Continued).

either party to repudiate the compromise altogether. **Behari Lal v. Dholam Das**, 38 P.W.R. 1910=5 Ind. Cas. 994.

RATTIGAN, J.

Reference:—(a) 31 C. 516.

(182-a) S. 374. See No. 181, *supra*.

(183) S. 375—*Compromise likely to give trouble—Powers of Court to record—Effect of resiling from compromise—Indian Contract Act (IX of 1872), S. 24—Unlawful agreement—Different portions separable.*

A Court cannot disregard a compromise merely because it sees that the working out of the compromise is likely to give trouble. A lawful compromise arrived at by the parties must be recorded by the Court, which must pass a decree in accordance therewith. A Court has power to determine whether a compromise has been arrived at, and it is not bound to disregard it if any of the parties resiles from it (a).

By a compromise the defendant agreed to sell his property in lieu of a debt to the plaintiff, and to relinquish his ex-proprietary holding in his favour, and the plaintiff accepted the compromise. The Court below passed a decree in terms of the compromise. *Held* that the compromise was lawful, except in respect of the agreement for the relinquishment of the ex-proprietary holding, and the parties having treated the different parts of the compromise as separable and having acted upon them, the compromise, so far as it related to other matters, was lawful. **Khurshed Ali v. Wazir-un-nissa**, 7 A.L.J. 778 = 6 Ind. Cas. 857.

TUDHALL and CHAMIER, JJ.

References:—19 M. 419; 20 Bom. 304; 24 C. 908, R. and F.

(184) S. 375. See COMPROMISE DECREE, No. 1, 14 C.W.N. 451.

(184-a) S. 375. See No. 182, *supra*.

(185) S. 396—*Suit for partition—Preliminary decree in plaintiff's favour—Resistance to Commissioners—Refusal of plaintiff's application for re-issue of Commission—Court's power.*

Where the Court of first instance, in a suit for partition, made a preliminary decree, partially in the plaintiff's favour, but the plaintiff resisted the Commissioner appointed by the Court and objected to his preparing a plan for the partition, and the Court thereafter refused the plaintiff's application for the re-issue of the

Civ. Pro. Code (1882)—(Continued).

commission and entirely dismissed the suit, the Court below having in appeal upheld the order of dismissal, *held* that, as the Court of first instance had passed a preliminary decree decreeing a part of the plaintiff's claim, it had no authority to nullify that decree by totally dismissing that suit, and that under the circumstances the Court ought to have acceded to the request of the plaintiff to re-issue the commission and to have seen that the order was obeyed. **Masum-un-nissa v. Latifan**, 7 A.L.J. 196=5 Ind. Cas. 872.

STANLEY, C.J., and BANERJI, J.

(186) S. 396—*Partition suit how long to be deemed to be pending.*

A partition suit must be considered pending until the final decree under S. 396 is passed (a). **Togaram Appadu Patnaidu v. Togaram Appalaswami Patnaidu**, 8 M.L.T. 295.

WALLIS and KRISHNASWAMI IYER, JJ.

Reference:—18 M.L.J. 23, F.

(187) Ss. 396 and 581—*Appointment of Commissioner—Not necessary in every partition suit—Parties concluded by conduct—Objection taken for the first time, in second appeal.*

It is not necessary, in every case wherein a decree is made for the partition of immoveable property not paying revenue to Government, to appoint a Commissioner under S. 396, C.P.C. The section clearly contemplates a discretion in the Court. In the present case, it was clear that neither the Court, nor the decree-holder thought it necessary to postpone the execution of the decree until a Commissioner was appointed (a).

A partition decree is not to be considered pending, until action is taken under S. 396.

The contention, that the bar of limitation to the execution of decree is saved by the petitioner's attaining majority only recently could not be allowed in second appeal, as it depended on a question of fact which should have been established in the Courts below. **Krishnama-chariar v. Kuppammal**, 31 M. 540=5 M.L.T. 222.

MILLER and PINHEY, JJ.

Reference:—(a) 8 M.L.J. 23, Diss.

(188) S. 424—*Government officer—Assault and use of insulting language—Notice, if necessary—Damages.*

Where a public officer employs insulting language to and assaults his subordinate, he is

Civ. Pro. Code (1882)—(Continued).

not entitled to such notice of any action of his, as is required by S. 424.

If a public officer exceeds his rights and uses defamatory language which is actionable, or assaults or beats a subordinate, he is responsible in damages as any ordinary person would be liable. **Mumtaz Husain v. A.E. Lewis**, 7 A.L.J. 301=5 Ind. Cas. 467.

STANLEY, C.J., and BANERJI, J.

(189) *S. 124 (=S. 80, C.P.C., 1908)—Suit for injunction against public officer—Notice, whether necessary.*

Suit against a public officer for an injunction to restrain the commission of an act, not done but threatened to be done, is not a suit in respect of an act purporting to have been done by him, and so, this section (S. 80, C.P.C., 1908) does not render notice necessary, so far as a suit seeks relief by injunction. **Fandumal v. Mahomed Sharif**, 3 Sind L.R. 175.

LUCAS and CROUCH, J.CS.

References :—(a) 36 C. 28, *F.*; appeal No. 3 of 1903 (referring to 11 Q.B.D. 788), *D.*

(190) *S. 424, Act V of 1908, S. 80—Notice—Suit against Government—Act of Government officers—Bhagdari Act (Bom. Act V of 1862), S. 3—Collector's declaration under the Act.*

The Collector of Kaira, acting under S. 3 of the Bhagdari Act, 1862, declared that certain mortgages in favour of plaintiff were illegal and inoperative. The plaintiff filed a suit to have it declared that the order was null and void. The notice, required by S. 424 of the Code of 1882, was not given :

Held, that the notice was compulsory, for the declaration was a distinct act of the Collector, done in the exercise of a statutory power, and therefore in his official capacity.

The true test of an action for the purposes of S. 424 (which is the same as S. 80 of the new Code of 1908) is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part and, secondly, whether that act purported to have been done by him in his official capacity. Both these elements must combine to render necessary the giving of notice under S. 424 as a condition precedent to suit. **Chhagan Lal v. Collector of Kaira**, 12 Bom. L.R. 825.

CHANDAVARKAR and HEATON, JJ.

(191) *S. 436—Indian Companies Act (V of 1882), S. 89—Limitation Acts (XV of*

Civ. Pro. Code (1882)—(Continued).

1877 and IX of 1908), Art. 164—Service of summons—Companies registered under the Indian Companies Act—Ex parte decree—Period of limitation to set aside ex parte decrees—Knowledge of the decree—General Clause Act (X of 1897), S. 6—Acts of procedure—Retrospective effect—Construction of statute.

The service of summons on a company registered under the Indian Companies Act, 1882, is regulated by S. 89 of the Act.

S. 436 of the Civil Procedure Code, 1882, does not apply to companies registered under the Indian Companies Act, but to the more uncommon class of companies authorised to sue or to be sued in the name of an office or trustee.

When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act.

The plaintiff obtained an *ex parte* decree on the 15th November, 1904. An application to execute the decree was made on the 3rd September, 1909; and notice under O. XXI, r. 22 of the Code of 1908, was served on the defendant on the 14th September, 1909. On the 20th September, 1909, the defendant obtained a rule against the plaintiff to show cause why the *ex parte* decree should not be set aside. The plaintiff contended that the defendant had knowledge of the decree before the 14th September, 1909, and that his application was barred under Art. 164 of the Limitation Act of 1908. The defendant, in contending that the application was governed by Art. 164 of the Limitation Act of 1877, relied on S. 6 of the General Clauses Act, 1897 :

Held, overruling the defendant's contention, that the remedy in respect of the liability involved in the *ex parte* decree was given by the Civil Procedure Code, and that the Limitation Act, merely regulated the time within which the remedy must be sought.

Held, that, therefore, the defendant's application was barred under Art. 164 of the Limitation Act, 1908. **Hope Mills v. Vithaldas Pranjivandas**, 12 Bom. L.R. 730.

SCOTT, C.J., and BATCHELOR, J.

Civ. Pro. Code (1882)—(Continued).

(192) *S. 456—Representation of minors—Order appointing guardian ad litem—Absence of evidence of affidavit—Presumption of regularity.*

In a case, where the question was whether certain minors were properly represented at the hearing of a suit in which the decree now impugned was made, the order appointing a guardian *ad litem* of the minors was on the record, but no affidavit required by S. 456, C.P. C. (1882), was forthcoming.

Held, that it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done; and that the minors were properly represented by the guardian *ad litem* appointed by the Court. **Munshi Munnu Lal v. Ghulam Abbas**, 12 Bom. L.R. 439 (P.C.) = 11 C.L.J. 557 = 14 C.W.N. 794 = 8 M.J.T. 57 = 13 O.C. 123 = 6 Ind. Cas. 788 = 20 M.L.J. 591 = 32 A. 287.

LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

Reference :—30 I.A. 192, D.

(192-a) *S. 457—Married woman appointed guardian ad litem—Right to question validity of decree in execution.* See EXECUTION OF DECREE, No. 22a, 8 Ind. Cas. 26.

(193) *S. 462—Dismissal for default—Minor—Next friend making default in appearance—Absence of pleader.*

The idea that defaults in appearance can always be atoned for by paying costs is an erroneous idea and should not be allowed to gain ground.

A minor's suit is liable to be dismissed for his next friend making default in appearance at the time of hearing of the suit. The fact of the minority of the plaintiff makes no difference, for there is no distinction in the Civil Procedure Code in his favour. The minor may sue again through another next friend or himself on attaining majority. **Mussammat Gurdevi v. Raman Mal**, 99 P.J.R. 1910.

JOHNSTONE, J.

(194) *Ss. 470 to 474—Interpleader—Two qabuliats given by tenant to two parties—Suit by tenant to get rid of one—Not maintainable.*

The plaintiff passed two *qabuliats* in favour of two parties in respect of certain land and found himself in the predicament of being sued on both. He brought a suit praying that "the

Civ. Pro. Code (1882)—(Continued).

Court may declare which defendant has what right in which of the disputed lands, and in what right the plaintiff holds which of the said land under whom :"

Held, that the prayer of the suit seeks a declaration as to the title to land, and the plaintiff cannot describe himself as a mere stakeholder of the property; that the case does not come within the positive provisions of Chapter XXXIII of the Civ. Pro. Code, 1882, and that, S. 474 of the Code being in its terms clearly against the plaintiff the suit is not maintainable. **Mr. K. S. Bonerjee v. Raj Chandra Dutt**, 5 Ind. Cas. 577 = 11 C.L.J. 577 = 14 C.W.N. 784 = 27 C. 552.

JENKINS, C.J., and DOSS, J.

(194-a) *S. 471.* See No. 194, *supra*.

(194-b) *S. 472.* See No. 194, *supra*.

(194-c) *S. 473.* See No. 194, *supra*.

(194-d) *S. 474.* See No. 194 *supra*.

(195) *S. 483—Attachment before judgment—Conduct of defendant—Commencement of suit.*

In considering an application for attachment before judgment, the Court is not restricted to the conduct of the defendant subsequent to the commencement of the action. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention. **Macgregor v. The Cawnpore Sugar Works, Ltd.**, 11 C.L.J. 19 = 5 Ind. Cas. 181.

MOOKERJEE and RICHARDSON, J.J.

(195-a) *S. 483.* See No. 26, *supra*.

(196) *Ss. 483 and 488, and 253—Attachment before judgment—Removal on K giving security—Suit dismissed by lower Court but decreed on appeal—Inability of surety for amount of appellate decree.*

An attachment before judgment, which was issued in a suit to attach certain money due to the defendant, was subsequently withdrawn on K giving security to pay over the money so due or the decretal amount. The suit was dismissed by the lower Court, but decreed on appeal. It was then sought to execute the amount of the appellate decree against K.

Held, that K's liability ceased when the suit was dismissed by the lower Court, as the attachment itself, to remove which K gave the

Civ. Pro. Code (1882)—(Continued).

security, must have been removed, under S. 488, with the dismissal of the suit. **Ma Bi v. S. Kalidas**, 5 L.B.R. 156=5 Ind. Cas. 985.

HARTNOLL, J.

Reference :—12 B. 71, *F*.

(196-a) S. 486. See No. 91, *supra*.

(196-b) S. 487. See No. 91, *supra*.

(196-c) S. 488. See No. 96, *supra*.

(196-d) S. 490. See No. 88, *supra*.

(197) S. 492—Wrongful sale in execution—Temporary injunction. See CIV. PRO. CODE (1908), No. 142, 7 A.L.J. 932.

(198) S. 503—Position of official receiver. See OFFICIAL RECEIVER, No. 1, 5 L.B.R. 213.

(199) S. 505—Report recommending appointment of a receiver—Order refusing to make the appointment—*Appeal*.

Where a Subordinate Judge recommended a person to the District Judge for receivership, and the District Judge declined to appoint a receiver and the petition was then dismissed, *held*, no appeal lies against the District Judge's order under S. 505 refusing to authorize the appointment of a receiver. **Kayarunnisa Begum v. Sakina Bivi**, 20 M.L.J. 78—5 Ind. Cas. 991.

BENSON and MILLER, JJ.

References :—10 M. 179 (180) (F.B.) (foot note), *F*.

(200) Ss. 510, 521—*Arbitration—Arbitrator becoming incapable of acting—Order superseding arbitrator—Award, objections against—Decree in accordance with award—Appeal—Revision—Objection for the first time on appeal for revision.*

On an arbitrator becoming incapable of acting, the Court ordered a new arbitrator to be appointed in his place. On the award being delivered, objections were preferred by the plaintiff which were disallowed, and a decree in accordance with the award was passed. It was not objected that S. 510 of the C.P.C., under which the lower Court acted, was not applicable to the case. The plaintiff contended that the decree was wrong and must be set aside on appeal or at any rate on revision.

Held, that the contention was not valid. It was too late to raise the objection that S. 510 was not applicable to the case, that no appeal lay and that the Court would not exercise revisional jurisdiction in the case even if the revision lay. **Harnam Singh v. Harnam Singh**, 27 P.L.R. 1910.

REID, C.J., and ROBERTSON, J.

Civ. Pro. Code (1882)—(Continued).

(201) Ss. 520, 521. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 5, 5 Ind. Cas. 454.

(202) Ss. 520, 521, 525, 526—*Private arbitration—Award—Filing in Court—Stifling a Criminal prosecution—Agreement invalid—Compoundable case—Public policy.*

S. 526 of the Civ. Pro. Code is not exhaustive, and does not affect the inherent jurisdiction of the Court to decide a fundamental objection which goes to the root of the matter, *e.g.*, that the agreement, on which the award is based, was against public policy and not therefore enforceable in a Court of Justice.

The Court when invited to enforce the award, is not limited to the ground, mentioned in Ss. 520 and 521 of the Civ. Pro. Code (*a*).

The same transaction may give rise to a civil as also to a criminal liability, and a reference to arbitration for the settlement of the civil dispute alone would be valid, but not if the object of the reference was to stifle a criminal prosecution also (*b*).

But in order to make the award invalid, it is essential for the defendant to prove that the criminal prosecution stifled was for a non-compoundable offence, that is, for an offence of a character, the compromise of which is regarded by the Criminal Code as forbidden by law or against public policy (*c*). **Rai Charan Purkait v. Amrita Lal Gain**, 11 C.L.J. 131 5 Ind. Cas. 98.

MOOKERJEE and TEUNON, JJ.

References :—(*a*) 25 C. 757 ; 20 M. 89 ; 17 A. 21 ; 28 A. 62 ; 22 A. 224, *Rel. on.* (*b*) 6 Q.B. 309 ; 66 R.R. 392 ; 9 Q.B. 371 ; 72 R.R. 298 ; 11 B. 566 ; 22 A. 224 ; 28 A. 718 ; 9 P.R. 1906, *D.* (*c*) 3 C.W.N. 5 ; 81 P.R. 1875 ; 82 P.R. 1904 ; 7 M.H.C.R. 378 ; 28 B. 326, *F*.

(202-a) S. 521. See Nos. 200, 201, 202, *supra*.

(203) S. 522—*Award by arbitrators—Decree in accordance with award—Appeal on the ground of award being void ab initio—Maintainability of.*

In a suit for partition a reference to arbitration was made, at the request of the parties. The arbitrators submitted an award and a decree was passed in accordance therewith. The first defendant appealed on the ground that the award was void *ab initio*, as no notice was given to one of the arbitrators and as the award was signed by only one of them.

Civ. Pro. Code (1882)—(Continued).

Held, that no appeal lay on the ground alleged as under S. 522, C.P.C., an appeal lay only in so far as the decree was in excess of, or not in accordance with the award (a). **Nagalinga v. Nagalinga**, 6 M.L.T. 176 = 4 Ind. Cas. 87.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 33 C. 890; 29 C. 167 (P.C.), F.; 26 M. 47, *diss.*

(204) S. 523. See SPECIFIC RELIEF ACT, No. 12, 6 Ind. Cas. 420.

(205) S. 525.—*Arbitration, reference to Hindu Mitakshara joint family—Reference for partition—Minor member bound by reference made by karta—Reference by misrepresentation and undue influence, effect of.*

The two heads (kartas) of two branches of a joint Hindu Mitakshara family agreed to have a partition made, and for the purpose a reference was made to arbitration. One karta executed the deed of reference on his own behalf and as guardian of his minor nephew:

Held, that the karta had full power to act as guardian of the joint property of himself and his minor nephew, and to deal with it for the purpose of making the reference to arbitration.

A person, who secures a reference to arbitration by misrepresentation and undue influence, should not be allowed to benefit by his wrongdoing, and it is unjust that a person affected by an award so obtained should be precluded from contesting its validity in an application for filing the award and be driven to a separate regular suit (a).

The Court should decide definitely whether the reference to arbitration was for the benefit of the minor so as to be binding upon him (b). **Jai Nath Jha v. Kamala Nath Jha**, 7 Ind. Cas. 31.

BRETT and VINCENT, JJ.

References:—(a) 25 C. 757; 17 A. 21, F. (b) 27 B. 287, R.

(206) S. 525.—*Arbitration—Award refusing application to file—Appeal—Civ. Pro. Code (Act V of 1908), S. 104, cl. (f)—Proceedings—Securing attendance of witness—Procedure—Rules of evidence.*

An appeal lies against an order refusing to grant an application to file an award under S. 525 of the Code of 1882 (a).

There is no provision of law which requires persons, to whom matters have been referred

Civ. Pro. Code (1882)—(Continued).

for decision by private arbitration, to adopt any special procedure, or which compels them to keep any record or to produce any record of the proceedings taken before them.

The proceedings contemplated by S. 525 of the Code of 1882 are proceedings of a private nature to which the rules of evidence cannot be strictly applied.

It is no part of the duty of the Court acting under S. 525, Civ. Pro. Code, 1882, to enter into the merits of the award.

There is no provision of law which would enable private arbitrators to secure the attendance of persons before them for the purpose of giving evidence, and the duties of such arbitrators do not go further than to examine the persons produced before them by the parties to give evidence. **Ram Dhabhi Sahu v. Ram Charitar Sahu**, 7 Ind. Cas. 333.

BRETT and VINCENT, JJ.

References:—(a) 7 C.L.J. 486, F.; 28 A. 21; 2 A.L.J. 450; A.W.N. (1905), 150, *diss.*

(207) S. 525—Private award—Suit based thereon independently of the summary procedure under S. 525—Limitation for such suit—Decree appealable. See **AWARD**, No. 2, 11 P.W.R. 1910.

(207-a) S. 525. See Nos. 182, 202, *supra*.

(208) S. 526—*Appeal dismissed for default—Memorandum of objection—Costs.*

A memorandum of objections, filed under the old Civ. Pro. Code, cannot be argued, if the appeal is dismissed for default.

Courts are not bound to allow costs when the memorandum of objections is dismissed owing to the appeal having been withdrawn or dismissed for default. **Muthu Payal v. Nagalingam**, 6 Ind. Cas. 309 = 8 M.L.T. 53.

BENSON and KRISHNASWAMI Aiyer, JJ.

(208-a) S. 526. See No 202, *supra*.

(209) S. 539—*Suit by minor whether maintainable—"Person," meaning of.*

The term "person," in S. 539 should not be restricted to persons, *sui juris*, and a suit under that section can be maintained by an infant, who is interested in a public religious and charitable trust, if he is properly represented by a next friend. **Sri Sri Lakshmi Janardan v. Eradatullak Mallik**, 6 Ind. Cas. 119.

MOOKERJEE and TEUNON, JJ.

Civ. Pro. Code (1882)—(Continued).

(210) *S. 539—Religious institution—Suit for removal of Mahant of Dharmasala—Sanction of Collector necessary.*

One out of several *lambardars* of a village with two other residents of the village sued the Mahant of a Dharmasala for his removal and the cancellation of alienations of endowed property alleged to have been effected by him. No sanction was obtained under S. 539 of the C.P.C.

Held, that, sanction being necessary, the suit was not maintainable. **Sahab Singh v. Phuman**, 198 P.L.R. 1910.

SIR ARTHUR REID, KT., C.J., and KENSINGTON, J.

References:—78 P.R. 1907 = 193 P.L.R. 1908 & 7 P.R. 1908 = 176 P.L.R. 1908, *F.*; 94 P.R. 1885 and 29 P.R. 1897, *cited*: 33 Bom. 509 and 33 C. 789, *R.*

(210-a) *S. 539 (= Ss. 92, 93, C.P.C., 1908)—Removal of mahant—Order of Collector under S. 539, granting sanction to file suit for removal—No revision.*

An order of a Collector granting permission under S. 539, C.P.C., 1882, to sue for the removal of the mahant of a temple, is not open to revision by the Chief Court. **Dhian Das v. Jegat Ram**, 104 P.R. 1910 (Civil).

REID, C.J.

References:—24 M. 685; 24 G. 413, *R.*

(211) *S. 539—Whether confers power to High Court to try suits about charities in the mofussil. See HIGH COURT, No. 1, 7 M.L.T. 292.*

(211-a) *S. 539. See Nos. 31 and 32, supra.*

(212) *S. 544—Applicability. See APPEAL (GENERAL), No. 1, 7 M.L.T. 296.*

(212-a) *S. 544. See No. 178, supra.*

(213) *Ss. 544, 102—Appeal—Dismissal of suit for default—Application for suit to be restored by some of the plaintiffs—Appeal by co-plaintiff who had not joined in the application.*

Four brothers filed a suit, the eldest of them, who was employed in the army, was unable to attend Court on the day of hearing. The pleader of the four plaintiffs and the three younger brothers were present in Court, but the pleader declined to appear for the plaintiff who was absent. The Munsiff dismissed the suit ostensibly under S. 102, C.P.C.

Civ. Pro. Code (1882)—(Continued).

The pleader, on behalf of the plaintiffs who were present, applied for the case to be restored, but his application was refused. On appeal on behalf of the plaintiff who was absent in the original Court, the order was set aside and the suit was ordered to be restored. The defendant applied for revision and contended that the order passed on appeal was illegal.

Held, that the contention was right, for the absent plaintiff, not having taken any steps in the original Court to get the suit restored had no *locus standi* to appeal, and that S. 544, C.P.C., 1882, was not applicable to the case. **Chugata Khan v. Wasil Khan**, 21 P.L.R. 1910—6 Ind. Cas. 496.

WILLIAMS, J.

(213-a) *S. 549—Order to furnish security made by appellate Court—Non-compliance with the order—Dismissal of appeal—Second appeal to High Court against the order.*

No second appeal lies to the High Court against an appellate Court's order dismissing an appeal for non-compliance with its order directing the appellants to furnish security for the respondent's costs within a time fixed. **Singani Mupan v. Krishna Char**, 8 Ind. Cas. 496.

MUNRO and SANKARAN NAIR, JJ.

Reference:—18 A. 101, *F.*

(213-b) *S. 558. See No. 76, supra.*

(214) *S. 562—Bengal Tenancy Act (VIII of 1885), S. 52—Abatement of rent—Measurement—Dispossession by paramount title.*

When the decision of the first Court is not based on any preliminary ground, the lower appellate Court has no jurisdiction to set aside the decree of the first Court under S. 562, C.P.C., 1882.

S. 52 of the Bengal Tenancy Act is not exhaustive; that is, it is not the only provision of law under which abatement of rent can be claimed (*2*).

When the tenant is dispossessed of a portion of the land comprised in his tenancy, by a person claiming under a paramount title, he is entitled to a reduction of the rent (*b*). **Rani Dasi v. Asutosh Roy Chowdhury**, 6 Ind. Cas. 206.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 3 C.W.N. 225; 7 C.W.N. 93, *R.* (b) 10 W.R. 120; 1 B.L.R.A.C. 87; 12 W.R. 109; 21 C. 1005; 21 I.A. 118, *R.*

Civ. Pro. Code (1882)—(Continued).

(215) *Ss. 562, 591—Point decided before remand—No appeal against the order of remand—Whether can be pressed in second appeal—Practice—Applicability of Art. 36, Limitation Act, 1908.*

Where the question of limitation was decided by the District Judge when making an order of remand, and the appellants did not appeal against the order of remand.

Quere:—Whether it is open to the appellants in second appeal to appeal against the decision on the question of limitation (a).

Art. 36, Limitation Act, does not apply to a suit for the value of jewels lost owing to the negligence of the defendants who are the servants of the plaintiff and who have acknowledged the liability. **Seshu Gurukkal v. Soma-sundara Mudaliar**, 7 M.L.T. 93; 5 Ind. Cas. 764.

BENSON and ABDUR RAHIM, JJ.

References:—32 M. 318, doubted; 18 M. 421; 14 B. 232; 14 A. 318; 23 C. 335, R.

(216) *S. 561—Appeal—Order of remand directing addition of parties—Preliminary point—Legality of order.*

An order of remand, under S. 561, C.P.C., by an appellate Court, directing addition of new parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit, and is perfectly legal. **Jadab Gobinda Singh v. Anath Bandu Saha**, 37 C. 171=5 Ind. Cas. 998.

SHARFUDDIN and CONE, JJ.

Reference:—23 A. 167, F.

(217) *S. 568—Evidence, additional—Appellate Court—When to be taken—Mortgage—Undivided share—Partition—Mortgage during partition suit—Right of mortgagee—Share allotted to mortgagor.*

S. 568, Civ. Pro. Code, 1882, authorizes an appellate Court to admit evidence in appeal, when, on hearing the case, it thinks that such evidence is required to enable it to pronounce judgment, but it does not authorize it to make a new case not justified by the pleadings (a).

A person taking a mortgage from one co-sharer takes the security, subject to the right of the other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. He would take the subject of the pledge in the new form which it would assume by the partition (b).

Civ. Pro. Code (1882)—(Continued).

A mortgage executed during a partition suit must be followed against the share allotted to the mortgagor, and cannot affect the share of a non-mortgagor. **Baikuntha Nath Roy v. Sheikh Nura**, 6 Ind. Cas. 196.

CHATTERJEE, J.

References:—(a) 31 B. 381 (P.C.); 11 C.W. N. 721; 6 C.L.J. 5; 4 A.L.J. 461; 2 M.L.T. 435; 8 Bom. L.R. 671; 17 M.L.J. 347, R. (b) 1 I.A. 106; 21 W.R. 233, F.

(218) *S. 574 (=O. 41, r. 31 of the Code of 1908)—Judgment in appeal, not in conformity with the section—Order of remand in second appeal.*

A District Judge, who reverses the Munsiff's decision, must write a judgment in conformity with the requirements of S. 574 of the old Code (O. 41, r. 31). If it is not so done, an order of remand will be made in the second appeal. **Kuppusamy Chetti v. Seshadri Aiyangar**, 7 M.L.T. 120.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

(219) *S. 574—Judgment of Appellate Court—What should it contain.*

The judgment of a Court of first appeal should contain the points for determination, the reasons for the Judge's conclusions, and it should also set forth the nature of the case and the grounds urged before the Judge in appeal. **Hira Rodhiani v. Sokhyono Patojoshji**, 8 M.L.T. 380.

ABDUR RAHIM and KRISHNASWAMI AIYAR, JJ.

(219-a) *S. 578—Misjoinder of causes of action—Whether cured. See MISJOINDER, No. 3, 6 Ind. Cas. 15.*

(220) *S. 578—Misjoinder of causes of action, if ground of appeal. See HINDU LAW (WIDOW), No. 8, 6 Ind. Cas. 248.*

(221) *S. 578—Effect of over-valuation or under-valuation of suits. See ACT VII OF 1887 (SUITS VALUATION), No. 5, 20 M.L.J. 726.*

(221-a) *S. 578. See No. 65, supra.*

(221-b) *S. 582. See Nos. 27 and 173, supra.*

(222) *S. 553—Restitution—Mesne profits—Jurisdiction to restore all such benefits as the party seeking restitution is deprived of.*

It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has

Civ. Pro. Code (1882)—(Continued).

been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree it is about to reverse, has been executed or not. Hence, where a mortgagee was deprived of possession of the property comprised in his mortgage in execution of a decree for redemption passed by the Subordinate Judge, but the High Court subsequently modified that decree by raising the amount payable by the mortgagor and the mortgagor failed to pay the increased amount, whereupon the mortgagee made an application to the Subordinate Judge for restitution of possession and for mesne profits, *held* that the Subordinate Judge had jurisdiction, not only to make restitution by restoring possession but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits. **Parbhu Dayal v. Ali Ahmad**, 7 A.L.J. 1 4 Ind. Cas. 376.

STANLEY, C.J., and BANERJI, J.

- (223) S. 583 (= C.P.C., 1908), S. 144—*Decree—Possession in execution—Dispossession without Court's intervention, on reversal—Restoration of original decree—Application for restitution—Maintainability.*

Where the plaintiff got a decree for possession and took possession, and where the defendant, on reversal of the decree on appeal, took possession without applying for execution, and in defiance of an order of the High Court staying execution pending a second appeal before it.

Held, that, on restoration of the original decree by the High Court, the plaintiff was entitled to be put in possession of properties by way of restitution. **Theevana Pillai v. Kulla Pillai alias Subroya Pillai and another**, 7 M.L.T. 107=5 Ind. Cas. 776.

MUNRO and ABDUR RAHIM, JJ.

- (224) Ss. 583, 244—*Decree—Sale in execution—Decree-holder's possession as purchaser—Sale set aside—Claim for mesne profits and interest by the representatives in title of the judgment-debtor—Decree-holder's claim for interest on the purchase-money.*

The appellant purchased certain property put up to sale by auction, in execution of a decree obtained by him against the predecessor in title of the respondents, and obtained possession of the same. The purchase-money was set off against the amount due under the decree, which contained no provision for future interest on the amount decreed. The sale was

Civ. Pro. Code (1882)—(Continued).

ultimately set aside for irregularity. Subsequently, the respondents paid to the appellant the sum found due to him by the decree; and possession of the property was restored to them. Then the respondents applied in execution proceedings for mesne profits and interest. The appellant contended that a separate suit was required, and that he was entitled to interest in respect of his purchase-money.

Held, that the claim of the respondents to have the questions in dispute determined in the execution proceedings was justified by Ss. 583 and 244, C.P.C., 1882, and that the claim of the appellant to be allowed interest was absurd. **Munshi Prag Narain v. Thakur Kamakhia Singh**, 11 Bom. L.R. 1200 (P.C.)=10 C.L.J. 257-6 M.L.T. 303-3 Ind. Cas. 798-19 M.L.J. 599=13 O.C. 180.

LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (225) Ss. 583, 244—Application for execution—Restitution—Court-fees. See COURT FEES ACT, No. 18, 11 C.L.J. 541.

(225-a) S. 584. See No. 187, *supra*.

(226) S. 586—Lease—Possession not given as per covenant—Suit for recovery of money—Small Cause suit—Second appeal. See ZURPESIGH LEASE, No. 1, 6 Ind. Cas. 704.

(226-a) S. 586. See No. 73, *supra*.

(226-b) S. 588 (8). See No. 61, *supra*.

(226-c) S. 588 (16). See No. 64, *supra*.

(227) S. 591—*Appeal against decree—Erroneous decision in an interlocutory order—Ground of appeal.*

An appeal lies against the final decree of a Court within the meaning of S. 591, C.P.C., 1882, though the only ground of appeal is the erroneous decision of Court in regard to an interlocutory order.

It is not necessary for a suitor to appeal from every interlocutory order by which he may feel himself aggrieved. Any erroneous interlocutory order may be set aside in the appeal from the final decree. **Rajah Dhamara Kumara Thimmanayanim Bahadur Yaru v. Bukkapatnam Venkatacharlu**, 6 Ind. Cas. 239-8 M.L.T. 72.

BENSON and ABDUR RAHIM, JJ.

References:—7 C. 148; 14 B. 232, 7 M.I.A. 283 (302); 22 A. 366; 23 M. 260; 18 A. 19 (22); 23 M. 494; 21 M. 324, R.

Civ. Pro. Code (1882)—(Continued).

(228) *S. 591—Order for compensation embodied in decree—Appeal.*

There is no appeal against an order for compensation though it is embodied in the decree.

S. 591, G.P.C., does not apply to such a case. Kandappa Chetty v. Chinnappia, 8 Ind. Cas. 164.

SANKARAN NAIR, J.

Reference:—24 M. 62, F.

(228-a) *S. 591—Validity of order of remand—When to be impeached after the passing of final decree. See PRE-EMPTION, No. 17, 5 Ind. Cas. 667.*

(228-b) *S. 591. See Nos. 65, 69 and 215, supra.*

(229) *S. 617—Decree not final—No reference lies—Court's power to refer.*

A Court is not competent to make a reference to the High Court under *S. 617* of Act XIV of 1882, in case in which the decree of the Court would not be final. *In re Debi Prasad v. Shama Charan, 5 Ind. Cas. 584.*

STANLEY, C.J., and BANERJI, J.

(230) *S. 622—No interference by the High Court where the right result has been reached by the lower Court—Jurisdiction of the lower Court to review wrong order.*

Where a Court passed an order under a wrong section, it has jurisdiction to review the wrong order for sufficient reason; and the High Court will not interfere under *S. 622*, if the right result has been reached and that which was irregularly done has been set right. *Bollapragada Narayan Row Garu v. Bolla Pragada Janki Ramiiah Garu, 31 M. 414 = 5 M.L.T. 221.*

MILLER, J.

Reference:—16 M. 421, R.

(231) *S. 622—Order under S. 18 (Act XX of 1863) whether open to revision. See Act XX OF 1863 (RELIGIOUS ENDOWMENTS), No. 5, 7 M.L.T. 126.*

(231-a) *S. 622. See No. 147, supra.*

(231-b) *S. 623. See No. 76, supra.*

(232) *Ss. 623, 624, 626—Review of judgment, application for—Admission of review—Admission of truth of plaintiff's claim by defendant, evidence of—Appeal against order admitting review, if lies—Court, jurisdiction of, to admit evidence after decree—Evidence or matter, if should be existing at*

Civ. Pro. Code (1882)—(Continued).

the time of the trial, but was not procurable—“Discovery of new or important matter,” meaning of—“Any other sufficient reason,” meaning and scope of.

No appeal lies against an order which is not passed in contravention of the provisions of *S. 624* or *S. 626* of the Code of Civil Procedure (Act XIV of 1882) (a).

S. 623 of the Code of 1882, in dealing with the discovery of new and important matter or evidence, clearly indicates that the matter or evidence must be in existence at the time of the decree.

The words “for any other sufficient reason” in *S. 623* do not apply and cannot apply to something which came into existence after the decree was made, and the section does not authorise the review of the decree, which was right when it was made, on the ground of the happening of some subsequent event; and a Court commits a material irregularity in admitting a review on such a ground (b). *Golam Ali Jemadar v. Abdul Kasim Sarkar, 11 C.L.J. 27 = 14 C.W.N. 214 = 5 Ind. Cas. 182.*

CHITTY and RICHARDSON, JJ.

References:—(a) 21 C. 878; 12 B. 171, R. and F. (b) 24 M. 1, R. and F.

(232-a) *S. 624. See No. 232, supra.*

(232-b) *S. 626. See No. 232, supra.*

(232-c) *S. 629. See No. 110, supra.*

(232-d) *S. 612. See No. 111, supra.*

(233) *S. 619—Civ. Pro. Code (Act V of 1905), S. 151—Commissioner—Amount drawn by Commissioner in excess of his fees—Writ of attachment for recovery of that amount—Inherent power of Court—Appeal.*

A writ of attachment was issued for the recovery of an amount drawn by a Commissioner in excess of what was allowed by the Court as his fees:

Held, that the order falls within S. 619 of the Code of 1882, and is appealable.

Held, also, that the order must be taken to be one which is contemplated by S. 151 of the Code of 1908, and valid under the inherent powers of the Court. Upendra Mohan Das Gupta v. Raja Jyoti Prasad Singh Deo, 6 Ind. Cas. 386.

HOLMWOOD and SHARFUDDIN, JJ.

References:—34 C. 950; 11 C.W.N. 856, F.; 10 C.W.N. 234, R.

Civ. Pro. Code (1882)—(Concluded).

(234) S. 652—Rules framed under—Nature of. See LIMITATION ACT (1877), No. 111, 3 Sind L.R. 171.

(235) Applicability of, to Presy. S. C. Courts. See ACT XV OF 1882 (PRESY. S. C. COURTS), No. 3, 7 M.L.T. 385.

Civ. Pro. Code (Mysore).

(1) *Provision not exhaustive—Jurisdiction of Civil Courts—Inherent power.*

The Code of Civil Procedure is not exhaustive, and when a Court has made an order which it has jurisdiction to make, there is inherent power in the Court to have that order carried into effect (a). **Fakir Mahamad Sait v. Ibrahim Sait**, 15 M.C.C.R. 202.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

Reference :—(a) (1907) 31 C. 860, F.

(2) S. 37—Agent appointed under rule 23, Mysore Revenue Manual, not a "recognised agent." See JURISDICTION OF SMALL CAUSE COURT, No. 2, 15 M.C.C.R. 150.

(3) S. 50—*Alternative causes of action.*

M and L were undivided brothers. After their deaths, L A purchased a land from L's widow. Subsequently one K L asserted his right to the said land on the strength of a sale by M's widow. L A then paid some money and obtained a sale deed from K L also. In a suit by L A for recovery of the land, where it was contended that plaintiff's title was based on two conflicting and inconsistent titles. *Held*, that, when a property belonged to one or other of two persons, and the plaintiff purchased from both of them, there is nothing inconsistent in his conduct, and his attempt to secure title by buying up the claims of both the possible disputants is not fatal to his suit (a). **Nanji v. Lakkanna**, 15 M.C.C.R. 86.

NANJUNDAYYA and SETTLUR, JJ.

Reference :—(a) (1890) 13 M. 549, R.

(4) Ss. 50 and 53—*Amendment of plaint.*

When a plaint does not contain all the material facts necessary for the determination of the case, the proper course is to return it for amendment, but not to dismiss the suit (a). **Malledevaru alias Sanna Mallasetty v. B. Nanjappa**, 15 M.C.C.R. 112.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

References :—(a) (1881) 7 C. 429; (1879) 4 Bom. 223, F.

Civ. Pro. Code (Mysore)—(Continued).

(4-a) S. 53. See No. 4, *supra*.

(5) S. 82—*Service of summons on residence.*

In the absence of any affidavit by, or any examination of, the serving officer, the affixing of a copy of the summons to the defendant's house cannot be deemed to be good service. **Siddappa v. Byre Gowda**, 15 M.C.C.R. 95.

STANLEY ISMAY, C.J., and SETTLUR, J.

(6) S. 111—*Set off—Jurisdiction.*

The defendants obtained from the plaintiff an advance of Rs. 300 for the supply of ragi and executed a promissory note for the amount. Plaintiff sued on the pro-note for the balance due after giving credit for the value of ragi supplied. The defendants pleaded that the value of ragi supplied was Rs. 404 and not Rs. 231 and odd as alleged in the plaint, and claimed to set off the former amount. It was contended on behalf of the plaintiff that the amount of set-off being above Rs. 300, the Small Cause jurisdiction of the subordinate Judge, he had no jurisdiction to enquire into the question of set-off.

Held, that the contention was untenable, since the amount of set-off must be deemed to be not Rs. 404, but Rs. 404 minus the sum of Rs. 300 and odd advanced by the plaintiff (a). **Nagappa v. Ramachari**, 15 M.C.C.R. 116.

KRISHNA RAO, J.

Reference :—(a) (1868) 5 Bom. H.C.R.O.C 147, F.

(7) S. 139—*Non-production of evidence at the first hearing.*

In a suit on accounts where the defendant denied having had any dealings with the plaintiff, the defendant tendered in evidence an account book produced by his partner, who was not a party to the suit, to show that the suit transactions were not entered therein. The Subordinate Judge refused to admit it, on the ground that it was not produced at the first hearing.

Held, that the Subordinate Judge was right under the S. 139, Civ. Pro. Code, in declining to receive it in evidence. **Veerabhadrayya v. Donappa**, 15 M.C.C.R. 31.

NANJUNDAYYA, J.

(8) S. 220—*Mortgage suit costs.*

A mortgagee has absolute right as to costs, unless they are forfeited by misconduct; if they are forfeited by misconduct, then they are within the discretion of the Judge. **Chame Gowda v. Kuriputte Gowda**, 15 M.C.C.R. 155.

STANLEY ISMAY, C.J., and SETTLUR, J.

Civ. Pro. Code (Mysore) —(Continued).

- (9) *Ss. 223 and 226—Transfer of decree for execution—Jurisdiction.*

A Court, to which a decree is transferred for execution, has no jurisdiction to execute it, if the amount of the decree exceeds the pecuniary jurisdiction of that Court (*a*). **Yasudeva Bundari v. Ganapati Hebbar**, 15 M.C.C.R. 51.

KRISHNA RAO and SETTLUR, JJ.

References:—(a) (1889) 16 C. 457; (1889) 16 C. 565; (1887) 12 B. 155, F.; (1893) 17 M. 309, *dissented from*.

- (9-a) S. 226. See No. 9, *supra*.

- (10) *S. 232—Execution of decree by transferee—Refusal of Court to execute—Separate suit.*

When an application for execution by a transferee is refused by the Court executing the decree, a suit for a declaration that the assignment is valid does not lie. **Subramanaiya v. Munisamaiya**, 15 M.C.C.R. 281.

ISMAY, C.J., and KRISHNA RAO, J.

- (11) *S. 233—Assignment of decree—Inadequate consideration—Rights of parties.*

The transfer of a decretal debt for a consideration below the value of the debt in no way affects the rights and liabilities which existed between the original parties at the date of the transfer. The question of the inadequacy of consideration for the assignment is one with which the debtor has nothing to do, it being open to the original creditor to transfer the debt due to him for any consideration he deems fit to accept. **Ramaswami Setty v. Doddappa Mudda**, 15 M.C.C.R. 43.

KRISHNA RAO and SETTLUR, JJ.

- (12) *Ss. 233 and 246—Transfer of decree—Prior equities.*

Under S. 233 of the Code of Civil Procedure, the judgment-debtor may enforce against the transferee any equities which came into existence prior to the time when he had notice of the transfer. **Abdul Khader Saib v. Tunga Nunjunda Setty**, 15 M.C.C.R. 15.

STANLEY ISMAY C.J., and P.S. KRISHNA RAO, J.

- (13) *S. 235—Application for execution—Production of decree copy.*

There being no rule of practice requiring a decree-holder to file with his execution application a copy of the decree sought to be executed, it is not competent to a Court to order the production of such copy, or to dismiss the application when such copy is not produced in

Civ. Pro. Code (Mysore)—(Continued).

- obedience to order. **Muniyamma v. Muniappa**, 15 M.C.C.R. 117.

NANJUNDAYYA and KRISHNA RAO, JJ.

- (14) *S. 244—Parties to suit.*

A defendant against whom a suit has been dismissed does not, by a reason of such dismissal, cease to be a party to that suit within the meaning of S. 244. **Linge Gowda v. Made Gowda**, 15 M.C.C.R. 247.

STANLEY ISMAY, C.J.

- (11-a) S. 246. See No. 12, *supra*.

- (15) *S. 253—Decree—Application for execution against surety—Limitation. See LIMITATION ACT (MYSORE), No. 9, 15 M.C.C.R. 72.*

- (16) *S. 258—Execution of decrees—Payment out of Court—Mode of certifying.*

A payment out of Court may be certified at any time by the decree-holder, and though the ordinary way of certifying such payment is by application to the Court, there is nothing to prevent the payment being certified on an application to execute the decree (*a*). **S. Siddappa v. Sidda Boyi**, 15 M.C.C.R. 64.

STANLEY ISMAY, C.J., and NANJUNDAYYA, J.

Reference:—(a) (1895) 21 B. 122, F.

- (17) *S. 265—Partition of estate by the Deputy Commissioner—Control of Civil Courts.*

The Deputy Commissioner, in effecting a partition under S. 265 of the Code, is only doing a ministerial duty, and his acts are therefore, subject to the control of the Civil Court (*a*). **Munia alias Appaji v. Linge Gowda**, 15 M.C.C.R. 139.

KRISHNA RAO, OFFG. C.J., and SETTLUR, J.

References:—(a) (1896) 19 M. 435, F. and (1890) 15 Bom. 527, *dissented from*.

- (18) *Ss. 278 and 283—Claim to attached property—Judgment-debtor how far a party.*

When a claim is preferred to property attached as the property of the judgment-debtor, the contest is between the decree-holder on the one hand and the claimant on the other. The judgment-debtor cannot be regarded as a party to the proceedings, in the sense that his right or title to the property attached will be affected by any order which may be made (*a*). **Uliappa v. Lakmaji**, 15 M.C.C.R. 89.

STANLEY ISMAY, C.J., and SETTLUR, J.

References:—(a) (1888) 15 C. 674, F.; (1869) 4 M.H.C.R. 472, *dissented from*.

Civ. Pro. Code (Mysore)—(Continued).

(18-a) S. 263, Sec No. 18, *supra*.

(19) Ss. 295 and 622—*Rateable distribution of sale proceeds*—"Same judgment debtor"—*Revision*.

G obtained a decree against the assets of D M, deceased, in the hands of L and I, and in execution brought certain property to sale. A, who held a decree against the assets of the said D M in the hands of C, applied under S. 295 for rateable distribution.

Held, that S. 295 did not apply, the judgment-debtors under the two competing decrees not being the same (a).

Also, that an order passed under the said section is open to revision under S. 622 of the Code. **Ambasa v. D. Gangardharappa**, 15 M.C.C.R. 87.

NANJUNDAYYA, J.

References:—(a) (1901) 25 B. 494, F.; (1902) 26 M. 179, D.

(20) S. 310-A—*Application for setting aside sale on deposit of debt—Order rejecting—Appeal*.

In execution of a decree, certain properties were attached and brought to sale. On the date fixed for the sale, the defendant moved for stay of sale, urging that the decree was against the assets of his deceased brother in his hands, but the properties attached were his own. The Munsiff rejected the application on the ground that it was made too late. The defendant then paid up the debt under S. 310-A of the Code, and the sale was set aside. This appeal was preferred to the Chief Court against the order rejecting the first application.

Held, that the appeal was untenable since the attachment was cancelled and there was no relief to be claimed. **Bhaskarayya v. Seetharamayya**, 15 M.C.C.R. 111.

NANJUNDAYYA and SETLUR, JJ.

(21) S. 318—*Application by purchaser for delivery of possession of immovable property—Limitation—Art. 178, Sch. II, Limitation Act*.

An application under S. 318 of the Code of Civil Procedure by a purchaser for delivery of possession will be barred under Art. 178, Sch. II of the Limitation Act, if not made within three years of the date of the confirmation of sale (a). **Basappa v. Kidiyappa**, 15 M.C.C.R. 58.

KRISHNA RAO and SETLUR, JJ.

References:—(a) (1893) 17 M 89; (1908) 30 A. 390, F.

Civ. Pro. Code (Mysore)—(Continued).

(22) S. 335—*Purchase at a Court sale—Resistance*.

An application filed by a person, who obtained possession of property purchased by him at a Court sale, that possession should not be given to a person who purchased the same property in another sale, does not fall under S. 335 of the Code the applicant not having been resisted, or obstructed or dispossessed. Such an application is not subject to the rule of limitation applicable to applications under S. 335. **Bhagirathamma v. Dodde Gowda**, 15 M.C.C.R. 26.

NANJUNDAYYA and KRISHNA RAO, JJ.

(23) S. 335—*Order under—Regular suit—Limitation—Limitation Act, Art. 11, Sch. II*.

The special period of limitation of one year prescribed by Art. 11, Limitation Act, for a suit by a person against an order passed under S. 335 of C.P.C., applies only to those cases in which an investigation has been held on the merits of the claim, the ordinary rule of limitation applying when there is no such investigation. **Thylachari v. Kala Khan alias Abdulla Sab**, 15 M.C.C.R. 223.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

(24) S. 492—*Temporary injunctions*.

The primary object of a temporary injunction is to keep matters in *statu quo* till the suit can be heard and determined. It is only under very exceptional circumstances that a temporary mandatory injunction should be granted. **Guddadiiah v. Rangappa**, 15 M.C.C.R. 206.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

(25) S. 539—*Suits relating to public charities—Scheme of management*.

In setting a scheme of management under S. 529, the Court is bound to give the due consideration to the established practice of the institution to which the suit relates, and to the position of the parties connected therewith (a). **Krishnaiya v. Bettachari**, 15 M.C.C.R. 34.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

References:—(a) (1906) 8 Bom. L.R. 756; (1887) 12 B. 247, F.

(26) S. 539—*Suits relating to charitable or religious trusts*.

Civ. Pro. Code (Mysore)—(Concluded).

A suit instituted for the purpose of obtaining a declaration that the suit property (which is only one of several properties alleged to belong to a temple) is the property of the temple, and not the private property of the defendant, is not a suit within the purview of S. 539 of the Code. **Dase Gowda v. Moodlagowda**, 15 M. C.C.R. 212.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

(27) Ss. 562 and 561—*Effect of illegal remand.*

An order of remand which is not within the scope of S. 562 is an illegal order, and proceedings subsequent to such order are, by reason of the illegality, rendered null and void (a). **Chowdia v. Sidda Naika**, 15 M.C.C. R. 54.

STANLEY ISMAY C.J., and KRISHNA RAO, J.

References :—(a) (1899) 12 A. 510; 28 M. 437, F.

(27-a) S. 564. See No. 27, *supra*.

(28) S. 574—*Contents of judgment of appellate Court.*

The judgment of an appellate Court should show, on the face of it, that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them (a). **Chikha v. Parvatam-manni**, 15 M.C.C.R. 61.

STANLEY ISMAY, C.J., and NANJUNDAYYA, J.

References :—(a) (1898) 22 M. 12; (1884) 10 C. 932; (1886) 9 A. 26, F.

(29) S. 622. See No. 19, *supra*.

Civ. Pro. Code (1908).

(1) Procedure—Applicability of the new Code. See CIV. PRO. CODE (1882), No. 31, 7 M.L.T. 45.

(1-a) Decree in force under the Code of 1882—Whether the Code of 1908 operates retrospectively. See APPEAL (GENERAL), No. 1, 7 M. L.T. 296.

(1-b) Crim. Pro. Code, 1882—Change in law of procedure—Right to amendment. See PROCEDURE, No. 1, 13 O.C. 51.

(1-c) Retrospective operation—Construction of statute. See CONTRACT ACT, No. 3, 5 Ind. Cas. 102.

(1-d) S. 2—*Decree—Decision of an issue in a case—No decree drawn up embodying the decision—Appeal.*

Civ. Pro. Code (1908)—(Continued).

In the administration suit, the Court of first instance decided on one of the issues a substantial question of right between the parties; and having so decided it appointed receivers of all the property in dispute.

In appeal to the District Judge, the finding on the issue was sought to be challenged, on the ground that it was a decree. The District Judge held that there was no decree and therefore no appeal lay to his Court. Before the High Court, it was contended that there was a decree with reference to the question raised in the issue in the first Court, and that an appeal lay from it:

Held, that no appeal lay to the High Court, for there was in fact no formal decree upon the question raised in the issue. **Baldivali v. Visnay Manordas**, 11 Bom. L.R. 1926=34 B. 182=4 Ind. Cas. 829.

SCOTT, C.J., and HEATON, J.

(1-e) S. 2—“Decree,” definition of—Order striking off certain defendants to be treated as order dismissing the case—Order dismissing the case to be treated as a decree—Appeal, right of, from such an order.

Where a Court, before deciding a case finally, orders the names of certain defendants to be struck off from the record on the ground that the plaintiff made out no cause of action against them, such order is tantamount to a dismissal of the case against those defendants, and the plaintiff can treat the order as a “decree.” An appeal, therefore, lies against such an order. **Idan Khan v. Mendi Lal**, 8 Ind. Cas. 409.

CHAMIER, J.C., and EVANS, A.J.C.

(2) S. 2—Order under Land Acquisition Act not a decree. See Act I OF 1894 (LAND ACQUISITION), N. 3, 12 Bom. L.R. 839.

(3) Ss. 2, 47—Pre-emptor—Mesne profits. See PRE-EMPTION, No. 26, 6 Ind. Cas. 648.

(3-a) Ss. 2, 47, 104 (2), 154, O. 21, rr. 90, 92—Application for setting aside sale for fraud or irregularity—Second appeal. See EXECUTION SALE, No. 5-a, 8 Ind. Cas. 3.

(4) Ss. 2, 47, 144—*Decree—Appeal—Pre-emption suit—Execution proceedings—Mesne profits—Order allowing mesne profits to pre-emptor.*

When a decree for possession of land is passed in a suit for pre-emption, a question, whether mesne profits should be allowed to the plaintiff for the period between the institution

Civ. Pro. Code (1908)—(Continued).

of his suit and the final obtaining of his decree on appeal, is not included in the words "relating to the execution, discharge or satisfaction of the decree" as used in S. 47 of the C.P.C., 1908.

The case does not come under S. 144 of the Code, as there is really no question of restitution. It is really a claim to compensation or damages for wrongful exclusion from possession of the land. The question could be carried only by a separate suit.

When an order was passed in favour of the plaintiff by the District Judge in execution proceedings, held that the order was a decree within the meaning of S. 2 of the Code and was therefore appealable. Since it was illegal, it must be set aside. **Chaudhri Hoa Ram v. Rama Paliya**, 44 P.L.R. 1910.

JOHNSTONE, J.

(5) *Secs. 2, 115—Decree or order—Preliminary issue whether a party is an agriculturist—Decision on that issue—Preliminary decree—Dekkhani Agriculturists Relief Act (XVII of 1879), Sec. 53—Revisory application to the District Judge—High Court Revision.*

The plaintiffs, alleging that they were agriculturists, filed a redemption suit. The Subordinate Judge raised a preliminary issue whether the plaintiffs were agriculturists, and found it in the plaintiffs' favour. The defendant applied to the District Judge in revision under S. 53 of the Dekkhan Agriculturists' Relief Act, 1879; but he, being of opinion that the decision on the preliminary issue was not a decree, declined to consider the correctness of the decision of the Subordinate Judge. The defendant next applied to the High Court under S. 115 of the Civ. Pro. Code, on the ground that the District Judge had declined to exercise the jurisdiction vested in him by law under S. 53 of the Dekkhan Agriculturists' Relief Act:

Held, (1) that the formally expressed decision upon the point would be a preliminary decree within the meaning of S. 2 of the Civ. Pro. Code, 1908, being an adjudication which, so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to the manner in which accounts between them should be taken, notwithstanding the written contract that they had entered into before suit.

Civ. Pro. Code (1908)—(Continued).

(2) that, therefore, the District Judge should not have declined jurisdiction in the case. **Krishnaji v. Maruti**, 12 Bom. L.R. 762.

SCOTT, C.J. and BATCHELOR, J.

(5-a) *Ss. 2 (2), 47 (1)—Order directing distribution of sale proceeds between several mortgagees—Whether a decree—Appeal. See MORTGAGE (GENERAL), No. 52, 8 Ind. Cas. 4.*

(6) *Ss. 2 (17), 80—Public servant—Cantonment Committee is a public servant—Notice of claim—Notice compulsory—Actions ex delicto.*

The Cantonment Committee, constituted under the Indian Cantonments Acts, 1889, is, for the purposes of S. 80 of the Civ. Pro. Code, 1908, a "public officer" as defined in S. 2 (17) of the C.P. Code.

S. 80 of the Civ. Pro. Code, 1908, applies to actions sounding substantially in tort, although those sections may, by operation of law, be treated, for certain purposes, as actions *ex contractu*. **Cecil Gray v. The Cantonment Committee of Poona**, 12 Bom. L.R. 615.

CHANDAVARKAR and HEATON, JJ.

Reference:—20 Bom. 697, *Expt.*

(7) *S. 2, O. XXII, r. 3 (1)—Suit by Hindu widow—Death of plaintiff—Legal representative Reversioner.*

Where a Hindu widow died after the institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of her husband, being her legal representatives, should be brought upon the record (a). **Rikhai Rai v. Sheopujan Singh**, 7 Ind. Cas. 97 = 7 A.L.J. 960.

STANLEY, C.J., and GRIFFIN, J.

References:—(a) 9 M.L.A. 543; 2 W.R. (P.C.) 31; 23 C. 636; 20 A. 341, *F.*

(8) *S. 9—Suit for declaration and injunction—Right to perform Ram Lila—Not connected with shrine or temple—Office—Voluntary payments—Suit of civil nature.*

The plaintiff, a minor, sued for a declaration that he had the right to hold a certain Ram Lila and claimed an injunction to restrain the defendant from interfering with that right. It was admitted that the Lila used to be held by means of voluntary subscriptions of the Hindu community. The expenses of the Ram Lila used to be paid out of those subscriptions, and the balance was appropriated by the plaintiff. Held that the suit was not maintainable under

Civ. Pro. Code (1908)—(Continued).

S. 9, the pageants not being connected with any temple, shrine or sacred spot, and the plaintiff not holding any office or receiving any emoluments. **Chunnu Dat Vyas v. Babu Nandan**, 7 A.L.J. 529=6 Ind. Cas. 223.

STANLEY, C.J., and BANERJI, J.

References:—19 M. 62; 11 M. 450; 1862 S. D.A. 314, *R. and Discussed*.

- (9) *S. 9—Stotrapatam office—Suit for declaration of right to recite stotrams, and injunction—Whether cognizable by Civil Court—Voluntary offerings—Refusal of right to participate in—Damages.*

A suit for a declaration of the right of *Vadagalais* to recite *stotrams*, on certain occasions in the *Conjeevaram* temple, and also for an injunction to restrain *Tengalais* from interfering with their *stotrapatum* by themselves reciting the *prabandham* or in any other way is one cognizable by a Civil Court (a).

Where the offerings are voluntary, damages cannot be awarded, but when voluntary offerings have been actually contributed, then the refusal of a person's right to participate in the fund causes damage, which is a natural consequence of the refusal, and the Courts are entitled to award damages in such cases. **Bashia-kar v. Yenkata Varada Thathachariar alias Chinnasawmi Thathachariar**, 20 M.L. J. 530=8 M.L.T. 137=7 Ind. Cas. 148.

MILLER and SANKARAN NAIR, JJ.

Reference:—5 M. 313, *R.*

- (10) *S. 9—Maripora Brahmin, suit by—Claim to officiate as priest at the cremation ceremony—Custom, valid, essentials of—Agreement with Municipality to officiate as priest, is specifically enforceable—Bengal Municipal Act (III of 1884, B.C.), S. 266-1—License to employ cremation priest, if can be granted.*

Where the plaintiff claims a hereditary right to officiate exclusively as a priest on the occasion of the cremation ceremony of all dead bodies brought for funeral to a particular place, the suit is maintainable as one of a civil nature.

A claim for a declaration that the plaintiff is entitled, to the exclusion of all other Brahm-ins of the class to which he belongs, to officiate as a priest at the cremation ceremony, is not maintainable under Hindu law or under any customary right.

A custom, to be valid, must have four essential attributes; first, it must be immemorial;

Civ. Pro. Code (1908)—(Continued).

secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. In order to ascertain whether a particular custom is reasonable or not, one must look to the possible period of its inception.

A voluntary consent of the people to the employment of the plaintiff or his predecessors as cremation priests cannot confer upon him any exclusive right, and the continuance of this state of things, even for generations, cannot confer upon him a legally enforceable right.

An agreement with the Municipal Corporation that the plaintiff alone would officiate as a priest at the cremation ceremony is not specifically enforceable.

S. 260-A of the Bengal Municipal Act does not contemplate that the commissioners should create a monopoly in favour of any person, even in respect of fuel shops. More than one person can get licenses to keep fuel shops for the sale of the necessary articles at the prescribed rates.

The Municipality and the licensee from them are not entitled, by the grant of the license under S. 260-A of the Bengal Municipal Act, to compel any person to employ a particular cremation priest, and they have no authority to levy any fee for this purpose. **Gourmoni Debi v. Chairman of Panihati Municipality**, 12 C.L.J. 75=6 Ind. Cas. 864=14 C.W.N. 1057.

MOOKERJEE and TEUNON, JJ.

- (11 & 12) *S. 9—Declaration that a person is not plaintiff's son—Suit of civil nature—Powers of Court. See SPECIFIC RELIEF ACT, No. 23, 12 Bom. L.R. 697.*

- (13) *S. 11—Res judicata—Two suits—One judgment, but two decrees—Appeal against one decree—Finality of the other decree.*

The Code of Civil Procedure requires a separate judgment and decree for each suit for appeal, and two or more decrees cannot be challenged by one appeal.

A decree, unless it be a decree, which is a nullity by reason of, for example, fraud, cannot be superseded, except it be upon appeal in the regular course.

Civ. Pro. Code (1908)—(Continued).

An appellate Court is bound to apply the rule of *res judicata*, even though the decision pleaded in bar is the decision of an inferior Court, provided that that Court was competent to decide the case.

Where, therefore, two suits were tried together and disposed of by one judgment, and a decree was passed in each suit, but an appeal was preferred against the decree in one of the suits only, *held* that the appeal would be barred by the other decree which stood unreversed and was binding upon the appellant (*a*). **Zaharia v. Debia**, 7 A.L.J. 861 (F.B.)=7 Ind. Cas. 156.

STANLEY, C.J., and TUDBALL and CHAMIER, JJ.

References :—(*a*) 10 All. 123; 11 All. 148; 12 All. 578 approved and followed. 29 All. 730, overruled.

(14) *S. 11—Res judicata—Co-defendants—Mortgagor and prior mortgagee.*

In a puisne mortgagee's suit on his mortgage, the prior mortgagee was made a party defendant. The subsequent mortgagee questioned the validity of the prior mortgage on the ground that no consideration has passed. The mortgagor kept silence. The Court held that the prior mortgage was a good mortgage and was for consideration. Subsequently the prior mortgagee brought a suit on his mortgage, making the subsequent mortgagee as well as the mortgagor parties to the suit. The mortgagor pleaded that it was without consideration:

Held, that it was not open to the mortgagor in the second suit to question the validity of the prior mortgage. **Jai Narain v. Mitthu Lal**, 6 Ind. Cas. 375.

RICHARDS and TUDBALL, JJ.

(15) *S. 11, Expl. IV—Suit on first mortgage—Order for unconditional sale—Non-disclosure of second mortgage—Subsequent suit on second mortgage—Bar.*

Where a mortgagee holding two mortgages, under two separate deeds, of the same property, sued upon the first mortgage without disclosing the existence of the second mortgage, and obtained a decree for unconditional sale of the property, and where he subsequently sought, by a second suit, to enforce his second mortgage by sale of the same property, *held* that he was barred from suing a second time for sale of the property on his second mortgage, by

Civ. Pro. Code (1908)—(Continued).

S. 11, Expl. IV, C.P.C., 1908 (a). **Diwan Sahjram Tahilram v. Gagumal Dharamdas**, 4 S.L.R. 82.

HAYWARD, J.C., and CROUCH, A.J.C.

References :—(*a*) 24 A. 429 (P.C.) and 30 M. 353, *F*.

(16) *S. 11—See RES JUDICATA.*

(17) *S. 12—See ACT VIII OF 1885 (BENGAL TENANCY), No. 55, 14 C.W.N. 364.*

(18) *S. 14—Retrospective effect. See FOREIGN JUDGMENT, No. 1. 165 P.W.R. 1909.*

(19) *Ss. 14, 151 and O. 47, R. 1—Second appeal decided on facts—Application for review—Whether entertainable.*

Held that the High Court in second appeal cannot entertain an application for a review of judgment sought on the ground that since the disposal of the appeal, documentary evidence has been discovered which, if sufficiently proved, would have led the Court below to come to a different finding. If the fact of the discovery of the new evidence is brought to the notice of the High Court at the hearing of the appeal, it cannot consider the weight of such evidence, nor can it remand the case to the lower appellate Court with a view to the consideration of such evidence by that Court.

It can, however, allow the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence. **Nand Kishore v. Anwar Husain**, 6 A. L.J. 979=4 Ind. Cas. 809=32 A. 71.

STANLEY, C.J., and BANERJI, J.

References :—4 B.L.R. 213, A.C.; 18 M. 480, R. and F.

(20) *S. 17—Jurisdiction—Suit for possession of immoveable property, situate in several districts and based on different causes of action—Power of Full and Division Benches on cases referred to them respectively.*

Held, that :—

(1) A suit for possession of immoveable property is one for obtaining relief respecting that property. It can be entertained by any Court within the local limits of whose jurisdiction any portion of the property is situate, if the entire claim is cognizable by such Court. But a suit relating to several properties situate within the jurisdiction of different Courts and based on separate and distinct causes of action

Civ. Pro. Code (1908)—(Continued).

cannot be tried anywhere, being bad for multi-fariousness, until it is confined to the property, claim to which, is based on one of the causes of action.

(2) Several separate invasions of plaintiff's rights constitute different causes of action and each one arises on the day of infringing the right (a).

(3) *Obiter—Practising*:—Where a case is referred by a single Judge to a Division Bench for deciding a difficult question of law, the Bench hearing it is competent to deal with all the points whether of law or fact involved therein, and is not bound by the single Judge's finding thereon. Similarly a Full Bench can interfere, when it finds that some point has been wrongly decided by the referring Bench (b). **Chiranjilal Shah v. Bankta Chari**, 12 P.W.R. 1910 5 Ind. Cas. 838.

JOHNSTONE and SCOTT-SMITH, JJ.

References:—(a) 1 P.R. 1905; 127 P.R. 1892; 24 P.R. 1899; 18 All. 432, D. (b) 10 P.R. 1891; 91 P.R. 1898, R.

(21) Ss. 20, 92—Dispute about succession to trusteeship cannot be referred to arbitration—Application to file award in such cases—Jurisdiction of Court. See MAHOMEDAN LAW (WAKF), No. 5, 6 Ind. Cas. 219.

(22) S. 24—Transfer of suit—High Court—Subordinate Court Concurrent jurisdiction—Position of Munsiff's Court.

Under S. 24 of the Code of 1908, the High Court and the District Court have concurrent jurisdiction to direct the transfer of a suit. The High Court can direct a transfer even after the application for the same purpose has been refused by the District Court.

The Court of a Munsif is subordinate to the High Court within the meaning of S. 24. **Hari Nath Biswas v. Debendra Nath Biswas**, 11 C.L.J. 218—5 Ind. Cas. 771.

MOOKERJEE and VINCENT, JJ.

(23) S. 21—Transfer of case—District Judge—Assistant Judge—Order of transfer of a claim upwards of Rs. 10,000 from the Court of first Class Subordinate Judge to the District Court—Order passed by Assistant Judge—Bombay Civil Courts Act (XIV of 1869).

A suit, wherein the plaintiff claimed Rs. 18,197-13-0 from the defendant, was filed in the Court of the First Class Subordinate Judge at Poona. After the suit had been heard

Civ. Pro. Code (1908)—(Continued).

by that Judge for some days, the defendant applied to the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The latter heard the application and ordered that the suit be transferred to the District Court of Poona for trial. The plaintiff objected that this order was without jurisdiction:—

Held (1) that it appeared from the Bombay Civil Courts Act (XIV of 1869) that an Assistant Judge was not a Judge having jurisdiction co-ordinate with that of the District Judge. He was, therefore, not a Judge of the District Court, which alone had jurisdiction to transfer the case under S. 24, Civ. Pro. Code, 1908.

(2) That, under S. 24 of the Code, the District Court might withdraw any suit and try and dispose of it. Here the suit withdrawn was for a sum exceeding the pecuniary jurisdiction of the Assistant Judge, and he therefore could not try and dispose of it. He, therefore, was not a Judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction. **Haji Umar Abdul Rahiman v. Gustadji Mancherji Cooper**, 12 Bom. L.R. 354.

SCOTT, C.J., and CHANDAVARKAR, J.

(23-a) S. 24—See ACT XV OF 1882 (PRESY. S. C. Courts), No. 2, 11 C.W.N. 662.

(24) S. 24, O. XXXIX, r. 2, cl. (3) - Application to District Munsif for disobedience of an *ad interim* injunction—Transfer of application by District Judge—Jurisdiction—Extent of powers of transfer under S. 24—Notice of transfer to party.

An interlocutory application pending before the District Munsif to punish the defendant for disobedience of an *ad interim* injunction granted by the Munsif cannot be transferred from his file to the file of some other Court by the District Judge or the High Court.

S. 24 of the C.P.C. does not apply to such cases.

When the District Judge transfers a case under S. 24, on the application of a party, he should, before passing the order of transfer, give notice to the opposite party.

If, however, the applicant invites the District Judge to transfer the case of his own motion, and the Judge orders the transfer without giving notice to the opposite party, the order of transfer is not liable to be set aside on the mere

Civ. Pro. Code (1908)—(Continued).

ground of want of notice, the irregularity not being material but only a defect of form. **Bellary Press Co. Ltd. v. Yenkata Row**, 8 M.L.T. 374.

MUNRO and KRISHNASAWMY IYER, JJ.

Reference:—20 M. 378, R.

(25) S. 33—*Effect of—Previous order in execution—Res-judicata.*

Where a decree has been interpreted in a particular sense as between the parties, that interpretation has the force of *res-judicata*, and the subsequent amendment of the law has no effect on this question. **The Collector of Shajahanpur v. Kunj Behari Lal**, 7 A.L.J. 190=5 Ind. Cas. 210=32 A. 210.

KNOX and PIGGOTT, JJ.

(26) Ss. 38, 39, O. 21—Transfer of decree passed by Civil Court for execution to a Rent Court. See EXECUTION OF DECREE, No. 17, 13 O.C. 119.

(26-a) S. 39—See No. 26, *supra*.

(27) S. 47—*Decree containing penal clauses—Relief against penalty in execution.*

Where a decree contains penal clauses, relief as against the penalty cannot be granted in execution proceedings. The general rule is laid down in S. 47 of the Code, which has been generally held to exclude all questions relating to the validity of the decree. **Dayaram Jesamal v. Adamji Karimji**, 4 S.L.R. 1=7 Ind. Cas. 583.

HAYWARD, J.C.

(28) S. 47—Suit for mesne profits—Maintainability. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 2, 7 Ind. Cas. 187.

(29) S. 47—Unrecorded co-sharer whether representative of recorded tenant. See ACT VIII OF 1885 (BENGAL TENANCY), No. 54, 7 Ind. Cas. 769.

(29-a) S. 47—Right to question validity of decree in execution. See EXECUTION OF DECREE, No. 22-a, 8 Ind. Cas. 26.

(29-b) S. 47—See Nos. 3, 3 a and 4, *supra*.

(30) Ss. 47, 49, O. 21, r. 2—*Execution proceedings—Res judicata—Opportunity to contest validity of order—Objection by judgment-debtor not heard as decree-holder dropped proceedings—When rule 2 applicable—Contest between assignee of decree and execution purchaser of judgment-debtor's interest—Question whether regular*

Civ. Pro. Code (1908)—(Continued).

suit is maintainable, when not of practical importance—Assignee of decree—Equities and defences available to judgment-debtor.

A party to an execution proceeding, who allows an order for execution to be passed against him at one stage of the proceeding where he had an opportunity to contest the validity of that order, cannot be permitted, at a subsequent stage of the proceeding, to re-open the whole matter in controversy (a).

This principle is based on the assumption that the person debarré had an opportunity to contest the validity of the order. It has consequently no application when it is proved that there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings with due diligence.

Consequently, where there has been no judicial determination of the objection or the judgment-debtor by reason of the default of the decree-holder, it cannot be held that the previous order operates as an effective bar to an enquiry into the merits of the objection on the occasion of a subsequent application for execution.

In cases, to which the provisions of O. XXI, rule 2 of the Code, are applicable, if appropriate application has not been made within the prescribed time, the alleged payment or satisfaction must be ignored, and the party, who seeks the benefit thereof, cannot indirectly obtain an extension of the period of limitation, on the ground that the question falls within the scope of S. 17 and may be determined thereunder.

Where the contest lies between the assignee of the decree and the execution purchaser of the interest of the judgment-debtor in the properties covered by the decree, and the latter makes allegations of fraud and conspiracy between the decree-holder and the judgment-debtor in the matter of the assignment of the decree, O. XXI, rule 2, has no application to the case, which falls within the scope of S. 17 under which the matter may be investigated.

The question whether a regular suit is maintainable for the determination of the question of fraudulent assignment, or whether it ought to be determined in execution proceedings, does not become one of practical importance, where the Court, in which the question has been raised, is the Court competent to execute the decree as also to entertain the suit. The

Civ. Pro. Code (1908)—(Continued).

matter is one of form, and the Court will not, by a strict adherence to the form, defeat the ends of justice.

Under S. 49 of the Code, the assignee of a decree stands in no better position than the assignor, and takes it subject to all the equities and defences subsisting at the time of the assignment which the judgment-debtor could have asserted against it in the hands of the judgment-creditor, notwithstanding that the assignee may have had no notice thereof. **Mon Mohon Karmakar v. Dwarka Nath Karmakar**, 7 Ind. Cas. 55 = 12 C.L.J. 312.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 8 C. 51; 11 C.L.R. 113; 8 I.A. 123; 6 A. 269; 11 I.A. 37; 7 A. 102; 11 I.A. 181, F.

(31) *Ss. 47, 104, cl. (2), O. XXI, rr. 89, 92 O. XLIII, r. (1) (i)—Deposit by judgment-debtor—Order setting aside or refusing to set aside sale—Appeal—Second appeal.*

A deposit by the judgment-debtor to set aside a sale can only be made under R. 89 of O. XXI. It does not come under S. 47 of the Code.

An order refusing to receive it and to set aside the sale, or an order setting aside the sale, is made under R. 92 of O. XXI, and an appeal lies to the District Judge under O. XLIII, R. 1 (j), and no second appeal lies to the High Court. **Sita Nath Roy v. Hare Krishna Sahu**, 6 Ind. Cas. 573.

HOLMWOOD and SHARFUDDIN, JJ.

(32) *Ss. 47, 151—Execution of decree—Question relating to execution—Question as to what was sold at execution sale—Inherent power of Court to rectify mistake—Res judicata—Question of mistake.*

The question of what was sold at an execution sale is a question relating to the execution of the decree; and no decision as to the validity of the decree or as to the validity of the sale held under the decree on the ground of fraud can possibly operate as *res judicata* in a question of mistake which occurred in the execution proceeding itself. The Court has full jurisdiction under S. 151 of the Code to rectify it. **Ekadashi Das v. Chandra Mohan Shaha**, 7 Ind. Cas. 91.

HOLMWOOD and CHATTERJEE, JJ.

(33) *Ss. 47, 158—Execution—Fraudulent decree—Separate suit or application—Nullity—Remedy against fraudulent decree—Application for execution treated as suit—Rules of procedure, alteration in—Retrospective effect.*

Civ. Pro. Code (1908)—(Continued).

A judgment or decree obtained by fraud upon a Court binds neither the Court, which passes it, nor any other Court; and its nullity upon the ground of fraud, though it has not been set aside or reversed, may be alleged in a collateral proceeding.

In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of Judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as nullity and judgment which can be clearly shown to have been obtained by manifest fraud.

Where a decree has been obtained by fraud, the remedy is by a separate suit and not by an application under S. 47 of the Code (a).

No person has any vested rights in procedure. Alterations in the procedure are always retrospective unless there be some good reasons against it (b). **Shamsheryar Khan v. Gopal Chand**, 7 Ind. Cas. 11.

KNOX and KARAMAT HUSAIN, JJ.

References :—(a) 9 M. 81; 21 C. 605; 24 C. 546; 26 C. 326; 3 C.W.N. 395; 27 C. 197; 20 A. 370; 2 H.L.C. 257; 1 Jo. and Lat. 178; 6 Ir. Eq., R. 569 and 26 B. 545, R. (b) 3 App. C. 603; 3 Q.B. 160; 9 B. and S. 86, 37 L.J. Q.B. 80; 87 L.T. 540; 16 W.R. 540; 8 B. 511; 12 C. 583; 18 B. 12; 21 B. 822; 27 M. 538 and 14 M.L.J. 340, R.

(34) *S. 48—Decree for sale upon mortgage passed before 1908—No curtailment of right to execute—Application of section—Retrospective effect—Statutes.*

The right to enforce the execution of a decree is a substantive right. That right cannot be lost without an express provision of law to that effect.

A decree for sale of mortgaged property was passed while Act XIV of 1892 was in force. Twelve years expired, but the decree was not satisfied. In the meantime, Act V of 1908 was passed, S. 48 of which was made applicable to all decrees. Held that the decree passed before the passing of that Act could be executed more than twelve years after the date it was passed. No statute shall be so construed as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Statutes are to be construed as operating only on cases or facts which come into

Civ. Pro. Code (1908)—(Continued).

existence after they are passed. **Kounsilla v. Ishri Singh**, 7 A.L.J. 420=6 Ind. Cas. 188.

KNOX & KARAMAT HUSAIN, JJ.

- (35) *S. 48—Decree—Execution—Application to execute decree—Attachment of property—Transmission of decree by Buroda Court to British Court—Application to execute decree by attaching other property in British India—Limitation.*

The plaintiff obtained a decree in the Amreli Court (H.H. the Gackwar's territory) against the defendants for Rs. 6,727 on the 17th July, 1893. An application to execute that decree was made in 1894. A second application for the purpose was made on the 10th July, 1905, wherein the prayer was for attachment of whatever moveable property of the defendants that might be found at whatever place within the jurisdiction of the Amreli Court. The Court made the order of attachment. Subsequently, on the plaintiff's application, the decree was transmitted for execution to the High Court of Bombay on the 25th July, 1909. The plaintiff applied to the High Court, on the 15th October, 1909, to execute the decree by attaching the moveable property of defendant No. 2 in Bombay. The defendant No. 2 objected that the application was barred by the provisions of S. 18 of the C.P.C. (1908).

Held that the plaintiff's application to the High Court was a substantive application with regard to the property in Bombay which was not the subject of any previous application; and that, having been made more than twelve years after the date of the decree, it was barred by the provisions of S. 48 of the C.P.C. (1908). **Jeevandas Dhanji and Ranchoddas Chaturbhai**, 12 Bom. L.R. 844.

SCOTT, C.J., and BATCHELOR, J.

- (35-a) *S. 48—See No. 170, supra.*

- (35-a-i) *S. 48, O. XXI, r. 11—Execution application, effect of striking off—Attachment, subsisting, removal of—Fresh application or one ancillary to the previous application—Twelve years' rule in execution proceedings to be strictly observed.*

An order directing an application for execution to be struck off the file does not in itself necessarily involve the removal of the subsisting attachment, but the passing of such orders as have the effect of striking off the application for execution, and at the same time, allowing the attachment to remain in force, ought to be discouraged.

Civ. Pro. Code (1908)—(Continued).

The question whether an application for execution is only ancillary to the previous application or is a fresh application is to be decided according to the circumstances of every case.

The twelve years' rule laid down in S. 48, C.P.C., is a salutary one and its evasion should not be permitted. Execution proceedings should not be allowed to be dragged on beyond twelve years merely because it suits the convenience of the decree-holders.

If a decree-holder desires to come to terms with his judgment-debtor in such a manner as to allow a longer period than twelve years for the satisfaction of the decree, he may enter into a fresh contract. **Mahadeo Prasad v. Hyder Mehdi**, 8 Ind. Cas. 727.

PIGGOTT, J.C.

*References:—*18 A. 482; 18 A. 49; 8 O.C. 152, R.

- (35-b) *S. 49—See No. 30, supra.*

(36) *S. 55 (3) and (4)—Competency of executing Court to imprison judgment debtor after applying for insolvency. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 8, 83 P.W. R. 1910.*

- (37) *S. 60 (1) (i) and O. 21, r. 48 (3)—Execution of decree—Attachment—Pay of Military Assistant Surgeon—Exemption from attachment under Army Act 1881 (44 & 45 Vic. c. 58), s. 144—Refusal by officer commanding to comply with order of attachment—Procedure to be adopted by Civil Court.*

Held, that the pay of an Assistant Surgeon in the Military employ is absolutely protected from attachment in execution of a decree, (S. 144 (3), proviso 1, Army Act, 1881, 44 & 45 Vic. c. 58) because such an officer is not a 'public officer' within the meaning of S. 60 (i) C.P.C., 1908.

Where an officer commanding refuses to comply with an order of attachment of the pay of an officer which is liable to such attachment.

Held, that the Civil Court ought to act under the provisions of O. XXI, R. 48 (3), C.P.C., 1908, that is to say, the Court should proceed to recover from Government, for the benefit of the decree-holder, the sums which should have been stopped out of the judgment-debtor's pay and remitted to the Court by the officer authorised to disburse the judgment-debtor's pay, leaving the Government to settle up as it pleases.

Civ. Pro. Code (1908)—(Continued).

with its officer, the judgment-debtor. **Oakes & Co. Ltd., of Madras v. Mr. J. P. Discarale**, 10 P.R. 1910 = 23 P.W.R. 1910 = 5 Ind. Cas. 802.

JOHNSTONE and SHAH DIN, JJ.

(37-1) S. 63—See No. 40, *infra*.

(37-a) S. 64—Attachment of holding before judgment—Surrender of holding during attachment—Effect. See ATTACHMENT, No. 1-a, 8 Ind. Cas. 76.

(37-b) Ss. 64, 115, O. 23, r. 10. See ACT I OF 1891 (LAND ACQUISITION), No. 14, 7 Ind. Cas. 481.

(38) S. 72—Agricultural land—Order of Collector refusing to intervene after attachment of land—No appeal.

Where a Civil Court by its order, after attachment of agricultural land, sent the record to the Collector, it amounts to an enquiry whether he wished to intervene, and where the Collector, by an order of his, refused to intervene, no appeal lies against the Collector's order. **Raja Ram v. Durga Dut**, 5 P.R. 1910 (Rev.).

DOUSIE, F.C.

(39) S. 73—Rateable distribution, application for—Notice to rival decree-holders, necessity of.

Held that applications for rateable distribution should be dealt with after notice to the rival decree-holders, whose interests may be seriously affected thereby. **Ikkar Husain (Saiyad) v. Jafar Ali Khan (Nawab)**, 13 O.C. 282.

EVANS and PIGGOTT, J.CS.

(40) Ss. 73, 63—Rateable distribution among decree-holders—Transfer of decrees to the Court where realisation takes place—Application for execution to the Court realising money, necessity of.

The object of S. 73, C.P.C., is twofold, *firstly*, to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property, and *secondly*, to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them.

Held further, that S. 295 of Act XIV of 1882 (corresponding to S. 73 of the present Code), did not require the transfer of a decree to the Court where the process of realization takes

Civ. Pro. Code (1908)—(Continued).

place as a condition, and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realisation takes place. **Mohan Lal (Lala) v. Humayun Jah (Prince Mirza)**, 13 O. C. 291.

EVANS and LINDSAY, J.CS.

(40-a) S. 80—See No. 6, *supra*.

(41) S. 91—Powers of Advocate-General. See ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY), No. 3, 12 Bom. L.R. 274.

(42) S. 92—Suit against mahant of a gaddi.

The appellant instituted this suit against the respondent, who was admitted to have been for years Mahant of the Gaddi alleging various breaches of trust and asking for removal of the respondent from his trusteeship and for a declaration that the property entered in the schedule to the plaint was trust property.

Held, that the case came within S. 92 of Act V of 1908 and therefore under sub-section (1) of the section the suit could not be entertained unless instituted in conformity with the provisions of the sub-section. **Shoo Ratan Doss v. Audhesh Narain**, 13 O.C. 177.

CHAMBER and EVANS, JJ.

(42-a) S. 92—See No. 21, *supra*.

(43) Ss. 92, 93—Persons entitled to use the property—Declaration of right—Permission to sue. See SPECIFIC RELIEF ACT, No. 22, 7 A.L.J. 797.

(44) Ss. 32, 115—Suit with Advocate-General's sanction in respect of public charities—Court Fee—Court Fees Act (VII of 1870), Sch. II, Art. 17, VI—Striking off a prayer for relief—Advocate-General's sanction if necessary—Interlocutory order—Revision by High Court.

A plaint in a suit under S. 92, C.P.C. (1908) (relating to public charities), should bear a Court-fee stamp of Rs. 10 only, as required by Art. 17, cl. vi of Sch. II of the Court Fees Act (a).

Where the plaintiffs in such a suit, being ordered by the Judge to value the suit and pay *ad valorem* Court-fee on such value, moved the High Court, without waiting for the dismissal of the suit for non-compliance with the order:

Held—That the order in effect amounted to a denial of jurisdiction, and, though interlocutory, was a fit one for interference in revision by the High Court.

Civ. Pro. Code (1908) —(Continued).

A prayer for relief in a plaint in such a suit, not covered by those specified in S. 92, may be struck off on the application of the plaintiff, the sanction of the Advocate-General for striking off such a prayer being unnecessary (b). **Ramrup Das v. Mohunt Shiyaram Das**, 14 C. W.N. 932—7 Ind. Cas. 92—12 C.L.J. 211.

HOLMWOOD and CHATTERJEE, JJ.

References :—(a) 19 A. 60; 21 A. 200, *relied on*. (b) 33 C. 789, *R*.

(44-a) S. 93—See No. 43, *supra*.

(45) S. 99—*Suit upon agreement by Karnava of Malabar Tarwad against successor—Necessity of joinder of other members—'Misjoinder' in S. 99 Whether includes 'non-joinder.'*

Where a suit is brought, upon an arrangement entered into by a Karnavan, against the successor of that Karnavan, the successor-Karnavan represents all the other members of the Tarwad, and it is unnecessary to make the other members parties.

The word 'misjoinder' in S. 99, C.P.C., 1908, includes 'non-joinder.' **Ekkannath Eachara Unni Yalia Kaimal v. Manakkat Yasunni Elaya Kaimal**, 7 M.L.T. 102—5 Ind. Cas. 774—20 M.J. 344.

WHITE, C.J., & KRISHNASAWMY IYER, J.

References :—7 M. 428, *D*; 21 M. 373 (382), *F*.

(46) S. 100—*Second appeal—Point of law—Whether decree fraudulent—Conclusion of law from facts.*

A finding of the lower appellate Court that a certain decree is not fraudulent is not a finding of fact, but is a conclusion of law arrived at from facts found and is, therefore, amenable to reversal in second appeal. **Deo Nagar Roy v. Ram Sewak Mahto**, 5 Ind. Cas. 398.

HOLMWOOD and CHATTERJEE, JJ.

(47) S. 100—*Second appeal—Question of fact—Jurisdiction of High Court.*

Where the High Court, in deciding a second appeal, said that, on a careful consideration of the evidence and the circumstances, it thought the appellant must succeed: *Held*, that it went beyond the limits open to the High Court in second appeal. **Jaggannath Mahapatra v. Ram Kristo Mahapatra**, 6 Ind. Cas. 760.

JENKINS, C.J., and DOSS, J.

(48) S. 102—*Second appeal—Nature of suit cognizable by Small Cause Court—Suit for damages for cutting away crop.*

Civ. Pro. Code (1908) —(Continued).

In a suit for damages between two sets of *raiyats*, the plaintiff alleging that the defendant had wrongfully come and cut away the crop on his land, the Courts below found that the defendant had no possession or title in the land and was, therefore, liable to damages. In second appeal by the defendant:

Held that no second appeal lies in this case (a).

Held, further, that, although a question of title to land has been tried, it was tried incidentally, and, therefore, the second appeal was incompetent (b). **Manbodh Acharya v. Ananta Karu**, 6 Ind. Cas. 415.

HOLMWOOD and SHARFUDDIN, JJ.

References :—(a) 17 C. 707, *F*; 25 M. 510, *D*. (b) 2 C. 470; 1 C.L.R. 33, *F*.

(49) S. 102—*Failure of consideration—Suit by auction purchaser for refund of purchase money. See EXECUTION SALE, No. 3, 12 Bom. L.R. 723.*

(50) S. 102—*Second appeal—Suit to enforce payment of 'begar.' See ACT XVIII OF 1881 (C. P. LAND REVENUE), No. 1, 6 N.L.R. 117.*

(50-a) S. 104 (cl) (i)—See No. 31, *supra*.

(51) Ss. 104, 105—*Interpretation of statutes—Retrospective effect—Appeal—Order refusing to file an award made in 1909—Application in 1908.*

The Code of Civil Procedure, 1882, granted no appeal to a higher tribunal from an order refusing an application to have an award made a rule of Court, but the Code of 1908 does grant such an appeal, *rule* S. 104 (f). Where, therefore, an application was made on the 19th September, 1908, to make an award a rule of Court, and the application was rejected on the 18th June, 1909, *held* that the provisions neither of S. 154 nor of S. 104 of the Code applied, and the appeal was not maintainable.

A Court will not ascribe retrospective effect to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature (a). **Gajraj Lal v. Ramdin Lal**, 7 A.L.J. 1070.

KNOX and GRIFFIN, JJ.

Reference :—(a) 6 Q.B. 23, *R*.

(52) S. 104, *Sch. II, r. 11—Indian Arbitration Act (IX of 1899), S. 10—Arbitrators—Reference to arbitration—Difference in opinion of arbitrators on a question*

Civ. Pro. Code (1908)—(Continued).

of law—Statement of a special case for the opinion of the Court—Appeal from the Court's order.

The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons; and a consent Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes with regard to properties which were not the subject-matter of the suit. The agreements provided that, in case of disagreement between the arbitrators, which prevented them from making an award, the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to an umpire. But the arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case, under the C.P.C., 1908, Sch. II, r. 11, and the Indian Arbitration Act, S. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision :

Held that no appeal lay, since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion; but there was simply a statement of a question of law for the opinion of the Court. The case was not, therefore, one which fell under r. 11 of the second schedule of the C.P.C., 1908; but it fell under S. 10 of the Indian Arbitration Act, in so far as it related to the second agreement. **Purshotumdas Ramgopal v. Ramgopal Hiralal**, 12 Bom. L.R. 852.

SCOTT, C.J., and BATCHELOR, J.

(52-a) S. 105—See No. 51, *supra*.

(53) S. 105 (2), O. 43, r. 1 (u)—Power of Chief Court on appeal against order of remand. See PRE-EMPTION, No. 40, 86 P.L.R. 1910.

(54) S. 107 (2), O. 1, r. 10, O. 23, rr. 1 and 3—Revocation of probate by first Court—Compromise in appellate stage—Legality—Petitioner for revocation if can withdraw entire proceeding pending appeal by objector. See PROBATE, No. 3, 12 C.L.J. 91.

(55) S. 108, O. XXII, rr. 4 and 11—Second appeal—Death of respondent—Change of law of Limitation—Limitation Act, 1877, Sch. II, Art. 175 C.—Limitation Act, 1908, Sch. II, Art. 177—Curtailment of 3 years into 6 months—General Clauses

Civ. Pro. Code (1908)—(Continued).

Act (X of 1897), S. 6—Abatement as against some respondents without whom the suit cannot proceed—Effect as against others.

An application to bring on record the legal representative of a respondent, who died when the old Limitation Act (1877) was in force must be dealt with under the new Act of 1908. Such an application must be made within six months from the date of the respondent's death under Art. 177 of the Act of 1908, and the benefit of a three years period under Art. 175 C. of the Act, of 1877 will not avail. S. 6, General Clauses Act, 1897, has no application so as to preserve the older period of limitation, which is not a rule of substantive law.

Where an appeal abated as against some of the respondents (Co-urals of a *decree*) without whom the appeal cannot be prosecuted as against the rest, the appeal should be dismissed as against all. **Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad**, 7 M.L.T. 115=5 Ind. Cas. 420=20 M.L. J. 347.

MILLER and KRISTINASWAMI IYER, JJ.

References :—11 A. 408 and 11 Bom. H. C.R. 117, *F.*; 6 B. 26, *D.*; 29 M. 529, *R.*

(56) S. 109, cl. (1)—Privy Council Appeal—Order of remand—Decision on cardinal question.

Where, in a suit for the winding up of a partnership business, the first Court directed an account to be taken, and the High Court on appeal disagreed with that Court in respect of the respective liabilities of the parties, and remanded the suit for a fresh taking of the accounts :

Held that the decision of the High Court on this cardinal question as to the respective liabilities of the different parties is such a decision as to constitute such a final decision on the points in issue as to amount to a decree in suit. **Dwarka Nath Sarkar v. Haji Mahomed Akbar**, 7 Ind. Cas. 622.

BRETT and VINCENT, JJ.

References :—18 I.A. 6; 15 B. 155; 22 I. A. 1; 17 A. 112, *followed*.

(56-a) S. 109 (c), O. XLV, r. 3—Privy Council Appeal—Case fit for appeal.

In 1902 a decree received a certain interpretation by the Court. In a subsequent proceeding the High Court decided that the interpretation given in 1902 operated as *res judicata*.

Civ. Pro. Code (1908)—(Continued).

Against this order of the High Court, the decree-holder applied for leave to appeal to the Privy Council :

Held that it was not a fit case for appeal to His Majesty in Council. **Kunj Behari Lal v. Collector of Shahjehanpur**, 8 Ind. Cas. 485.

JOHN STANLEY, K.T., C.J., and BANERJI, J.

- (57) *Ss. 109, 110—Privy Council Appeal—Leave to appeal—Subject-matter not exceeding Rs. 10,000—Certificate granted in connected cases—Same question involved—Fit case for appeal to His Majesty in Council.*

Applications were made in several connected appeals for leave to appeal to His Majesty in Council. Some of them satisfied the requirements of S. 110 of Act V of 1908, and the certificates were granted. One of them, however, did not satisfy the requirements of the section but involved the same question as did the others.

Held, that, in view of the fact that the same question was involved in all the appeals, the certificate should be granted, even in the appeal which did not satisfy the requirements of S. 110. **Makund Sarup v. Richard Ross Skinner**, 5 Ind. Cas. 583.

STANLEY, C.J., and BANERJI, J.

- (58) *Ss. 109, 110, O. 41, r. 10—Order rejecting appeal for failure to furnish security for costs—Order affirming decision of the Court below, meaning of—Final order passed on appeal, meaning of.*

Where an appeal had been rejected for failure on the part of the applicant to furnish security for costs under Order 41, r. 10, *held*, that the order rejecting the appeal was not one affirming the decision of the Court below within the meaning of the last paragraph of S. 110, Civ. Pro. Code.

Held further, that the order in question was not "a final order passed on appeal" within the meaning of S. 109, Civ. Pro. Code. **Radha Kishen v. Jamna Prasad**, 13 O.C. 59.

CHAMIER and EVANS, O.J.C.

References:—6 W.R. 102; 10 W.R. 1 (F.B.), 8 C.W.N. 296; 30 C. 679; 32 B. 108, R.

- (58-i) S. 110—See Nos. 57 and 58, *supra*.

(58-a) S. 113, O. 46, r. 1—See ACT VII OF 1899 (SUCCESSION CERTIFICATE), No. 1-a, 7 Ind. Cas. 806.

Civ. Pro. Code (1908)—(Continued).

- (59) *S. 115—Revision—Evidence, misappreciation of—Whether ground for revision—Berar and Central Provinces—Applicability of the Code.*

The mere fact that one item of evidence has been given undue weight or misappreciated is not a sufficient ground for interference in revision under the Code of Civil Procedure (a). The new Code of Civil Procedure is applicable to Berar and there is no difference between Berar and the Central Provinces with regard to the High Court's power of revision under the Code (b). **Babu v. Mt. Parwati**, 6 N.L.R. 49 = 6 Ind. Cas. 429.

SKINNER, A.J.C.

References:—(a) 4 N.L.R. 184 & 11 C. 6 (P. C.), R. (b) 2 N.L.R. 72 (77), D; Notification No. 687, dated 10th May, 1906 and Notification No. 919, dated 26th March, 1909, R.

- (60) *S. 115—Wrong decision on limitation—Revision.*

A wrong decision as to limitation or as to the jurisd relation between the parties does not necessarily involve any material irregularity or illegality in the exercise of jurisdiction, so as to make it a ground of revision under S. 115 of the Code. **Karmam Sama Row alias Venkata Naranappa v. Roddam Vencoba Row**, 6 Ind. Cas. 745.

MILLER, J.

- (61) *S. 115—Order granting an application to sue in forma pauperis—Revision.*

An order of a Subordinate Judge, granting an application to sue in *forma pauperis*, cannot be revised. **Malik Muhammad Ayub v. Malik Muhammad Mahmood**, 7 A.L.J. 741.

KARAMAT HUSAIN and CHAMIER, JJ.

(62) S. 115—Decree—Refusal to exercise jurisdiction—Appeal. See ACT VIII OF 1885, (BENGAL TENANCY), No. 46, 5 Ind. Cas. 158.

(63) S. 115—Resident's Court at Aden—Bombay High Court's revisionary powers. See ACT II OF 1864 (ADEN), No. 1, 12 Bom. L.R. 149.

(64) S. 115—Meaning of "case"—Revision of interlocutory orders. See REVISION, No. 1, 72 P.W.R. 1910.

(65) S. 115—See ACT VIII OF 1885 (BENGAL TENANCY), No. 10, 14 C.W.N. 788.

(66) S. 115—Revision of order of Civil Court refusing sanction to prosecute. See SANCTION TO PROSECUTE, No. 2, 14 C.W.N. 806.

Civ. Pro. Code (1908)—(Continued).

(67) S. 115—Order refusing to add parties—Revision—Meaning of "case" in S. 115. See PARTIES, No. 1, 13 O.C. 109.

(68) S. 115 Interference with interlocutory order. See ACT IV OF 1893 (PARTITION), No. 1, 7 Ind. Cas. 436.

(69) S. 115—Other remedies open to parties—Interference in revision. See SPECIFIC RELIEF ACT, No. 5, 4 S.L.R. 80.

(69-a) S. 115—See Nos. 5, 37-b and 44, *supra*.

(70) S. 115, O. XXXIX, R. 7—*Inspection of disputed property—Inventory, preparation of—Court's power to direct taking of inventory—High Court's power of revision—Interlocutory order.*

Under O. XXXIX, R. 7, of the Civil Procedure Code, the Court may not only allow inspection of the disputed property, but may also direct the preparation of an inventory of the structures, fixtures, and movables on the premises which are claimed by the plaintiff. But the Court will take care to impose as little inconvenience as possible on those on whom the order is made.

If irreparable injury would be caused to one of the litigants if the matters were not set right, the High Court will interfere with an interlocutory order made by a Subordinate Court in the exercise of its discretion. **Amjad Ali v. Ali Husain Johar**, 6 Ind. Cas. 574.

MOOKERJEE and CARNDUFF, JJ.

References:—4 Ind. Cas. 364; 14 C.W.N. 147; 10 C.L.J. 407, R.

(70-a) S. 132 and Orders XVI and XXVI—*Process, refusal to issue, on wrong and insufficient grounds—Exclusion of evidence—Ground for removal—Summonses, power of Court to refuse to issue—Cross-examination, fixation of limit of time for.*

An application for issue of summonses to a witness must, as a rule, be granted by the Court, and the question whether the application is made within a reasonable time is only to be decided when, afterwards, owing to the failure of the witness to attend the Court, an adjournment is prayed for by the party summoning such witness. Process may not be issued if the witnesses are described vaguely. But if witnesses do not appear after being served, the party calling them has the right to have them re-summoned.

Civ. Pro. Code (1908)—(Continued).

A Court has no power to fix a limit of time within which the cross-examination of a particular witness is to be finished, and where such a limit was fixed and the examination concluded, it was held a good ground for remand. **Amir Ali Khan v. Kulsum Begam**, 8 Ind. Cas. 418.

PIGGOTT, J.C., and LINDSAY, A.J.C.

(71) S. 135, cl. (2)—*Returning from Court—Privilege of exemption from arrest—How far applicable—Arrest in execution of a decree—Appeal.*

The respondent obtained an *ex parte* decree against the appellants at Benares. The appellants made an application to have the decree set aside. They, being residents of Bombay, came from that place to Benares to look after their case. They put up at a Dak bungalow, and attended the Court on the 27th of March, 1909. Their application to set aside the decree was dismissed. They came back to the Dak bungalow and thence proceeded to the Railway station. They took tickets for Allahabad and were seated in the train when they were arrested in execution of the decree. *Held*, under the circumstances, they could not be said to be returning from a tribunal, within the meaning of S. 135, C.P.C., 1908, and consequently they were not entitled to exemption from arrest (a).

Held, further, that an order directing the arrest and imprisonment of a judgment-debtor in execution of a decree is appealable. **Ardeshar Framji Bhumgara v. Kalyan Das**, 6 A.L.J. 912—32 A. 3—3 Ind. Cas. 46.

BANERJI and TUDBALL, JJ.

References:—(a) 1 M. 317, not approved; 14 B.L.R. 13, R.

(72) S. 139, and O. IX, r. 5—*Evidence Act (I of 1872), S. 57, cl. 7—Process, service of, proof of—Affidavit of identifier sworn before pleader—Honorary Magistrate—Signature of Magistrate—Judicial notice.*

Order IX, rule 5, Civ. Pro. Code, is only an enabling provision enacted for a special purpose only.

A plaintiff filed, in support of proof of a service of process on the defendant, an affidavit sworn in the Bar Library by the identifier before a pleader who is also an Honorary Magistrate. The Munsiff refused to accept the affidavit, and directed the plaintiff to have an affidavit sworn before the officer of the

Civ. Pro. Code (1908)—(Continued).

Court appointed for that purpose. The plaintiff not having complied with this, the suit was dismissed for default :

Held, that the Munsiff was right in refusing to accept the affidavit ; that S. 139 of the Code contemplates that at the time when an Honorary Magistrate administers the oath, he shall be acting in his official capacity as a Magistrate, and that the provisions of S. 57, clause (7), of the Evidence Act, as to the Court's taking judicial notice of the signature of an Honorary Magistrate, should be interpreted in the same way. **Ramjiban Bhuttacharjee v. Ahmed Khan**, 5 Ind. Cas. 537.

BRETT and SHARFUDDIN, JJ.

(73) *S. 141, Order IX, r. 9, O. XXI, r. 103—Re-hearing—Execution proceedings.*

An application for re-hearing of execution proceedings is maintainable under Order IX, r. 9, and is not barred under Order XXI, r. 103. S. 141 of the new Code has deliberately changed the provisions of the old Code as in S. 617. **Safdar Ali v. Kishun Lal**, 12 C.L.J. 6—7 Ind. Cas. 241.

HOLMWOOD and CHATTERJEE, JJ.

(74) *S. 144—Principle if applicable to restore a sale under an ex parte decree set aside—Subsequent contested decree if revives whole decree—Civil Procedure Code (Act XIV of 1882), S. 108.*

Where an *ex parte* decree and sale under it were set aside and after a re-hearing a decree was again passed against the judgment-debtors.

Held,—that the principle of S. 144, C.P.C., cannot be availed of to set aside the order setting aside the sale.

When a decree has once been set aside under S. 108, C.P.C. (Act XIV of 1882), it cannot by any subsequent proceeding be taken to be revived. If a decree is passed against judgment-debtors on re-hearing, it is a new decree and does not revive the former decree. **Raghu NANDAN SINGH v. Jagdis Singh**, 14 C.W.N. 182—3 Ind. Cas. 30.

STEPHEN and CHATTERJEE, JJ.

(74-a) *S. 144—See No. 4, supra.*

(75) *S. 148—Modification of decree, if can be made by first Court after appeal preferred.*

S. 148 of the new Code does not authorise the first Court to modify the decree or extend the time allowed by it for the execution of a *kabuliyat*, after an appeal has been preferred from that decree.

Civ. Pro. Code (1908)—(Continued).

The only Court which can pass such order, after an appeal has been preferred, is the appellate Court. **Mohunt Parmanand Das Gossain v. Kripasindhu Roy**, 14 C.W.N. 584 6 Ind. Cas. 275.

BRETT and SHARFUDDIN, JJ.

(76) *S. 148—Plaint—Insufficient stamp—Extension of time—Power of Court. See COURT FEES ACT, No. 17, 6 Ind. Cas. 421.*

(77) *S. 148—Power to extend time for paying pre-emption money. See PRE-EMPTION, No. 47, 140 P.W.R. 1910.*

(78) *Ss. 148, 149—Enlargement of time by Court—Court-fee, power to make up deficiency of—Small Cause Court—Registrar, power of, to enlarge time.*

When a party asks for enlargement of time and invites the Court to make an order under S. 149, or under that section read with S. 148 of the C.P.C., an application should be made to the Court, and the record ought clearly to indicate that all the circumstances have been brought to notice of the Court, which, with full knowledge thereof, has, in the exercise of its discretion, made an order entitling the plaintiff to make up the deficiency of Court-fees within the time fixed under S. 149 or within any additional period allowed under S. 148 (a).

Where the Court in its discretion called upon the plaintiff to pay the deficiency of Court-fee within a time fixed by it, but that order was not carried out :

Held that S. 149 did not assist the plaintiff, and if the deficiency was paid after the period of limitation the suit should be dismissed (b).

S. 149 of the C.P.C., 1908, has not brought about any change in the law so as to entitle a plaintiff, who has obtained time under S. 149 and has failed to carry out the order of the Court, to make up the deficiency of Court-fee on a subsequent day without an order for enlargement of time under S. 148.

The Registrar of a Small Cause Court is not competent to make an order under S. 148 of the C.P.C., 1908, for enlargement of time. **Budhan Shah v. Sita Nath Shah**, 7 Ind. Cas. 578.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 6 Ind. Cas. 424 ; 12 C.L.J. 62 ; 14 C.W.N. 882, D. (b) 34 C. 20 ; 4 C.L.J. 421 ; 11 C.W.N. 38 ; 1 M.L.T. 355 (F.B.) ; 27 C. 376 ; 2 C.L.J. 70 ; 9 C.W.N. 844, F.

Civ. Pro. Code (1908)—(Continued).

(79) Ss. 148, 151—Pre-emption or redemption cases—Court's power to extend time fixed in decree. See **MORTGAGE (GENERAL)**, No. 38, 7 Ind. Cas. 36.

(80) Ss. 148, 152, O. 20, R. 3—*Enlargement of time by Court—Power of Court to enlarge time subsequent to decree.*

Held, that the general provisions of S. 148 of Act V of 1908 relate only to proceedings antecedent to the passing of a final decree; and that, when one such decree has been passed, the power of the Court is limited by the general principle that, once a judgment has been pronounced and the decree signed, such final decree cannot be altered except under the provisions of S. 152 or Order XX, Rule 3 or those relating to review of judgment, except in cases in which power to grant further extension of time has been expressly reserved to the Court. **Narendra Bahadur Singh v. Ajudhia Prasad**, 18 O. C. 28-5 Ind. Cas. 413.

EVANS and PIGGOTT, J.CS.

(80-a) S. 149—See No. 78, *supra*.

(81) S. 151—*Inherent powers of Court—Exercise of the powers—Court—Discretion.*

G obtained three money decrees against M in the Small Cause Court at Poona; and in execution thereof got attached a sum of money belonging to M and lying in the Court of the First Class Subordinate Judge at Poona. M's brother P then sued for and obtained a declaration that this money was not liable to be attached. G, in the meanwhile, withdrew the amount from the Court in satisfaction of his decrees. On P's application, the Small Causes Court at Poona, in virtue of the powers reserved by S. 151 of the Civil Procedure Code, 1908, ordered G to repay the money into the First Class Subordinate Judge's Court at Poona.

Held, that an order could be made under S. 151, only if it was necessary for the ends of justice or to prevent the abuse of the process of the Court; and that it could not be said to be necessary for either purpose, because P had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court at Poona. **Ganesh Narayan Sathe v. Purushottam Gangadhar Karve**, 11 Bom. L.R. 1912-34 B. 135-4 Ind. Cas. 595.

SCOTT, C.J., and BATCHELOR, J.

(82) S. 151—*Court, inherent power of—Order made by misrepresentation and mistake—Power to cancel.*

Civ. Pro. Code (1908)—(Continued).

Where a Court dismissed a suit or default under misrepresentation and by mistake: *Held* that it had inherent power to cancel that order, as soon as it was apprised of the fact, and to try the suit. **Sri Adwaitanand Tirthoswami v. Basudeo Nand**, 6 Ind. Cas. 208.

BRETT and SHARFUDDIN, JJ.

References: 6 C.L.J. 662; 3 M.L.T. 41, F.

(83) S. 151—Inherent powers of High Court.—See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 1, 14 C.W.N. 586.

(84) S. 151—Amount drawn by Commissioner in excess of his fees—Attachment for recovery of that amount—Power of Court. See **CIV. PRO. CODE (1882)**, No. 233, 6 Ind. Cas. 336.

(85) S. 151—Partition suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court. See **PARTITION**, No. 13, 7 Ind. Cas. 94.

(85-a) S. 151—Contingency not provided by Legislature—Inherent power of Court. See **LANDLORD AND TENANT**, No. 47, 7 Ind. Cas. 846.

(85-b) S. 151—See Nos. 19, 32 and 79, *supra*.

(86) S. 151, O. 21, r. 29, and O. 41, r. 5—*Stay of execution—Power of Appellate Court.*

In this case, execution of a decree of 1907 was stayed pending decision of a counter case brought by the judgment-debtor R.B.K. against the decree-holder. That suit was dismissed and an appeal from this order of dismissal was presented to the Chief Court. R.B.K. now prayed that execution of the decree of 1907 might be stayed pending decision of the appeal.

Held, that though the case is not provided for by O. 21, r. 29 of the new Code (S. 243 of the Code of 1882), S. 151 of the new Code meets the case, and the Chief Court has power to stay execution pending the appeal.

It does not follow that an order cannot be passed simply because there is no express section in the Code providing for the passing of such an order. O. 21, r. 29, does not prohibit anything by implication. An appellate Court has, generally speaking, as full powers as the original Court, and, in the absence of any express provision to the contrary, the appellate Court can do, while the appeal is pending, what the original Court should do while the suit was

Civ. Pro. Code (1908)—(Continued).

pending before it. **Sardarni Bhagwan Kaur v. Rani Harnam Kaur**, 82 P.R. 1910=149 P.L.R. 1910.

CHEVIS, J.

References :—33 C. 927 ; 130 P.R. 1908, R. ; 41 P.R. 1904, not F.

(87) S. 151, O. XXI, rr. 97, 98, 99—*Resistance by outsider to delivery of possession to decree-holder—Inherent power of Court—Order for delivery of possession to decree-holder.*

The inherent powers of a Court may be exercised in favour of or against a person, who is not a party to the original suit (a).

Therefore, although the Civ. Pro. Code makes no express provision for the case of resistance to delivery of possession to the decree-holder, by a claimant other than the judgment-debtor who is not in possession and who makes no *bona fide* claim to be in possession of the property, yet S. 151 of the Code, which recognises the inherent power of a Court to make such orders as may be necessary for the ends of justice, completely covers the case, and the Court can order possession to be delivered to the decree-holder in such a case. **Radhika Mohun Shah v. Gyan Chandra Shah**, 6 Ind. Cas. 120.

MOOKERJEE and TEUNON, JJ.

References :—(a) 10 C. 109 ; 10 I.A. 171, R.

(88) S. 151, O. 41, r. 23—Remand by appellate Court when suit not disposed on preliminary point—Inherent power of Court. See **PARTIES**, No. 3, 7 Ind. Cas. 75.

(89) S. 152—*Accidental slip or omission, meaning of—Amendment of judgments, decrees or orders.* *

Held, that the test whether a Court can make an alteration under S. 152 of Act V of 1903 is, whether the order as it stands represents the intention of the Judge at the time he made it. If it does, then a mistake in it cannot be treated as an accidental slip or omission which may be corrected under the section. **Ashik Husain v. Madhi Hasan**, 13 O.C. 114.

CHAMIER, J.

References :—L.R. (1903) P.D. 88 ; L.R. 12 P.D. 145 ; L.R. (1895) 1 Ch. 141 ; 20 Q.B.D. 693, R.

(90) S. 152—Powers of amendment. See **PRACTICE**, No. 2, 37 C. 649.

(90-a) S. 152—See No. 80, *supra*.

Civ. Pro. Code (1908)—(Continued).

(91) S. 152 and O. 45, r. 13—Scope and effect. See **DECREE**, No. 1, 11 C.L.J. 155.

(91-a) S. 154—See No. 3-a, *supra*.

(91-b) S. 158—See No. 33, *supra*.

(92) O. 1, R. 3—*Purchaser—Mortgagee—Conditional sale—Party, addition of—High Court, revisional power of.*

A, a tenant under X, executed a conveyance of his holding in favour of B. X sued to eject B on the ground that the holding was non-transferable. A applied to be made a party to the suit, on the allegation that the conveyance was in reality a mortgage by conditional sale, and that he himself was still in possession. The Court refused the application.

Held, that, to prevent multiplicity of litigation A should have been made a party defendant.

Held further, that, as the application of A had been improperly refused, it was competent to the High Court to interfere. **Dwarka Nath Sen v. Kisori Lal Gosain**, 11 C.L.J. 426=14 C.W.N. 703=6 Ind. Cas. 549.

MOOKERJEE and TEUNON, JJ.

References :—11 C.L.J. 420, F.

(93) O. I, r. 3 ; O. II, r. 3—*Misjoinder of parties and causes of action—Practice—Procedure.*

The word "same" which precedes the words "act or transaction" in O. I, r. 3, Civ. Pro. Code, governs also the words "series of act or transactions" and must be read before these words also. Before a plaintiff can join several persons as co-defendants in the same suit, two conditions must be fulfilled ; first, the relief sought against the defendants, whether jointly, severally or in the alternative, must arise from the same act or transaction or from the same series of acts or transactions ; and secondly, there must arise between the plaintiff and all the defendants some common question either of fact or law.

The plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are jointly liable in respect of each and all of such causes of action, and the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation, and causes of action joined in one suit against

Civ. Pro. Code (1908)—(Continued).

several defendants must be causes of action in which the defendants are all jointly interested.

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit, but it is necessary that there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary. **Umabai v. Bhavu Balvant**, 11 Bom. L.R. 499 - 3 Ind. Cas. 165 - 34 B. 958.

DAYAR, J.

(94) O. I, r. 8—Parties, addition of—Administration suit—Practice.

If a person, belonging to a body of persons on whose behalf the suit has been filed, claims to be added as a party, he must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests.

In an administration suit, it is extremely undesirable that individual creditors should be added as parties, unless they show some very strong reason that the person, who has filed the suit on their behalf, is not conducting it in the proper way. It is not enough that they should be willing to bear their own costs. There is considerable delay caused by a fresh party coming in, and the costs of other parties consequently are increased. **Vasanji Tricamji & Co. v. Ismailbhai Shivji**, 11 Bom. L.R. 1051 - 34 B. 420.

MACLEOD, J.

(95) O. I, r. 9—Parties, non-joinder of—Suit when not liable to be dismissed.

On appeal the plaintiff's suit was dismissed, on the ground that the plaintiff's sons were necessary parties to the suit and the plaintiff refused to implead them notwithstanding the defendants' objection in the Original Court. The plaintiff applied for revision. It appeared that no issue on the point was framed and the period of limitation for the suit had not expired at the date of hearing of the application for revision. The plaintiff had no opportunity of adducing evidence on the plea of non-joinder and was not shown to have been directed by the Court to bring his sons on the record.

Held, that, under the circumstances of the case, the order of dismissal must be set aside. **Umeri Mal v. Jai Gopal**, 217 P.L.R. 1910.

REID, C.J.

Civ. Pro. Code (1908)—(Continued).**(96) O. I, r. 10—Adding of parties to suit—Person only indirectly interested—Power of Court—Jurisdiction, question of.**

The addition of persons, who are only indirectly affected and not directly interested in the issues between the plaintiffs and the defendant, as parties to the suit, is a question of jurisdiction; and the Court has no power, under O. I, r. 10 of the Code, to add persons only indirectly interested as parties to the suit. **Pandit Rup Chand v. Fateh Chand**, 6 Ind. Cas. 36.

KNOX and KARAMAT HUSSAIN, JJ.

References :—1 Ch. D. 487; 61 L.J. Ch. 319; 66 T.L.T. 570; 40 W.R. 520, *relied on*.

(97) O. I, r. 10—Order refusing to add parties—Failure to exercise jurisdiction—Revision. See PARTIES, No. 1, 13 O. C. 109.

(97-a) O. I, r. 10—See No. 54, *supra*.

(98) O. I, r. 10 (1)—Plaint—Amendment—Substitution of proper plaintiff—Bar of limitation—Computation—Limitation Act (IX of 1908), S. 22.

Suit on a promissory note executed in favour of M, by R and V as plaintiffs through their mother and guardian, M. In second appeal it was found that the suit could not be maintained unless M was the plaintiff. An application was then made to substitute M as plaintiff.

Held, that M can be made a plaintiff on such application under O. I, R. 10 (1) C.P.C., 1908 (a).

The utmost that could be done would be to date the amendment as of the date on which the Court of first instance ought to have made it, and that could not be earlier than the date of application (b).

The effect of S. 22 of the Limitation Act 1908, is that, in a suit of the kind, the mistake to be corrected under O. I, r. 10 (1) must be corrected before the limitation period of the suit expires. **Subbaraya Iyer and others v. Yaithinatha Iyer and another**, 7 M.L.T. 185 = 33 M. 115 = 5 Ind. Cas. 931.

MILLER and SANKARAN NAIR, JJ.

References :—(a) 30 M. 419, R. (b) 20 M. 467. (c) 21 B. 580 & 14 C. 400, R.

(99) O. I, r. 10 (1)—Party—Addition and substitution of accounts, suit for—Bona fide mistake—Mistake of fact or in law—Administration, order for, when relates back—High Court's power of interference—Interlocutory order.

Civ. Pro. Code (1908)—(Continued).

O. I, r. 10, sub. r. (1) of the Code of Civil Procedure is applicable only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake, but such mistake may be one of fact or of law.

Three of the five heirs of the testator, viz., A, B and *C, after the decision by the lower Court as to the invalidity of the will in a suit for construction of the will, and during the pendency of an appeal against that decision, instituted a suit against the representatives in interest of the executor and the other heirs for accounts. After the suit for construction of the will was withdrawn, owing to adverse decision of the question by a Full Bench, A and D, one of the shewbais under the will, after obtaining letters of administration, applied in the account suit that they be substituted or added as parties and that B and C might either be removed from the suit or transferred to the category of defendants.

Held, that A and D were to be added to and substituted for the parties, and they were entitled to maintain the suit.

Although an act done by a party, who afterwards becomes administrator, to the prejudice of the estate, is not made good by subsequent administration, yet if the act is for the benefit of the estate the order relates back, so that, by virtue of the appointment, the administrator is able to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled.

It is within the powers of the High Court to interfere with interlocutory orders, if the Court is satisfied that such interference is needed in the interests of justice. **Charu Chunder Dutt v. Sarat Chunder Singh**, 12 C.L.J. 537.

MOOKERJI and SHARFUDDIN, JJ.

(100) O. I, r. 10, clause (3)—*Land Acquisition Act (1 of 1894), S. 53—Party, addition of—Revenue-sale, purchaser of—High Court, revisional power of.*

During the pendency of proceedings before a Land Acquisition Collector, the property acquired was sold for arrears of revenue. The sale was confirmed after the Collector had made his award. At the instance of the defaulting proprietor, the Collector made a reference to the Civil Court, upon a question of apportionment of the compensation. The purchaser applied to the Civil Court to be made a party to the proceedings, but his application was refused.

Civ. Pro. Code (1908)—(Continued).

Held: that the purchaser at the revenue sale was entitled to be made a party to the proceedings, but he could urge only such objections as might have been taken by the defaulting proprietor. His special rights, if any, as a revenue sale purchaser, must be asserted in a separate suit (a).

Held also: that, when the Court below has improperly refused to join a person as a party to the proceedings, it is competent to the High Court to interfere (b). **Promotha Nath Mitra v. Rakhal Das Addy**, 11 C.L.J. 420=6 Ind. Cas. 546.

MOOKERJEE and TEUNON, JJ.

References:—(a) 34 C. 451; 12 C.W.N. 98; 12 C.W.N. 985, D. (b) 21 C. 539, F.; 13 C. 90, D.

(101) O. I, r. 13—*Non-joinder of parties—Objection not taken at earliest opportunity—Waiver.*

Where the defendants did not object to non-joinder of parties at the earliest possible opportunity, but waited so as to preclude the plaintiffs from making an application to the Court for adding parties within the period of limitation:

Held, that the objection must be deemed to have been waived. **Debi Saran Sahi v. Mahabir Singh**, 7 Ind. Cas. 102.

JOHN STANLEY, C.J. and GRIFFIN, J.

(101-a) O. II, r. 2—*Claim for arrears of rent or mesne profits not barred by a previous suit for possession of the same property—Different causes of action.*

In cases governed by the new C.P.C., the relief sought in a claim for arrears of rent or mesne profits of immoveable property and the relief sought in a suit for the recovery of that immoveable property must be regarded as based upon distinct and separate causes of action, and hence the restrictive provisions of O. II, r. 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or mesne profits, which become due before the suit for the recovery of the immoveable property was instituted. **Dubash Kader v. Fakeer Meera**, 8 Ind. Cas. 445.

BELL, J.

References:—3 L.B.R. 56, discussed; 11 M. 151; 19 C. 615 at p. 617; 12 C. 482, R.

(102) O. II, r. 2 (3)—*Declaratory suit for partition—Omission of relief—Separate suit—Limitation.*

Civ. Pro. Code (1908) — (Continued).

In a prior suit, the plaintiffs sought for a declaration that a certain Will executed by their father was null and void inasmuch as he had no right to dispose of by Will the ancestral joint property. One of the defences raised in that suit was that the suit was barred by section 42 of the Specific Relief Act, as the plaintiffs, being out of possession, had failed to ask for possession. The subordinate Judge held that the plaintiffs, and the defendants were in joint possession, and hence overruled this plea of the defendants. The case went up to the Privy Council, but nowheredid the defendants challenge the finding of the subordinate Judge. Later on, the plaintiffs brought this suit for partition of the property:

Held, that, under the circumstances, the second suit was not barred by the provisions of Order II, rule 2 (3) of the Code of Civil Procedure, 1908.

Held, further, that the second suit was not barred by limitation, inasmuch as it had been brought within twelve years from the date of the subordinate Judge's decision in the prior suit. **Kanhaya Lal v. Kunwar Lal Bahadur**, 7 Ind. Cas. 284.

STANLEY, C.J. and GRIFFIN, J.

(102-a) O. II, r. 3. See No. 93, *supra*.

(103) O. V, r. 6—*Service of summons—Defendant—Ex parte decree—Court's inherent powers to set it aside—Limitation Act (IX of 1908), Art. 164—Knowledge of the decree.*

S. 79 of the Code of 1882 (O. V, r. 16 of the present Code) contemplates three distinct classes of service: (1) on the party in person; (2) on that party's duly appointed agent; and (3) upon any other person on behalf of that party. The law contemplates the third class of service, only when the party cannot himself be found.

The Court has inherent powers to set aside *ex parte* decrees of its own, upon any sufficient ground or when it appears that failure to do so would result in an abuse of its own processes; but it cannot exercise those powers so as to override the provisions of statutory limitations.

The term "knowledge" used in Art. 161 of the Limitation Act, 1908, means no more than knowledge of the fact that a decree of the kind is in existence: it does not embrace knowledge of the contents and general effect of the decree. **Abdool Hoosein Essuffally v. Esmailji Abdool Hoosein**, 12 Bom. L.R. 462.

BEAMAN, J.

Civ. Pro. Code (1908) — (Continued).

(103-a) O. V, r. 17—*Summons posted at the house of a person known to have gone to a particular place—Validity.* See ACT XXI of 1886 (ODH RENT), No. 7, 13 O.C. 54.

(103-b) O. VI, r. 17. See AMENDMENT No. 4-a, 8 Ind. Cas. 79.

(104) O. VII, r. 7—*Suit for cancellation of sale-deed by vendor and for recovery of properties—Decree for unpaid purchase-money—Jurisdiction.*

In a suit for the cancellation of a sale-deed and for recovery of properties comprised in the sale on the ground of failure of consideration, the Court is justified, on the principle of O. VII, R. 7 of the C.P.C (Act V of 1908), in giving the plaintiff vendor a decree for the amount of the purchase money that, it finds, was not paid to him. **Mahalinga Pathan v. Tirumalai Pillai**, 8 M.L.T. 433=8 Ind. Cas. 64.

MUNRO and SANKARAN NAIR, JJ.

(104-a) O. 7, r. 17—*Amendment of plaint—Deliberately deferred till decision of another suit—Not bona fide mistake.*

Although r. 17 of O. VII is in wider terms than S. 53 of the old Code, amendments are still to be made on such terms as may be just, and this cannot mean that they may be allowed so as to defeat the object of limitation and of the rules as to the framing of suits. Thus generally an amendment should not be allowed, save when the plaintiff by some mistake or misapprehension has failed to put things properly before the Court.

An amendment will not be allowed where the amendment was deliberately not sought to be made and was deferred till the failure of another suit made it clear to the plaintiff that without amendment he had no chance of obtaining the relief he desired. **Maung Than Daing v. U The**, 8 Ind. Cas. 600.

PARLETT, J.

(105) O. 8, r. 6—*Set off—Sum ascertained—Right to sue—Joint—Not several.*

The defendants in a suit cannot claim to set off, as against the plaintiffs, a sum for which they could not have sued without making another person a party to the suit. **Uma Nath Das v. Monsur Ali Howladar**, 11 C.L.J. 406=14 C.W.N. 186=5 Ind. Cas. 570.

HARINGTON and WOODROFFE, JJ.

Civ. Pro. Code (1908)—(Continued).

- (106) *O. 8, r. 6—Kinds of set-off—Washerman not returning articles made over to him—Right to set off value of articles against his wages.*

There are two kinds of set-off: (1) statutory, and (2) equitable. Statutory set-off can be claimed as of right under *O. 8, r. 6. C.P.C.* But this provision of the law is not exhaustive, and does not take away any rights of equitable set-off which parties would have independent of it. Such set-off should be allowed only where the Court deems it equitable to allow it. So if a washerman loses some of the articles given to him to wash, his employer is entitled equitably to set off the price of those articles when paying him his wages. **Maiden v. Bhodu**, 77 P.R. 1910=108 P.W.R. 1910=145 P.L.R. 1910.

SCOTT-SMITH, J.

- (106-a) *O. IX, r. 5. See No. 72, supra.*

- (106-b) *O. IX, r. 9. See No. 73, supra.*

- (107) *Sch. I, O. 9, r. 8, Sch. II, S. 8—Arbitration—Application by arbitrator for extension of period allowed for making award—Dismissal for default.*

The arbitrator applied for extension of period allowed for making the award. The plaintiff failed to attend Court on the date fixed in the case and the Court dismissed the suit.

Held, that the action of the Court was harsh; when a case is under arbitration, a Court should not hastily dismiss the suit for non-appearance in Court of the plaintiff. Much less should this be done when the arbitrator has made an application for extension of time for filing award.

Held also, that, when an arbitrator asks for extension of time and there is no reason to suspect that, being in collusion with either party, he is wilfully delaying matters or that in any other way there is bad faith in his conduct, the Court should always grant reasonable extension. **Mussammat Ram Kaur v. Seth Multani Chand**, 29 P.L.R. 1910.

JOHNSTONE, J.

- (108) *O. IX, r. 13, O. XLVII, r. 1—Ex parte decree—Summons not served upon defendant—Review of judgment—Application beyond time—Excuse of delay—Limitation Act (IX of 1901), Art. 164.*

The plaintiff filed a suit against the defendants, a firm of merchants at Glasgow, and served the writ of summons, upon a Bombay firm who were not agents of the defendants. An *ex parte*

Civ. Pro. Code (1908)—(Continued).

decree was passed on the 29th March, 1910. On the 8th May 1910, the plaintiff served the defendants with the decree demanding execution. The defendants applied on the 1st August, 1910, for review of the judgment. It was contended on behalf of the plaintiff, first that an *ex parte* decree could not be set aside by an application for review; and, secondly, that the application was time barred, whether it was an application to set aside the *ex parte* decree or an application for review.

Held that, as there was no service of summons on the defendants, and as they consequently were prevented from having their defence before the Court, that was a sufficient cause for granting the application for review of judgment and thereby setting aside the *ex parte* decree. **Shavaksha Ruttonji Bommonji v. Hugh Hogarth and sons**, 12 Bom. L.R. 896.

BEAMAN, J.

- (109) *O. XI, r. 12—Order for discovery when allowed and disallowed. See ACT I OF 1894 (LAND ACQUISITION), No. 6, 12 C.L.J. 505.*

- (110) *O. XI, r. 21—Penal Code, Ss. 175 and 188—Difference between section 136 of the old, and Order XI, Rule 21 of the new Code—Disobeying order for production or inspection of documents.*

Held, that a party to a suit failing to comply with an order for production or inspection of documents can be dealt with only in the manner prescribed by Order XI, Rule 21, and is not punishable under S. 175 or any other section of the Penal Code. **Ram Chand v. The Crown**, 15 P.W.R. 1910 (Cr.).

SIR ARTHUR REID, C.J.

- (111) *O. XI, r. 21—Jurisdiction of Court to strike out defence of defendant of its own motion.*

Held that a Court has no power to strike out the defence of a defendant of its own motion under r. 21 of Order XI of the C.P.C. **Lala Das v. A. Spratt**, 84 P.L.R. 1910.

SHAH DIN, J.

References:—80 P.R. 1889; 59 P.R. 1892, *W.*

- (111-a) *O. XII, r. 22, cls. (1) and (4)—Appeal filed out of time—Dismissal of appeal—Memorandum of objections also liable to be dismissed.*

Cl. 1 of r. 22 of O. XII of the C.P.C., does not enact anything different from the law of the old Code of 1882.

Civ. Pro. Code (1908)—(Continued).

Where an appeal is dismissed on the ground that it was filed out of time, the memorandum of objections filed by the respondent also fails and cannot be heard and adjudicated upon. **Kanirkamanna Imath Narayana v. Maosad Kanirkamanna**, 8 Ind. Cas. 140.

ABDUR RAHIM and AYLING, JJ.

(111-b) O. XVI. See No. 70-a, *supra*.

(112) O. XIX, r. 3—*Affidavit, contents of—Practice—Re-hearing of an application—Jurisdiction of Courts.*

Where one proposes to rely on an affidavit, the provisions of O. XIX, r. 3 must be strictly followed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief.

The Court has inherent power to re-hear a matter before the Court's order passed at a previous hearing is perfected. **Padmabati Dasi v. Rasik Lal Dhar**, 37 C. 259 = 6 Ind. Cas. 666.

JENKINS, C.J. and WOODROFFE, J.

(113) O. XX, r. 2—*Delivery of judgment by successor in office—"May pronounce"—Not mandatory.*

A Judge fixed a date for delivering judgment, wrote it out and placed it upon the record. He was transferred before the date fixed. His successor took a different view and delivered his own judgment. The words "may pronounce" in O. XX, r. 2 of the C.P.C., are not mandatory, but the Judge has an option to pronounce the judgment written by his predecessor in office. **Lachman Prasad v. Ram Kishan**, 7 A.L.J. 1189.

KNOX and KARAMAT HUSSAIN, JJ.

Reference:—21 C. 842, F.

(113 a) O. XX, r. 3. See No. 80, *supra*.

(114) O. XX, r. 4. *Clause 1—Judgment of Court of Small Causes—Reasons for finding.*

It is not necessary that the Judge of the Small Cause Court should record reasons for his findings on issues. **Ahmed Aycoob v. The Asiatic Petroleum Co. Ltd.**, 4 S.L.R. 17 = 7 Ind. Cas. 591.

HAYWARD and LEGGATT, JJ.

Reference:—31 B. 314, F.

Civ. Pro. Code (1908)—(Continued).

(115) O. XX, r. 11—C.P.C., 1882, S. 210—*Inherent power of Court to stay execution at the time of decree.*

The power to order stay of execution at the time of passing a decree is not unreasonable or in violation of any principles of justice, in view of O. XX, r. 11, C.P.C., 1908. The old Code though it did not expressly confer such a power did not take away such powers as are inherent in a Court to do justice between the parties. **Palaniappa Chettiar v. Yelayutha Pillai**, 7 M.L.T. 151 = 5 Ind. Cas. 421.

ABDUR RAHIM, J.

(116) O. XX, r. 11—*Decree—Instalments.*

The discretion vested in a Court under O. 20, R. 11, to make a decree payable in instalments, must be judicially and not arbitrarily exercised. The mere fact that the defendant is hard pressed is not by itself a sufficient reason to justify a decree for instalments spread over for many years. **Balgobindram Bhakat v. Chheddilal Saha**, 11 C.L.J. 431 = 6 Ind. Cas. 552.

MOOKERJEE and TEUNON, JJ.

(117) O. XX, r. 14—*Decree in pre-emption suit—Decree fixing price to be paid, and allowing costs to be deducted—Payment of decree amount after deducting costs—Appellate Court raising the price to be paid and reversing order as to costs—Payment of difference without costs previously recovered, whether sufficient compliance with the appellate decree—Subsequent suit for costs.*

In a suit for pre-emption, the Lower Court gave a decree in favour of A for possession of property on payment of Rs. 130, authorising A to pay the amount after deducting Rs. 5-14-0, the costs adjudged to him. A paid the amount deducting the costs within the time fixed by the Court. But on appeal by the vendee, the price to be paid was raised to Rs. 512 and the order as to costs was also reversed. No notice of the exact additional amount to be paid was given to A, who paid in Rs. 82, the difference between Rs. 430 and 512. The vendee contended that the appellate decree was not complied with, since the costs already recovered by A were not also paid, and A therefore lost his right to possession.

Held, since the appellate Court's order did not call upon A to pay in Rs. 512 and costs but Rs. 512 only, the payment of the difference between Rs. 430 and 512 within the time

Civ. Pro. Code (1908)—(Continued).

allowed, *without the costs already realised*, was a sufficient compliance with the decree of the appellate Court and the vendee was separately entitled to recover costs. **Bhagwana v. Goru**, 56 P.R. 1910 = 6 Ind. Cas. 954.

ARTHUR REID, C.J.

Reference.—10 A. 400, F.

(117-a) O. XXI. See No. 26, *supra*.

(118) O. XXI, r. 1—*Decree—Payment of money—Payment into the Court—Court closed on the date of payment—Payment made on the opening of Court.*

It was provided by a decree that, if the plaintiff paid Rs. 100 by the 10th April 1909 to defendants, the property in dispute would belong to the plaintiff by ownership; otherwise, the ownership would rest with the defendants. The plaintiff did not pay the money to the defendants but elected to pay the money into Court. And as the Court was closed from the 10th to 13th April, 1909, the payment was made into Court on the 14th April 1909. The lower Courts held that, as the money had by the terms of the decree to be paid to the defendants, the plaintiff had no option to pay it into Court; and that, therefore, the payment into Court was not in compliance with the terms of the decree:

Held that Rule 1 of Order XXI of the Code provided that all money payable under a decree should be paid into Court or out of Court to the decree-holder. The rule enacted that payment into Court is a valid compliance with a decree, even though the decree directed payment to the decree-holder. **Wana Ravji v. Natu Murha**, 12 Bom. L. R. 818.

CHANDAVARKAR and HEATON, JJ.

(118-a) O. XXI, r. 2. See No. 30, *supra*.

(118-b) O. XXI, rr. 9 and 90—*Auction sale—Adjournment—Illegality or irregularity—Civil rules of practice, r. 152.*

A sale in execution, conducted from day to day for a period longer than seven days, is neither illegal nor irregular. To keep open the sale for such a long time is a very common practice, and having regard to local conditions, it cannot be said to be a non-beneficial one. R. 152 of the civil rules of practice is not opposed to such a practice. **Pir Mohammad v. Mayandi Chettiar**, 8 Ind. Cas. 564.

WALLIS and KRISHNASWAMI IYER, JJ.

(119) O. 21, r. 15—*Discharge by one decree-holder under—Effect.* See LIMITATION ACT (1877), No. 10, 12 Bom. L. R. 682.

Civ. Pro. Code (1908)—(Continued).

(120) O. 21, rules 18, 19, 20—*Setting off of decree for simple money against decree for recovery of money by enforcement of charge—Procedure salutary.*

A Court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge. The procedure of setting off of decrees in this way is a very salutary procedure. **Nagar Mal v. Ram Chand**, 7 A.L.J. 1179.

KNOX and KARAMAT HUSSAIN, JJ.

(121) O. 21, rr. 22, 23—*Civ. Pro. Code (Act XIV of 1882), Ss. 248, 249—Notice—Objection of judgment-debtor—Duty of Court to entertain objections.*

When once a Court has issued notice under O. XXI, r. 22 of the Code of 1908, it has no alternative but to dispose of any objection that may have been raised on behalf of the judgment-debtor under O. XXI, r. 23 of the Code. **Kallian Das v. Bhawani Shankar**, 5 Ind. Cas. 546.

KNOX and KARAMAT HUSSAIN, JJ.

(122) O. 21, r. 29—*Award under the Arbitration Act—How enforceable—Stay of execution.* See ACT IX OF 1899 (ARBITRATION), No. 10, 12 Bom. L.R. 860.

(122-i) O. XXI, r. 22. See No. 86, *supra*.

(122-ii) O. XXI, r. 18 (3). See No. 37, *supra*.

(122-a) O. XXI, r. 58—*Decree for arrears due on account of holding—Claim when not allowable.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 44-a, 8 Ind. Cas. 50.

(123) O. XXI, R. 60 C.P.C. (Act XIV of 1882), S. 280—*Execution of rent decree—Claim—Tenure or holding—Homestead land let out for building purposes—Jurisdiction of Court to investigate claim—Bengal Tenancy Act (VIII of 1885), S. 170.*

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is undoubtedly open to the Court to ascertain the true nature of the property.

Therefore, where a claimant contended that the property attached in execution of a rent-decree was neither a tenure nor a holding within the meaning of S. 170 of the Bengal Tenancy Act, but a piece of homestead land let out for building purposes to which the provisions of the Act have no application: *held* that the Court had jurisdiction to investigate the claim,

Civ. Pro. Code (1908)—(Continued).

as the claimant was, in no way, bound by the recital in the decree under execution to which he was not a party. **Sarba Sundari Dasi v. Harendra Lal Roy Chowdhury**, 7 Ind. Cas. 490.

MOOKERJEE and CARNDUFF, JJ.

(123-a) O. 21, rr. 50, 51—Promissory note—Purchaser in Court auction—Right to sue—Vesting order. See **NEGOTIABLE INSTRUMENT**, No. 4, 8 Ind. Cas. 17.

(124) *Order XXI, rules 83 and 89, and Order XLIII, rule (1) (j)*—Appeal—Order refusing to set aside sale.

Held, that a judgment-debtor has no right to appeal under Order XLIII, rule (1) (j), from an order of the executing Court refusing to set aside sale in execution of decree, if his application can neither come within the purview of rule 83 of Order XXI, which can only be resorted to before sale, nor of rule 89 of the said order when he fails to deposit the several sums specified in clauses (a) and (b) of its sub-rule (1).

Obiter : *Held*, also that an order passed on an appeal under Order XLIII, rule (1) (j), is final. **Ghania Lal v. Pohlo Mal**, 105 P.W.R. 1910 = 72 P.R. 1910 = 7 Ind. Cas. 718 = 143 P.L.R. 1910.

SHAH DIN, J.

(125) O. 21, rr. 84, 89—Code of Civil Procedure (Act XIV of 1882), S. 308—Forfeiture of deposit—Auction-purchaser—Refund of purchase-money

The Code of 1908 gives a discretion to the Court whether to forfeit the deposit made by an auction-purchaser, which the Code of 1882 did not. So where an auction-purchaser applied to get a refund of the purchase-money deposited in Court as required by Order XXI, rule 84, upon the sale having been set aside upon an application made by the judgment-debtor under O. 21, rule 89, the balance due by him not having been paid, and the Court below refused the application on ground that the deposit had been forfeited to Government in consequence of the auction-purchaser's default, *held* that, in this case, it would have been a proper exercise of discretion by the lower Court to have refunded the deposit. **Mathura Prasad Pande v. Gauri Shankar Das**, 7 A.L.J. 325 = 6 Ind. Cas. 564 = 32 A. 380.

KNOX and KARAMAT HUSAIN, JJ.

Civ. Pro. Code (1908)—(Continued).

(126) O. XXI, r. 89—Deposit by judgment-debtor to have sale set aside—Deposit short—Mistake of judgment-debtor, attributable to act of Court—Sum calculated by execution clerk and assured to be correct by shoristadar.

A judgment-debtor deposited, under O. XXI, rule 89 of the Code, in Court, within the prescribed period, a sum calculated by the execution clerk and assured by the *shoristadar* to be correct as the sum to be deposited to have a sale set aside. Subsequently, it was found that the amount was short by Rs. 80 which the judgment-debtor promptly paid, but the prescribed period had expired a few days before the payment was made :

Held, that the judgment-debtor made a *bona fide* mistake which was attributable to an act of the Court, and that the sale should be set aside (a). **Palturam Sing v. Kamini Mani Dassi**, 7 Ind. Cas. 52.

HOLMWOOD and CHATTERJEE, JJ.

References :—(a) 26 C. 449 (F.B.) ; 3 C.W. N. 283, R.

(126-a) O. XXI, rr. 89, 92. See No. 31, *supra*.

(126-b) O. XXI, rr. 90, 92. See No. 3-a, *supra*.

(127) O. XXI, rr. 97, 98, 99—Resistance or obstruction to possession—Remedy of decree-holder—Duty of Court.

Where, in execution of a decree for possession of immoveable property, a person other than the judgment-debtor not bound by the decree is found in its possession and refuses to obey the warrant, it amounts to resistance within the meaning of r. 87 of O. XXI, Civ. Pro. Code, 1908 ; and it is then the business of the decree-holder to apply under the said rule, to enable the Court to proceed under rr. 98, 99. But pending such action, fresh warrant cannot be issued. **Ghulam Muhammad v. Hassan Din**, 6 Ind. Cas. 649.

WILLIAMS, J.

(127-a) O. XXI, rr. 97, 98 and 99. See No. 87, *supra*.

(128) O. 21, rr. 97, 99, 103—Execution—Resistance of third party—Procedure to be followed by executing Court—Difference in procedure between the old and the new Codes pointed out.

Where a third party is found in possession of the property decreed and resists delivery of

Civ. Pro. Code (1908)—(Continued).

possession, the proper course is for the executing Court to make a summary enquiry under O. 21, rr. 97 and 99, C.P.C., 1908, into the claim of the third party, that he is in possession in 'good faith,' and pronounce a decision, leaving the aggrieved party to his remedy by suit under rule 103.

Difference in procedure between S. 331, C.P.C., 1881, which required the claim to be tried as a suit, and O. 21, rr. 97 and 99, C.P.C., 1908, pointed out. **Har Nihal v. Shamji and others**, 14 P.R. 1910 = 21 P.W.R. 1910 = 5 Ind. Cas. 809.

JOHNSTONE, J.

(129) O. XXI, r. 100.—*Civ. Pro. Code (Act XIV of 1882), S. 278—Claim to attached property, dismissal of—Regular suit, dismissal of—Hindu law—Mitakshara joint family—Father, decree against—Execution sale.*

When, in execution of a money decree against the father of a joint Mitakshara family, property has been sold after a claim by the son has been dismissed for non-prosecution, an application by the son against the auction purchaser under O. 21, r. 100, Civ. Pro. Code, objecting to delivery of possession of the entire property, cannot be entertained.

Quere:—Whether any member of a joint Mitakshara family can predicate that he is in possession, on his own account, of a specific share of the family property, and maintain an application under O. XXI, r. 100 in respect of such alleged share. **Sankar Nath Pandit v. Madan Mohan Das**, 11 C.L.J. 61 = 14 C.W.N. 298 = 5 Ind. Cas. 298.

MOOKERJEE and VINCENT, JJ.

References:—1 Bom. 748; (2) 3 M. 91, R.

(129-a) O. XXI, r. 103. See No. 73, *supra*.

(130) O. 22, r. 3 (1) (= S. 366 of old Code).—*Wrong legal representatives brought on record—If suit abates.*

On the death of one of the defendants, his father and brothers were brought on as his legal representatives, whereas his legal representative was his mother, who was not brought on. The application was made *bona fide* after consulting the vakil, and was granted by the Court.

Held that, in the circumstances, it cannot be said that there was no application to the Court within the meaning of S. 366 of the old Code or O. 22, r. 3 (1) of the new Code, so as

Civ. Pro. Code (1908)—(Continued).

to cause the suit to abate. **Mallaprajada v. Lingam Veeraraghava Row**, 7 M.L.T. 43 = 5 Ind. Cas. 514.

WALLIS and MILLER, JJ.

References:—23 M. 125 (131), *Appl.*; 26 M. 230 (234); 27 B. 162, R.

(130-a) O. XXII, r. 3 (1). See No. 7, *supra*.

(131) O. XXII, r. 4, sub-r. (3), and r. 9, sub-r. (2)—*Abatement of appeal—Application to set aside abatement—“Sufficient cause”—Negligence of agent.*

The negligence or forgetfulness on the part of the agent, specially appointed by an appellant to look after the appeal and to receive notices and information from the appellant's Vakil, is not a "sufficient cause" within the meaning of r. 9, O. XXII.

A respondent died in October 1909. In February 1910, his Vakil informed the Vakil for the appellant that the respondent was dead. Thereupon the Vakil for the appellant sent information to the agent of the appellant, but the agent did not intimate the matter to his master till April 1910. The appellant immediately took steps to make an application to the Court, but the application was presented after the appeal had abated:

Held that there was no sufficient cause for setting aside the abatement. **Tarni Kumar Dutt v. Gopeswar Pal Chowdhury**, 7 Ind. Cas. 391.

MOOKERJEE and CARNDUFF, JJ.

(131-a) O. XXII, rr. 4 and 11. See No. 55, *supra*.

(132) O. 23, r. 1—*Suit, withdrawal of—Leave to withdraw, when granted—Revision—High Court, power of.*

Under O. 23, r. 1 of the Civ. Pro. Code, a suit may be allowed to be withdrawn, when it must fail by reason of some formal defect or any analogous ground. A suit ought not to be allowed to be withdrawn when the plaintiff has adduced all his evidence and finds it insufficient to establish his allegations.

When an order in favour of the plaintiff for withdrawal of the suit has been irregularly or improperly made, the High Court can interfere in the exercise of its revisional jurisdiction. **Kharda Co., Ltd. v. Durga Charan Chandra**, 11 C.L.J. 45 = 5 Ind. Cas. 187.

MOOKERJEE and VINCENT, JJ.

Reference:—13 M.I.A. 160, *Appl.*

Civ. Pro. Code (1908)—(Continued).

(133) *O. 23, r. 1—Suit, withdrawal of—Withdrawal, permissible under what circumstances.*

In *O. 23, r. 1, C.P.C.*, clause (b) of sub-rule (2) must be read with clause (a) and subject to the limitations clause (a) suggests. A Court of appeal therefore is not competent to permit a suit to be withdrawn, when such suit has failed in the Original Court for want of evidence (a). **Mabulla Sardar v. Pani Hemangini Debi**, 11 C.L.J. 512.

JENKINS, C.J. and DOSS, J.

Reference : (a) 11 C.L.J. 45, *approved*.

(133-a) *O. XXIII, rr. 1 and 3.* See No. 54, *supra*.

(133-b) *O. XXIII, r. 10.* See No. 37-b, *supra*.

(134) *O. XXV, r. 1—Woman plaintiff Security for costs—Suit for defamation.*

The plaintiff, a woman, brought an action for defamation against the defendant, who it was alleged was circulating reports about her moral character. The plaintiff in filing the suit appeared to have been actuated by perfectly *bona fide* motives, and to have filed it in the *bona fide* belief that the defendant was the person who circulated the report, and for the *bona fide* purpose of protecting her right to maintenance and defending herself against the gravest charge of immorality. The defendant applied for security of his costs to be required from the plaintiff, under *O. XXV, r. 1* of the C.P.C. (1908)—

Held, that it would be a wrong exercise of the discretion, under *O. XXV, r. 1*, if the Court were to practically defeat the suit, when it was quite ripe for hearing, by ordering the plaintiff to lodge security.

Held, further, that the Court could, if it so chose, exercise the discretion given by the rule, in favour of a woman-plaintiff, upon such terms as it might think fit to impose. **Namubai v. Daji Govind Warang**, 12 Bom.L.R. 1071.

ROBERTSON, J.

(134-a) *O. XXVI.* See No. 70-a, *supra*.

(135) *O. XXXIII, r. 1—Petition to sue in forma pauperis.*

The petitioner prayed to be allowed to sue as a pauper to set aside the sale of her property by the respondent to whom it was mortgaged. The respondent brought into Court Rs. 101 as the surplus due to the petitioner after the amount due on the mortgage had been satisfied, and contended that the petitioner, being entitled to that sum, was not a pauper.

Civ. Pro. Code (1908)—(Continued).

Held, that the petitioner was a pauper as defined in *O. XXXIII, r. 1* of the Code.

The words "such suit" in the first part of the explanation to *O. XXXIII, r. 1*, refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. "The suit" referred to in the second part of the explanation is also the suit which may be instituted under the rule. **Fatma Bai v. Dossabhoj Umrigar**, 12 Bom.L.R. 102—34 B. 638=5 Ind. Cas. 688.

MACLEOD, J.

Reference :—10 Bom. 207, *not followed*.

(136) *O. XXXIII, r. 5—Application to sue in forma pauperis—Rejection ground that litigation would end in failure.*

A Court cannot refuse an application for leave to sue in *forma pauperis* on the ground that the litigation would very likely end in failure. **Chhangia v. Joti Pershad**, 6 Ind. Cas. 703.

BANERJI, J.

Reference :—A.W.N. (1893) 218, *followed*.

(137) *O. XXXIII, rr. 5 and 7—Bona fide claim—Abuse of process of Court.*

If the applicant is a pauper and it is not denied that he is, he is entitled to the benefit of *O. 33*. The fact that he had co-heirs who were men of means is immaterial. There could be no abuse of the process of the Court when the applicant had a *bona fide* claim on his own account, and was not entitled to require financial assistance from the co-heirs towards the payment of the Court-fees. The Court is bound to decide under *O. XXXIII, r. 7*, on the grounds specified in *r. 5*. **Mi Hla Min v. Mi Ket**, U.B.R. 2nd Qr., 26.

SHAW, J.C.

(138) *O. XXXIII, rr. 5, 7, 15—Order rejecting application for permission to sue as pauper—Appeal.*

An order rejecting (*r. 5*) or refusing (*r. 7*) an application for permission to sue as a pauper does not involve the rejection or dismissal of the plaint, as the applicant may proceed with the plaint if he can procure the necessary Court-fee Stamps (*r. 15*).

Such an order is not a decree as it is not an adjudication in a suit, and no appeal lies from such an order. **Mi Mya v. Mi Gyi**, U.B.R. 2nd Qr., 28.

SHAW, J. C.

Civ. Pro. Code (1908)—(Continued).

(138-1) O. 34—Effect of, on practice of High Court. See MORTGAGE (GENERAL), Nos. 57 and 58, 37 C. 907.

(138-a)—O. 34, r. 3—Application for order absolute—Limitation. See TRANSFER OF PROPERTY ACT, No. 60, 6 Ind. Cas. 537.

(139) O.*34, r. 5—Practice of High Court. See MORTGAGE (GENERAL), No. 48, 12 C.L.J. 596.

(140) O. XXXIV, r. 14—*Usufructuary mortgage—Possession not given to mortgagee—Suit for possession compromised—Mortgagee taking simple money decree—Sale of mortgaged property.*

Where a usufructuary mortgagee, not having obtained possession, brought a suit therefor, but consented to take a simple money-decree instead, *held* that he was entitled, in execution of the consent decree, to bring the mortgaged property to sale. **Ganesh Singh v. Debi Singh**, 7 A.L.J. 321 = 5 Ind. Cas. 419.

KNOX and KARAMAT HUSAIN, JJ.

References :—A.W.N. 152; 28 A. 58; 6 A.L.J. R. 731, D.; 8 C.W.N. 264, F.

(141) O. 38, rr. 5 and 6—Applicability to divorce proceedings. See DIVORCE, No. 1, 37 C. 613.

(142) O. 39, r. 1—“Wrongly sold in execution of a decree”—*Temporary injunction—Act XIV of 1882, S. 492—Act X of 1877, S. 492—Act VIII of 1859, S. 92.*

By using the words “wrongfully sold in execution of a decree,” the Legislature intended that an injunction might be granted, when property, which the claimant claimed to be his, was in danger of being sold in execution of a decree against another person or even against himself (a). **Re Abdulla Khan v. Banke Lal**, 7 A.L.J. 932 (F.B.) = 7 Ind. Cas. 183.

STANLEY, C.J., BANERJI and TUDHALI, JJ.

Reference :—(a) 26 A. 311, overruled.

(142-a) O. XXXIX, r. 2 (3). See No. 24, *supra*.

(142-b) O. XXXIX, r. 7. See No. 90, *supra*.

(143) O. 40, r. 1—*Suit on legal or equitable mortgage—Interest in arrears of property insufficient to pay charges thereon—Jurisdiction of the Court to appoint a Receiver—Principle of appointment.*

Civ. Pro. Code (1908)—(Continued).

A brought a suit on his equitable mortgage by deposit of title deeds to recover the amount due on his mortgage by sale of the mortgaged properties. The interest was in arrears. The property was also insufficient to pay the amount due to A, and a receiver was therefore appointed. The question was whether he was rightly appointed under the circumstances above described.

Held—The wording of S. 503 of the old Code was materially different from the wording of O. 40, r. 1, of the Code now in force. The legislature has adopted the language used in the English Judicature Act, and now a Court may appoint a receiver where it appears *just and convenient* to do so. The practice of the English Courts should be followed.

A receiver may therefore be appointed, as a matter of course, if the interest on mortgages, whether legal or equitable, is in arrears (a).

Also, in case of equitable mortgages, (the expression *paisne mortgages* being included therein) (b) a receiver may be appointed, if there is a reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon (c). **Ahmed Cassim Baroocha v. M.L.R.M.A.**, 5 L.B.R. 135.

FOX, C.J., and PARLETT, J.

References :—(a) Coote on Mortgages, Chap. XLVI, S. 2 (11) and Fisher on Mortgage, para 830. (b) Woodroffe on Receivers, p. 166. (c) *In re Pope* (1886) L.R. 17 Q.B.D. p. 742 and (1819) 2 Swanston, pp. 137 and 138, (*Leaves v. The Duke of Marlborough*).

(141) O. 40, r. 1—*Receiver, appointment of—Court's discretion—Partition suit—Exclusion of co-owner if ground for appointment, when no waste established—Change of law.*

Under O. 40, r. 1 of the Code the Court has been given precisely the same discretion in questions of appointment of a receiver that the Courts in England have. The condition in the old Code that, to justify such appointment in any case, it should be found necessary to preserve property from waste and alienation having been removed, there has been a substantial widening of the Court's discretion.

Where, therefore, in a suit for partition of joint family property, it was proved that a co-owner admittedly entitled to a half share in a considerable portion of the properties in suit

Civ. Pro. Code (1908)—(Continued).

was being kept out of possession by the co-owner, with the result that all supplies were cut off from his branch of the family.

Held—that, although no case of waste might have been established against the co-owner in possession, the case was eminently one for the appointment of a receiver. **Ramji Ram v. Saligram**, 14 C.W.N. 248=5 Ind. Cas. 96.

HOLMWOOD and CHATTERJEE, JJ.

References :—22 C. 459; 17 C. 614, not *F.*; 7 Ch. D. 358, *Relied on*.

(145) *O. 40, r. 1—Receiver, appointment of—Judicial discretion of Court—“Just and convenient,” what is—Defendant in possession not to be disturbed except on strong grounds—Waste—Delay in instituting a suit, effect of, on receivership application by plaintiff.*

The words “just and convenient” in *O. 40, r. 1*, are derived from the English Judicature Act, which greatly enlarged the powers which the Court of Chancery formerly exercised, and the Courts in India have the fullest jurisdiction to appoint as well, as to remove a Receiver in the exercise of a sound judicial discretion.

A Receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy unless there is some substantial ground for interference (*a*).

Held, on the facts, that the charge of waste against the defendant in possession had not been established, and that plaintiff's delay in instituting the suit was such as to disentitle him to relief by appointment of a Receiver. **Srimati Muthuria Debya v. Shibdayal Singh Hajari**, 14 C.W.N. 252=5 Ind. Cas. 27.

CASPERSZ and DOSS, JJ.

References :—(*a*) 15 C. 818, *F.*; 5 C.W.N. 365; 5 C.W.N. 62, *R.*

(146) *O. XL, r. 1—Receiver, appointment of—“Convenient and just,” meaning of—Appeal—Indiscretion—Onus.*

A large impartible estate was bequeathed by the widow of the last male owner for some religious and charitable purposes. The trustees were put in possession of the property and they remained so far over ten years, when a suit to set aside the bequest was brought by one of the claimants of the estate. The profits of the estate were large and the expenses necessary for the purposes of the trust were small.

The trustees, moreover, in making the expenses, paid no due regard to any method of account:

Civ. Pro. Code (1908)—(Continued).

Held that, under the circumstances, it was convenient to appoint a receiver of the property pending the decision of the suit.

Where the lower Court, in the exercise of its discretion, after considering all the facts and evidence, has come to a conclusion, it is for the appellants to show that the Court exercised its discretion improperly. **Raja Ram v. Thakurain Sheorani Kuer**, 7 Ind. Cas. 344.

KNOX and KARAMAT HUSAIN, JJ.

(147) *O. 40, r. 1, cl. (1) (d) and O. 43, r. 1 (s)—Directions to receiver, if appealable.*

Where both the parties have agreed to the appointment of a receiver of the properties in dispute, and the Court has, in appointing the receiver, given him certain directions as to the disposal of the income.

Held that an appeal lies from those directions by virtue of *O. 43, r. 1 (s)* of the Code. **Mohunt Anant Das v. Ram Parkash Das**, 14 C.W.N. 183=5 Ind. Cas. 69.

STEPHEN and CHATTERJEE, JJ.

(148) *O. XL, R. 1 and O. XLIII (1)—Appointment of Receiver when allowed—Appeal from order refusing to appoint receiver—Hindu Law—Position of eldest brother.*

Held that :—

(1) An order refusing to appoint a receiver is appealable (*a*).

(2) The exercise of the jurisdiction to appoint a receiver under *O. XL, Rule 1* is not a matter *ex debito justitiae*, and the Code leaves it to the Court to decide whether to make the appointment would, in its opinion, be “just and convenient.” But in all such cases the opinion of the first Court is entitled to great weight and is liable to be set aside only if it is either arbitrary, vague and fanciful (*b*).

(3) The appointment of a Receiver should only be granted where some specific act of misappropriation, malversation or mismanagement is shown, but not on a mere apprehension of future waste; and this principle is particularly to be applied in case of partition of Hindus' joint property in the hands of the eldest brother, who, according to Hindu law, is in the position of manager of that property (*c*). **Sant Ram v. Ram Chand**, 53 P.W.R. 1910=36 P. R. 1910=6 Ind. Cas. 659.

RATTIGAN, J.

References :—(*a*) 24 B. 38; 31 C. 495; 6 C. L.R. 467; 10 M. 179 (*F.B.*), *F.* (*b*) 10 C. 713, *F.* (*c*) 73 P.R. 1902; 17 C. 614; 18 M. 28, *D.*

Civ. Pro. Code (1908)—(Continued).

(149) *O. XLI, r. 4—Ground common to all defendants—Dismissal of suit on appeal by one defendant—Mortgage by Hindu lady—Suit against reversioners and their transferee—Decree by first Court—Appeal by transferee—Dismissal of whole suit, whether legal.*

A suit was instituted on a mortgage said to have been executed by a Hindu lady, against her reversioners and their transferee. The suit was decreed by the first Court. On appeal by the transferee alone, the lower appellate Court found that the mortgage was without consideration, and dismissed the suit altogether.

Held, that the decree of the first Court proceeded upon the existence of a valid mortgage, that is, the liability as against all the defendants depended upon a common ground, namely, the existence of a binding mortgage by the lady, and that the lower appellate Court was right in reversing the decree against the other defendants also, when it found, upon the appeal of the transferee defendant, that there was no valid mortgage. **Kishore Chandra Banerjee v. Ram Charan Bhattacharya**, 5 Ind. Cas. 388.

WOODROFFE, J.

References:—11 W.R. 449; 3 B.L.R. Ap. 11, D.

(149-a) *O. XLI, r. 5. See No. 86, supra.*

(149-b) *O. XLI, r. 10. See No. 58, supra.*

(150) *O. 41, r. 17—Appeal—Dismissal for default—Case called out and dismissed before rising of Court—Sufficient cause for absence of party—Party not to suffer on account of absence of pleader.*

Where an appeal was called at an early part of the day and dismissed for default on the appellant and his pleader not appearing to conduct the appeal, the Chief Court set aside the order of dismissal, and observed that the lower Appellate Court should have given a further opportunity, during the course of its sitting, of showing whether or not he was present, in person or by pleader, before it rose for the day.

The pleader's absence in a case need not be satisfactorily explained, if the appellant can give a reasonable excuse for his own absence. **Shankar Das v. Narain Das**, 34 P.L.R. 1910.

RATTIGAN, J.

Reference:—113 P.R. 1876, R.

(151) *O. 41, r. 19—Appeal dismissed for default—Restoration—Duty of pleader—Duty of Court—Practice.*

Civ. Pro. Code (1908)—(Continued).

It is the duty of the pleaders appointed by the parties to be present and to be ready to proceed with the appeal when it is called on for hearing. It is in no way the duty of the Court to send for the pleaders, or to see whether they find it convenient or not to come to Court. **Shambu Nath v. The Secretary of State for India**, 5 Ind. Cas. 120.

KNOX and PIGGOT, JJ.

(152) *O. 41, r. 20—Suit for partition—Non-joinder of some sharers in appeal—Effect—Limitation Act (XV of 1877), Art. 127—'Exclusion'—Whether non-participation amounts to exclusion.*

In a suit for partition, relief cannot be given to one sharer without all the other sharers being brought before the Court.

Where non-participation of some sharers in possession of the properties is not exclusion. **Sammantha Gramany v. Devasikamony Gramany**, 7 M.L.T. 174; 20 M.L.J. 364; 5 Ind. Cas. 924.

BENSON and KRISHNASWAMY Aiyar, JJ.

References:—24 M. 441; 30 M. 201, F.; 11 B. 216, not F.

(153) *O. 41, r. 20—Adding respondent interested in the result of appeal—Cross-objection—Limitation. See MORTGAGE (GENERAL). No. 18, 5 Ind. Cas. 654.*

(154) *O. 41, r. 22—Memo of cross-objections—Right to urge objections as against co-respondents who have not appealed.*

Under R. 22, O. 41 of the new Code, a respondent may file a memorandum of cross-objections and urge objections against co-respondents who have not appealed against the decree. **Ramchand v. Rikhab Dass**, 6 N.L.R. 51.

SKINNER, A.J.C.

References:—23 A. 93; 6 B.H.C.R. 244; 9 C.P.L.R. 62; 15 W.R. Cr. 26; 26 C. 114; 25 C. 565; 30 C. 655 and 14 C.P.L.R. 46, R. & D.; 7 M. 215, R.

(155) *O. XLI, R. 22 (1)—Respondent—No cross-appeal or objection—Right of respondent to support the decree on grounds decided against him by Court below.*

A respondent, although he may not have appealed against any part of the decree, may support the decree on any of the grounds decided against him in the Court below. It is only when he takes exception to the decree

Civ. Pro. Code (1908)—(Continued).

that he is bound to prefer an appeal or take cross-objections. **Shankar Lal v. Madari Singh**, 7 Ind. Cas. 484.

BANERJEE, J.

(156) O. 41, r. 22 (5). See MAINTENANCE, No. 7, 7 Ind. Cas. 118.

(157) O. 11, R. 23—*Remand by High Court to District Judge—Remand by District Judge to Munsif—Jurisdiction.*

The High Court remanded a case to the District Judge under S. 562 of the Code of 1882. The District Judge, instead of carrying out the order himself, remanded the case further down to the Munsif: *Held*, that the District Judge had no jurisdiction to remand the case to the Munsif. **Rambaran Upadhia v. Kashi Upadhia**, 6 Ind. Cas. 400.

KARAMAT HUSAIN, J.

Reference :—21 A. 230, F.

(157-a) O. XLI, r. 23. See No. 88, *supra*.

(158) O. 11, R. 23, O. 43 (1) (a), O. 45, R. 4—*Remand—Preliminary point—Irregular remand—Punjab Courts Act (XVIII of 1884), as amended, S. 70 (1) (a) (b)—Revision—Civil cases—Appeal—Material irregularity.*

The Original Court framed an issue, among others, whether the parties were governed by custom or Hindu Law, and decided the suit placing the *onus* on the plaintiff. On appeal, the Divisional Judge, being of opinion that the *onus* should have been on the defendant, remanded the suit for fresh trial under Order 41, Rule 23 of the Code. On further appeal—

Held, that the order was not appealable, (*Vide* Rule 43 (1) (a)).

Held, also, that revision under clause (1) (b) of S. 70 of the Punjab Courts Act did not lie, for the order passed by the Divisional Court did not amount to a "decree."

That the order must be revised under clause (1) (a) of S. 70, for the form of order was bad, the Original Court not having determined the suit on a preliminary point, and the Divisional Court not having reversed any decision of the Original Court.

Held, further that Order 45, Rule 4, does not apply to appeals preferred to the Chief Court, but only to appeals to the King in Council. **Mussammat Har Devi v. Harnam Singh**, 17 P.L.R. 1910 = 6 Ind. Cas. 491.

SHAH DIN, J.

Civ. Pro. Code (1908)—(Continued).

(159) O. XLI, r. 26—*Period within which objections to findings of the lower Court are to be filed—Duty of Court where no objection filed.*

There is nothing in O. XLI, r. 26, itself which precludes the period, within which objections are to be filed, being fixed by the Appellate Court when remanding the case. But even though no objection has been filed, the Appellate Court should (subject to the law as to the finality of findings of fact) consider the correctness of the lower Court's findings. **Dadnu v. Somnath**, 6 N.L.R. 109.

SKINNER, A.J.C.

Reference :—15 W.R. 235, R.

(160) O. XLI, r. 33—*Powers of Appellate Court.*

The High Court in second appeal, and the District Judge on appeal, can pass a decree against a defendant, even though the plaintiff has not filed any appeal or cross-objections against the decree dismissing the suit against him. **Krishnier v. Sarvothama Royar**, 5 M.L.T. 377.

ABDUR RAHIM and KRISHNASWAMI IYER, JJ.

(160-a) O. 11, r. 33—C.P.C. (Act XIV of 1882), Ss. 540, 584—*Suit for partition—Decree for plaintiff—Reduction of some defendants' share in consequence—Appeal by such defendants, whether lies—Relief to party not filing appeal or cross-objections.*

An appeal lies by a party against whom no decree has been passed if the effect of the decree is to make that person aggrieved by it.

It is competent to a Court of appeal, under Order XLI, R. 33 of the C.P.C. of 1908, to give a relief to the respondent, who has not filed cross-objections to that portion of the decree of the lower Court which is against him (a).

Plaintiff sued for a third share, alleging that defendants Nos. 1 and 2 were each entitled to a third share, and third defendant to no share. The Munsif gave decree as prayed for. On appeal the Sub-Judge granted plaintiff a fourth share, holding that the 3rd defendant was entitled to a fourth.

Held, on appeal by 1st and 2nd defendants, that it was competent to 1st and 2nd defendants to appeal, as they were aggrieved by the decree

Civ. Pro. Code (1908)—(Continued).

of the Sub-Judge (b). **Nagalla Kotayya v. Nagalla Mallayya**, 8 Ind. Cas. 337.

ABDUR RAHIM and KRISHNASWAMI
AIYAR, JJ.

References:—(a) Letters Patent Appeal No. 105 of 1908, R. (b) 28 M. 457; 30 M. 447; 17 M.L.J. 260; 2 M.L.T. 468; 21 A. 117, R.

(160-b) O. 41, r. 33—Powers of appellate Court—Second appeal. See MADRAS ACT I OF 1908 (ESTATES LAND), No. 3, 20 M.L.J. 528.

(160-c) O. XLIII (1)—See No. 148, *supra*.

(160-d) O. XLIII (1) (a)—See No. 158, *supra*.

(160-d-1) O. 43, r. 1, cl. A—See MESNE PROFITS, No. 4, 8 Ind. Cas. 162.

(160-e) O. XLIII, r. 1 (g)—See No. 31, *supra*.

(160-f) O. XLIII, r. 1, (s)—See No. 147, *supra*.

(160-g) O. XLIII, r. 1 (u)—See No. 53,

(160-h) O. XLIII, r. 1 (u)—No further appeal in suit—Order under S. 562, C.P.C., 1882 (O. XLI, r. 23)—*Appealability*—Case sub judice—*Revision—Punjab Courts Act, XVIII of 1884, S. 70 (1) (b)*.

No appeal lies under O. XLIII, r. 1, cl. (u), C.P.C., 1908, from the order of the Divisional Judge remanding the case under S. 562, C.P.C., 1882 (O. XLI, r. 23, C.P.C., 1908) in a case where no further appeal lies to the Chief Court from the decree of the Divisional Judge.

It will not be a proper exercise of the Chief Court's revisional power under cl. (b) of S. 70 (1) of the Punjab Courts Act, 1884, for it to interfere under that clause, in a case which is still *sub judice* in the lower Courts. **Ali Baksh v. Chuhar Singh**, 101 P.R. 1910 (Civil).

RATTIGAN and WILLIAMS, JJ.

(161) O. 43, r. 1 (v) and O. 47, r. 7—Appeal against order granting review—Appeal on merits against the final order passed on review. See REVIEW, No. 2, 13 O.C. 248.

(162) O. 44, r. 1—Application for leave to appeal as pauper—Matters to be considered. See PAUPER, No. 1, 13 O.C. 302.

(162-a) O. XLV, r. 3—See No. 56-a, *supra*.

(162-b) O. XLV, r. 4—See No. 158, *supra*.

(163) O. 45, r. 7—*Appeal to Privy Council—Poverty, whether sufficient for extension of time allowed for the deposit of security for Respondent's costs.*

Civ. Pro. Code (1908)—(Continued).

Time allowed under O. 45, r. 7 for the deposit of security for Respondent's costs in the appeal may be enlarged for "cogent reasons," and poverty is a sufficient reason for extension of time, where the sum of money required is large and diligence of the petitioner is shown by his having paid in three-fourths of the money required within the time originally allowed. **Bagga v. Salihon**, 44 P.R. 1910.

JHONSTONE and CHEVIS, JJ.

References:—10 C. 557 (P.C.). F'; & 14 M. 391, *dissented from*

(164) O. 45, r. 7—Meaning of "date of decree." See APPEAL (TO PRIVY COUNCIL), No. 1, 14 C.W.N. 420.

(164-a) O. XLV, r. 13—See No. 91, *supra*.

(165) O. 45, r. 13 (2) (c)—*Stay of execution before admission of appeal to Privy Council—Jurisdiction.*

The Court can stay execution of a decree pending appeal to the Privy Council, under O. 45, r. 13 (2) (c), only after the grant of a certificate for the admission of the appeal. Rule 13 (2) (c) refers to stay of execution of the decree appealed from. **Yenkata Reddy v. Obala Reddy**, 6 M.L.T. 309--20 M.L.J. 140.

MUNRO and ABDUR RAHIM, JJ.

References:—5 C.W.N. 562, F'; 19 B. 10, not F'.

(165-a) O. XLVI, r. 1—See No. 58-a, *supra*.

(165-b) O. XLVII, r. 1—See Nos. 19 and 108, *supra*.

(166) O. 47, r. 7—*Review, order, granting—Appeal, scope of—Civ. Pro. Code (Act XII of 1882), S. 373.*

When an appeal has been preferred under O. 47, r. 7, Civ. Pro. Code, against an order granting an application for review of judgment, if it is established that the application is barred by limitation or was presented to a judge who had no jurisdiction to deal with it, the Court of appeal is bound to reverse the order. The powers of the appellate Court in such an appeal are strictly limited to the grounds upon which alone an appeal is competent.

When a plaint is amended by the omission of certain parties and prayer clauses, in response to an objection that the suit as framed is bad for misjoinder of parties and causes of action, leave under S. 373, Civ. Pro. Code, entitling the plaintiff to institute a fresh suit against the omitted parties need not be expressly reserved.

Civ. Pro. Code (1908)—(Continued).

A second suit brought without such leave is not open to objection under S. 373 of the Civ. Pro. Code. **Manindra Chandra Roy Chowdhury v. Balaram Das**, 11 C.L.J. 161 = 5 Ind. Cas. 725.

MOOKERJEE and TEUNON, JJ.

(166-a) O. XLVII, r. 7—See No. 161, *supra*.

(167) Sch. II, S. 1—Award—Reference by parties interested—Defendant who did not appear not joining—Whether reference valid.

A suit was brought against several persons, one of whom was a minor. An official of the Court was appointed guardian *ad litem* for the minor defendant, but he did not put in an appearance. The parties, with the exception of the said minor, applied to the Court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators, whereby the minor was exempted from the plaintiff's claim. Objections being taken to the award, *held* that the minor, not having put in an appearance, nor contested the suit, was not a person interested in the matters which were referred to arbitration, within the meaning of S. 1, Sch. II of the Code, and his not joining in the reference did not invalidate it. **Ishar Das v. Keshab Deo**, 7 A. L.J. 807 = 7 Ind. Cas. 68.

STANLEY, C.J. and GRIFFIN, J.

Reference:—24 A. 229, *appl.*

(168) Cl. 18, Sch. II—Application for stay of suit—Whether can be under—In places where Arbitration Act applies.

Where the Indian Arbitration Act is in force, an application for stay of suit filed in a Court must be made in accordance with the provisions of S. 19 of that Act and the rules made thereunder, and not under cl. 18, Sch. II, Civ. Pro. Code (1908). **Yishindas v. Simpson**, 3 Sind. L. R. 162.

CROUCH, A.J.C.

(169) Sch. II, paras 15 and 16. See ARBITRATION, No. 4, 73 P.W.R. 1910.

(170) Sch. III, para. 11 (3) and S. 48—Limitation Act, Sch. I, Art. 182—Saving of limitation during period of execution by Collector—C.P.C. (XIV of 1882), S. 248, notice issued under—Notice based upon a preceding application which was defective or irregular.

Held that the protection extended to a decree-holder by the provisions of paragraph 11 (3) of

Civ. Pro. Code (1908)—(Concluded).

the third schedule of C.P.C. (Act V of 1908) applies, both to the limitation of twelve years referred to in S. 48 of Act V of 1908 and to the limitation of three years provided by Art. 182 of the first schedule to the Limitation Act (IX of 1908).

Held further, that the issue of a notice under S. 248 of Act XIV of 1882 gives a new start for limitation, even though the preceding application upon which the notice was issued was defective or irregular. **Mohammad Abdul Karim Khan v. Nawal Singh**, 13 O.C. p. 303.

EVANS and LINDSAY, J. C. S.

References:—12 O.C. 267; 19 Bom. 261; 1 All. 675; 15 All. 84; 22 Bom. 63, *R.*

Civil Suit.

(1) Stay of Criminal proceedings—Pendency of civil suit—General rule.

The general rule is that where a civil suit is brought subsequently to criminal proceedings, there shall not be any stay of the latter. **Harl Pada Pal v. Jotish Chandra Chatterjee**, 6 Ind. Cas. 181.

STEPHEN and CARNDUFF, JJ.

Claim.

(1) Claim—Moveable property of perishable nature, sale of—Subsequent investigation of claim—Claim to standing crop—Successful claimant not to be charged with costs of harvesting.

If moveable property of a perishable nature is attached and claim is preferred, the claim may be investigated even after the sale of the property by the Court. The Court will in such case adopt the rule of proportion in awarding damage to the claimant, assuming that the value of the article was represented with fair accuracy by the price realised at the sale.

Where standing crops belonging to a claimant are unlawfully attached, and extraordinary harvesting expenses are incurred due to the employment of Court peons to do the work, the burden of the harvesting costs cannot be charged to the account of the claimant. **Rasik Chandra v. Jutendra Kumar**, 8 Ind. Cas. 77.

MOOKERJEE and TEUNON, JJ.

Clog.

(1)—on equity of redemption—Condition as to interest being paid in lump at the time of redemption. See MORTGAGE (REDEMPTION), No. 20, 128 P.L.R. 1910.

Cochin.

Property in—Suit for possession—Jurisdiction. See CIV. PRO. CODE (1882), No. 23, 7 Ind. Cas. 67.

Coins.

Employing shroff to pass Babashai coins—Shroff passing shikkai coins—Loss to Government—Measure of damages. See MAXIM, No. 1, 12 Bom. L.R. 769.

Collection papers.

Admissibility of, See EVIDENCE Act, No. 3, 6 Ind. Cas. 369.

Commission.

Agent negotiating sale—Sale falling through owing to vendor's neglect—Right to. See CONTRACT, No. 7, 8 M.L.T. 40.

Commissioner.

Amount drawn by, in excess of his fees—Attachment for recovery of that amount—Power of Court. See CIV. PRO. CODE (1882), No. 233, 6 Ind. Cas. 386.

Community.

(1) **Common property belonging to—Decree appointing receiver till proper trustee is appointed by—Validity.** See RECEIVER, No. 2, 19 M.L.J. 669.

(2) **Suit by two persons belonging to the—Persons having the same interest in one cause—Maintainability of suit.** See CIV. PRO. CODE (1882), No. 29, 7 A.L.J. 233.

Companies.

(1) **Company—Liquidation—Scheme of management for paying off its debts and for managing its affairs—Court—Sanction.**

In an application for sanctioning a scheme, approved of by a satutory majority of the creditors of a company in liquidation, for payment of its debts and management of its affairs in future, the Court has to see whether the provisions of the statute have been complied with, whether the majority are acting *bona fide*, whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and whether the scheme is a resonable one. **In re Bombay Cotton Manufacturing Company Limited**, 12 Bom. L.R. 525=7 Ind. Cas. 452.

MACLEOD, J.

Reference :—1 Ch. 213, F.

Companies Act.

See ACT VI OF 1882.

Compensation.

(1) **Municipal body—Projection lawfully in existence—Power to remove—Compensation.** See MUNICIPALITIES, No. 1, 6 N.L.R. 53.

(2) **Suit for, for unlawful detention of plaintiff's money—Limitation.** See LIMITATION ACT (1877), No. 46, 7 Ind. Cas. 5.

(3) **Order for, embodied in decree—Appeal.** See CIV. PRO. CODE (1882), No. 228, 8 Ind. Cas. 164.

Compoundable offence.

Agreement to refer to arbitration with the object of stifling prosecution for non-compoundable offence—Validity of award. See CIV. PRO. CODE (1882), No. 202, 11 C.L.J. 131.

Compromise.

(1) *Compromise, finality of—Subsequent conduct of one of the executants inconsistent with the terms of the compromise—Whether such conduct entitles the other party to repudiate the compromise.*

A deed of compromise between parties, defining their rights in properties, is final and is binding on them.

The mere fact that one of the executants subsequently acted in a manner inconsistent with the compromise, by denying the title of the other parties to what was conferred on them by the provisions thereof, will not justify the latter to repudiate the compromise. **Ganga Yarapu Krishna Yenamma v. Naraparaju Yenkata Mukunda Row**, 4 Ind. Cas. 303=7 M.L.T. 33.

WALLIS and SANKARAN NAIR, JJ.

Reference :—31 C. 584, D.

(1-a) **Compromise decree—Suit to set aside, on the ground that agreement was unlawful—Civil Procedure Code (Act XIV of 1882), S. 375—Administrator agreeing to execute lease for which sanction afterwards refused by Court—Probate and Administration Act (V of 1881), S. 90, cls. (3) and (4)—Test, whether agreement specifically enforceable—Specific Relief Act (I of 1877), Ss. 3, 21 (c)—Administrator if “trustee”—Compromise based on agreement which is unlawful in part—Decree if to be wholly set aside or in part—No universal rule.**

Where a person acting for himself and also as administrator of the estate of a deceased person compromised a suit, agreeing thereby to execute within a month a darpuni lease of property jointly belonging to himself and the

Compromise—(Continued).

estate of the deceased, and undertook, previously to doing that, to obtain the permission of the Court which had granted the letters of administration, but such permission was refused on the ground of the proposed lease not being beneficial to the estate :

Held—That the administrator had acted in excess of his powers under S. 90 of the Probate and Administration Act in entering into the compromise, which was therefore not a lawful compromise within the meaning of S. 375, Civ. Pro. Code (1882).

Where a compromise decree has been made on the basis of an unlawful agreement, a suit lies to set it aside (a).

A compromise decree can be set aside on any ground on which the agreement itself could be set aside (b).

If the agreement could not be specifically enforced, neither should the decree.

The agreement by the administrator in this case could not be specifically enforced, being one made by a trustee in excess of his powers, within the meaning of S. 21, cl. (e) of the Specific Relief Act.

Held—That, in the circumstances of the case, the whole decree should be set aside, and not merely the portion affecting the estate of the deceased.

Whether in such a case the decree should be set aside in its entirety or only to the extent directly affected by the illegality would depend upon the circumstances of the case, and no universal rule can be laid down with regard to it. **Sarbesb Chandra Basu v. Hari Doyal Singh**, 14 C.W.N. 451 = 5 Ind. Cas. 236 = 11 C.L.J. 346.

MOOKERJEE and TEUNON, JJ.

Reference :—(a) 13 C.W.N. 1197 ; 2 Ch. 273, F.

(2) *Practice—Inherent powers of Court—Compromise of suit—Decree upon compromise—Compromise signed by pleader without any authority from his client—Decree ultra vires—Decree set aside.*

A suit was declared to have been ended by a decree passed in terms of what purported to be a compromise between the parties. It appeared that the compromise was signed by the defendant's pleader who was not authorised in this behalf. The defendant applied to the Court to set aside the compromise, on the ground that the pleader had not been instructed to appear

Compromise—(Continued).

for him in the suit, and that he had given the pleader no instructions in the case authorising him to enter into any compromise. The Court set aside the decree and ordered the suit to be re-heard :

Held (1) that the compromise was not binding upon the defendant, and the decree passed upon it was void as to him. It was *ultra vires*. The Court had been asked to put its seal upon and sign a document which had no legal ground to rest upon, and if that decree went out, then the whole suit was re-opened.

(2) That it was the inherent power of every Court to correct its own proceedings, where it had been misled. **Basangouda Hanmant gouda v. Churhigirigouda Yogangouda**, 12 Bom. L.R. 223 = 5 Ind. Cas. 968.

CHANDAVARKAR and KNIGHT, JJ.

(3) *Res judicata—Compromise in first suit—Validity questioned in subsequent suit.*

A compromise in a suit, where the subject-matter was below Rs. 10,000, can be questioned in a subsequent suit, if the subject matter is of a value over Rs. 10,000, and an appeal to the Privy Council consequently lies. **Raja Yenkata Narasimha Appa Rao v. Bukkapatnam Tirumala Narasimhachariyulu**, 7 M.L.T. 224.

MILLER and MUNRO, JJ.

Reference :—29 M. 195, R.

(4) *Compromise—Construction—Limitation—Joint trust—Right to the trust allowed to become barred by one trustee—Other trustee a minor—Suit to recover trust within three years after becoming major—Limitation.*

Where a deed of compromise states that the right to a trusteeship has remained in the families of the plaintiff and of the first defendant, and also provides that the plaintiff's right shall, after his death, be exercised by his heirs, and the first defendant's right shall be exercised by him and by the second defendant and after the death of both of them, by their heirs.

Held that the effect of the compromise was to constitute the representatives of the two branches of the family for the time being joint trustees, and to give them joint interests as joint owners in the property in question.

Where an adult male member of the family, who was a joint trustee with the other members of the family failed to take steps to protect the rights of the family when he was dispossessed of the trusteeship and trust properties, and

Compromise—(Continued).

allowed the remedy to become time-barred, the rights of the other joint trustee also become barred, even though the latter seeks his remedy by a suit brought within three years after he attained majority (a). **Thiagaraja v. Ratnasabapathy Pillai and others**, 20 M.L.J. 421 - 8 M.L.T. 134.

WHITE, C.J., and MUNRO, J.

Reference :—(a) 32 C. 129 (P.C.), D.

(8) *Application to obtain decree in terms of the compromise*—Some of the terms opposed to provisions of a statute—Public policy, — *Dekkhan Agriculturists' Relief Act (XVII of 1879), S. 15-B, cl. 2—Instalments—Default in payment of instalments.*

The plaintiff and defendant (an agriculturist) compromised a suit for recovery of money by sale of mortgaged property, by providing that the defendant should pay the amount of mortgage in annual instalments and that, on failure to pay any two instalments, the plaintiff to be at liberty to realize the whole of the balance by sale of the entire mortgaged property through the Court. This compromise was presented to the Court to obtain a decree in its terms; and the defendant there agreed to be bound by the terms of the compromise on its being explained to him. The Subordinate Judge before whom it was presented, having felt doubts as to the validity of the compromise, referred the following two questions to the High Court for opinion :—

(1) Whether the compromise was lawful, although it provided that, in default of the payment of two instalments, the plaintiff should realize the whole balance due by sale of the entire mortgaged property, such provisions being opposed to S. 15-B, cl. 2, of the *Dekkhan Agriculturists' Relief Act, 1879*?

(2) Whether the Court was bound to pass a decree on a compromise of this character?

Held (1) that it was not competent to the Court to pass a decree which would be in conflict with the clear provision of S. 15, cl. 2 of the *Dekkhan Agriculturists' Relief Act, 1879. (a).*

(2) That the mere fact that the defendant, though apprised of the terms of the compromise, agreed to it, did not invest the Court with the jurisdiction to pass a decree to carry out the compromise. **Kisandas Shivram Marwadi v. Nama Rama Yir**, 12 Bom. L.R. 1024.

BACHELOR and RAO, JJ.

Reference :—(a) (1894) P.J. 456, R.

Compromise—(Continued).

(6) *Compromise decree—Settlement for a particular period—Claim for future years on the basis of the compromise—Res judicata—Construction of compromise decree.*

By the terms of a compromise, which was made a decree of Court, the plaintiff agreed to his being adjudged entitled to a certain share for a particular *fasli*, on the basis of an admission by the 1th defendant. In a claim by plaintiff for the share due to him for subsequent years,

held, that plaintiff was not estopped by the rule of *res judicata* from claiming a larger amount by reason of the said compromise decree, which only settled plaintiff's share for a particular period. **Hukdar v. Karrup pana Pillai**, 8 M.L.T. 432.

ABDUR RAHIM and KRISHNASWAMY IYER, JJ.

References :—1 Ch. 37; 12 R. 1; 71 L.T. 594; 43 W.R. 131; 61 L.J. Ch. 189, R.

(6-a)—*amending award—Delay in acting upon its conditions—Effect.* See CIV. PRO. CODE (1882), No. 182, 38 P.W.R. 1910.

(7) *Compromise by Hindu widow—Relinquishment—Whether alienation—.* See HINDU LAW (WIDOW), No. 6, 7 M.L.T. 340.

(8)—*by minor's natural guardian—Validity of the—*See HINDU LAW (ADOPTION), No. 5, 12 Bom. L.R. 370.

(9) *Decree passed upon a—Application of S. 52, Tr. Pr. Act—*See TRANSFER OF PROPERTY ACT, No. 20, 13 O.C. 98.

(10)—*Whether good consideration.* See REGISTRATION ACT (1877), No. 5, 6 Ind. Cas. 651.

(11) *in appellate stage after revocation of probate—Legality—*See PROBATE, No. 3, 12 C.L.J. 91.

(12)—*Likely to give trouble—Powers of Court to record—Effect of resiling from—Unlawful agreement—Different portions separable.* See CIV. PRO. CODE (1882), No. 183, 7 A.L.J. 778.

(13)—*to have rest of decree executed at future time—Stop-in-aid of execution—Effect of—Acknowledgment.* See LIMITATION ACT (1877), No. 29, 6 Ind. Cas. 366.

(14)—*by widow—Effect on reversioners.* See HINDU LAW (WIDOW), No. 11, 8 M.L.T. 228.

Compromise—(Concluded).

(15) Reference for apportionment—Interest of one of the claimants attached before reference—Compromise amongst claimants—Abandonment of claim by claimant whose interest was attached—Effect—See ACT I OF 1894 (LAND ACQUISITION), No. 14, 7 Ind. Cas. 481.

(16) Decree passed on—whether binding on co-defendant not party to—See ESTOPPEL, No. 4, 15 M.C.C.R. 293.

(17) Sale pending suit—Compromise decree—Purchaser bound by the decree—*Lis pendens*—See TRANSFER OF PROPERTY ACT, No. 21, 6 Ind. Cas. 168.

(18) Claim by third party to portion of property sold—Power of purchaser to compromise with claimant—Whether vendor bound by—See VENDOR AND PURCHASER, No. 6, 8 Ind. Cas. 91.

Concurrent finding.

What is. See CUSTOMS (PUNJAB-ALIENATION), No. 4, 8 P.W.R. 1910.

Confiscation.

(1) Effect of confiscation and re-grant by Government. See CUSTOMS (PUNJAB-INHERITANCE AND SUCCESSION), No. 3, 120 P.W.R. 1909.

(2) Joint family property—Confiscation—Government grant of part of the property to one member of the family—Nature of estate granted. See HINDU LAW (JOINT FAMILY), No. 9, 12 Bom. L.R. 656.

Consideration.

(1) Definition of—Agreement to take no immediate action—S. 2, Contract Act.

A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

Where there was a settlement of debts between two parties, and one of them agreed to take no immediate action to recover the debt due, there would be forbearance on his part and benefit to the other party, and the agreement must be regarded as the consideration for a promise as defined in S. 2 (d), Contract Act. **Maung Me v. Ma Sein**, 5 L.B.R. 192.

HARTNOLL, J.

Reference :—L.R.A.C. (1900), p. 586, F.

Consideration—(Continued).

(2) *Personal liability—Promissory-note—Plea of failure of consideration—One consideration can only support one contract—Relations between parties entered in document—Rights and liabilities only governed by it—Mortgage—Mortgagor's personal liability.*

The defendant entered into an agreement reciting that S and the defendant had obtained a Manganesse concession in Mysore, and that they agreed to admit E to a share of the profits arising or to arise from the concern in consideration of E's causing the plaintiff company to undertake the management and development of the rights comprised in their license and to finance the concern. All three entered into an agreement with the plaintiff company on the same day, reciting that, at the request of E, the plaintiff company have undertaken to manage and develop the rights and advance the moneys from time to time. The agreement further laid down that the said plaintiff company should find all monies required from time to time for working, prospecting and developing the lands, and also all monies for the kist, etc., and that all sums so paid or advanced by the said company as aforesaid shall bear interest at 2 per cent. above the current bank rate and be paid or deducted from the sale proceeds of the ores, as are disposed of or shipped, and the deed further provided a remuneration for their services. Under the agreement, the plaintiff company were making the advances to the parties, one of whom was the defendant. The concern failed and the mine had to be closed and the defendant was called upon to pay his share of the expenses. He executed the plaint pro-note for this and some other indebtedness which is not in question in this suit. *Held*, that, under the agreement above set out, there was no personal liability on the part of the three members that entered into the agreement and, therefore, against the defendant.

It is well settled that there is an implied covenant in all mortgage instruments making the mortgagor personally liable (a).

But where the mortgage instrument contains clear provisions making the mortgage-debt repayable in a particular way, such provisions must be given effect to and in such cases there is no personal liability (b).

Where a contract is reduced to writing, in order to define and to give evidence of a

Consideration—(Continued).

transaction between the parties, the writing should regulate their respective rights and liabilities. (c)

An implied promise to pay does not follow where there is an express promise to pay in a particular manner and on a certain event happening.

It was contended on the facts above set forth that, the defendant having given a promissory note for the amount, he was not at liberty to plead that there was a failure of consideration: *Held*, that he was entitled to raise such a plea (d).

A consideration for a contract could operate only once, and when it had operated as consideration for one contract, it was spent. A single consideration cannot be made, by force of the definition in the Indian Contract Act (as including past services at the request of the promisor also), to support an indefinite series of subsequent contracts.

The advance made by the plaintiff company being in consideration of the first agreement, there was no consideration for the pro-note by the defendant (e). **Anglo-Indian Trading Company v. G. F. Brierly**, 8 Ind. Cas. 302.

WALLIS, J.

References:—(a) (1868) 4 Q.B. 182; 12 L.J. Q.B. 160; 3 G. and D. 351, *F.* (b) (1956) 1 H. N. 762; 26 L.J. Ex. 150; 5 W.R. 363, *F.* (c) (1905) A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 11 Com. Cas. 1; 21 T.L.R. 710, *Rel.* (d) (1856) 11 C.B. 481, *Rel.* (e) 16 M.L.J. 422, *Rel.*

(2-a) Residence with promisee whether constitutes. See **CONTRACT ACT**, No. 3, 5 Ind. Cas. 102.

(3)—in shape of services rendered or to be rendered—Grant of assessment—Sale—Gift—Registration. See **TRANSFER OF PROPERTY ACT**, No. 37, 12 Bom. L.R. 9.

(4) Meaning of—Pro-note—Plea of execution as name-lender, and consequent want of consideration. See **CONTRACT ACT**, No. 2, 7 M.L.T. 85.

(5) Stranger's right to impugn validity of title-deed on ground of want of. See **ACT VIII OF 1885, BENGAL TENANCY**, No. 1, 5 Ind. Cas. 291.

(6) Failure of—Suit—Limitation. See **CIV. PRO. CODE** (1882), No. 146, 7 M.L.T. 232.

(7) Assignment of decree—Inadequate consideration—Effect. See **CIV. PRO. CODE (MYSORE)**, No. 11, 15 M.C.C.R. 43.

Consideration—(Concluded).

(8) Unregistered sale deed—Registered mortgage bond for consideration money, validity of. See **CONTRACT ACT**, No. 14, 5 Ind. Cas. 581.

(9) Conveyance executed *bona fide*—No consideration paid—Rights of vendor. See **SALE**, No. 3, 6 Ind. Cas. 117.

(10) Sale deed—Proof of non-payment of. See **TRANSFER OF PROPERTY ACT**, No. 29, 6 Ind. Cas. 477.

(11) Suit by auction purchaser for refund of purchase money on failure of. Maintainability. See **EXECUTION SALE**, No. 3, 12 Bom. L.R. 723.

(12) Execution of mortgage deed admitted—Denial of—Burden of proof. See **MORTGAGE (GENERAL)**, No. 40, 7 Ind. Cas. 69.

(13) Presumption in favour of, when arises—Burden of proof. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 27, 83 P.L.R. 1910.

(14) Burden of proof as to, in mortgage transactions—Effect of delay in suit. See **MORTGAGE (USUFRUCTUARY)**, No. 6, 7 Ind. Cas. 646.

(15) Stifling of prosecution—Consideration for agreement—Non-compoundable offence. See **PUBLIC POLICY**, No. 2, 6 N.L.R. 148.

Construction.

1.—(OF ACTS).

2.—(OF DECREES).

3.—(OF DEEDS).

4.—(OF WILLS).

5.—(OF WORDS).

—1. —(Of Acts).

(1) *English law, how far a guide in—Indian Arbitration Act*, S. 12.

The words used in S. 12 of the Indian Arbitration Act are similar to those contained in the English statute, and they may be taken to bear the same construction and confer the same powers on the Court as those exercised by the English Courts under the corresponding section of the English Act of 1889. **Seth Utoomal Vasoomal v. Seth Haridas Asanand**, 4 S.L.R. 26=7 Ind. Cas. 595.

LEGGATT, J.

(2) When statutes are to be construed as operating—Retrospective operation. See **CIV. PRO. CODE** (1908), No. 34, 7 A.L.J. 420.

Construction—(Continued).**—1.—(Of Acts)—(Continued).**

(3) Value of marginal notes. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

(4) Statutes conferring jurisdiction—Construction. See ACT IX OF 1899 (ARBITRATION), No. 6, 3 Sind L.R. 221.

(5) Revenue enactments passed on the same day—Interpreting terms of one Act by reference to the terms of the other. See ACT OF 1876 (ODDH LAWS), No. 3, 14 C.W.N. 817.

(6) Acts, retrospective operation of. See ACT, 1900 (LOWER BURMA COURTS), No. 1, 5 L.B.R. 148.

(7) Scope of preamble. See ACT XIX OF 1841 [SUCCESSION (PROPERTY PROTECTION)], No. 2, 6 Ind. Cas. 259. ♦

(8) Court when can override plain language of Statute—Use of proviso. See ACT III OF 1884 (BENGAL MUNICIPAL), No. 2, 11 C.L.J. 524.

(9) Municipalities Act, construction of. See MUNICIPALITIES, No. 1, 6 N.L.R. 53.

(10) --where statutory rights of an exceptional character have been created. See ACT I OF 1891 (LAND ACQUISITION), No. 5, 11 C.L.J. 512.

(11) Value of marginal notes. See ACT XV OF 1891 (MURSHIDABAD), No. 1, 6 Ind. Cas. 392.

(12) Statute when may be held to have been repealed by another statute by implication. See LEASE, No. 15, 6 Ind. Cas. 685.

(13)—rule of construction—Words of old statute made part of new statute—Object. See ACT IX OF 1898 (C.P. TENANCY), No. 3, 6 N.L.R. 69.

(14) When one statute may be impliedly repealed by a subsequent statute. See ACT III OF 1909 (PRESY. TOWNS INSOLVENCY), No. 1, 12 Bom. L.R. 750.

(15) Acts of procedure—Retrospective effect. See CIV. PRO. CODE (1882), No. 191, 12 Bom. L.R. 730.

(16) Construction of Limitation Act. See LIMITATION ACT (1908), No. 5, 12 Bom. L.R. 881.

(17) Laws affecting rights—Retrospective effect. See CIV. PRO. CODE (1908), No. 51, 7 A.L.J. 1070.

Construction—(Continued).**—1.—(Of Acts)—(Concluded).**

(18) All legislation is primarily territorial—Limit when to be placed upon the general sense of words used in statutes. See LIMITATION ACT (1877), No. 16, 12 Bom. L.R. 977.

(18-a) Act enforced some months, after its passing—Effect. See LIMITATION ACT (1908), No. 24, 8 Ind. Cas. 543.

(19) Rules of. See REG. II OF 1877 (AJMERE LAND AND REV.), No. 1, 7 A.L.J. 370.

—2.—(Of Decrees).

Rule of—Court's duty. See DECREE, No. 4, 6 Ind. Cas. 75.

—3.—(Of Deeds).

(1) *Stridhan—Hindu Law—Succession—Unmarried daughters.*

A, a Hindu, died leaving a Will whereby he left his house to his daughter B absolutely, subject to certain charges by way of maintenance. Probate of this will was granted to the executors C and certain others. Then B died intestate, leaving her surviving five sons including C, a married daughter, and two unmarried daughters D and another. Some years after the death of B, a conveyance was executed by C and his surviving brothers in favour of E and others. The deed proceeded on the assumption that C and his surviving brothers were absolutely and beneficially entitled to the property conveyed by it, but the vendors purported to convey all their "estate, right, title, interest, claim, and demand in the property." D then brought a suit for declaration of her title to a moiety in the property and also for partition, and C contended that, as the surviving executor of the will left by A, he executed the conveyance and created a title which would defeat the title of D, and special reliance was placed on the general words whereby the vendors purported to convey all their estate, right and interest in the property.

Held, (1) that, on the death of B, the property as her stridhan property devolved on her unmarried daughters, (2) that, as C did not sell and convey as executor of the will, the purchaser's title could not prevail against D who was therefore entitled to a moiety in the suit property. **Pura Sundari Das v. Bijarji Nopani**, 37 C. 362=6 Ind. Cas. 893.

JENKINS, C.J., and WOODROFFE, J.

Construction—(Continued).**—3.—(Of Deeds)—(Continued).**

(2) *Document of title—Construction—Subsequent admission as to true meaning or conduct of party, not admissible in construction—Erroneous boundary—Acquiescence—Estoppel—Adoption of boundary in settlement of dispute—Limitation Act (XV of 1877), Sch. II, Art. 138, where applicable.*

A subsequent admission as to the true meaning of a document of title or the subsequent conduct of a party to, or of a person claiming under, the deed, cannot be received in aid of its construction (a).

Mere acquiescence in the boundary of certain properties erroneously laid down does not, by itself, constitute an estoppel.

Therefore, owners of adjoining tracts of land are not bound by consent to a boundary, which has been defined under a mistaken apprehension that it is the true line, and neither party is precluded or estopped from claiming his own rights under the true line when discovered, provided that the position of his opponent has not been meanwhile altered on the faith of his representation.

But if the boundary line has led to any dispute, and if, in settlement of such dispute, the parties have adopted a certain boundary as the true line of division between their properties, neither can be permitted to resile from the settlement.

Art. 138 of Sch. II of the Limitation Act, 1877, applies to suits brought against the judgment-debtor or persons who have derived title from him (b).

The article cannot be applied to a suit brought against a defendant who has not acquired a title from the judgment-debtor. **Khiroda Kanta Roy v. Krishna Das Laha**, 6 Ind. Cas. 467.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 10 O.B. 261; 19 L.J.C.P. 302; 84 R.R. 562; 12 A. and E. 442; 54 R. R. 597; 4 P. and D. 270; 9 L.J.Q.B. 373, *relied on*. (b) 7 C.L.J. 560; 12 C.W.N. 617, *F*.

(3) *Will—Settlement—Construction—Registration and form—Evidentiary value—Tests—Power of revocation—Use of future tense—Effect.*

A registered document, purporting to be an agreement executed by N in favour of his wife and his son's widow, contained the following clause, *viz*, "after my life-time, both of you

Construction—(Continued).**—3.—(Of Deeds)—(Concluded).**

shall not only get the right due to me in the said lands and the said salt pans, but shall also divide and enjoy in equal shares the income derived therefrom." It also declared that N's future debts shall not be binding on the properties, and contained no power of revocation.

Held that the instrument was a settlement and not a will.

The facts that some of the provisions are expressed to operate in the future (a), and the reservation of a life-estate (b) cannot affect the character of the instrument as a settlement.

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is, whether the paper is revocable (c).

The fact of registration (d) and the form (e) of the instrument, though circumstances to be taken into account, cannot be deemed conclusive in determining the character of the instrument. **Rajammal v. Authiammal alias Athi Lakshmiammal**, 20 M.L.J. 519 = 8 M.L.T. 139 = 7 Ind. Cas. 357 = 33 M. 304.

BENSON, O.C.J., and KRISHNASWAMI AIYAR, J.

References:—(a) (1891) 64 L.T. 49 (51), *R*. (b) 20 B. 210 (214), *F*. (c) (1867) F.R. 562 (581), *R*. (d) (1843) Dru. 11 = Ir. Eq. R. 238. (e) 5 B. 630 (631).

(4) of mortgage-deed. See **MORTGAGE (GENERAL)**, No. 15, 6 N.L.R. 20.

(5) Ambiguous instrument—Construction. See **ACT I OF 1969 (ODDH ESTATES)**, No 2, 7 A.L.J. 274.

(6) Description by quantity and by boundaries—Canons of interpretation. See **GRANT**, No. 1, 7 M.L.T. 390.

(7) Kanom instrument—Saswalam right—Construction. See **MALABAR LAW**, No. 6, 6 Ind. Cas. 307.

(8) Gift from father to daughter—"Putra poutradi krame"—Construction. See **HINDU LAW (GIFT)**, No. 2, 6 Ind. Cas. 354.

(9) Earlier document—Whether can be construed by reference to later documents not between same parties. See **RENT**, No. 2, 37 C. 626.

(10) Principal and agent—Deed of compromise in Tamil—Exoneration of agent from all 'mistakes'—Effect. See **PRINCIPAL AND AGENT**, No. 6, 8 M.L.T. 236.

Construction—(Concluded).**—4.—(Of Wills).**

(1) Bequest in favour of two married daughters—Joint tenancy or tenancy in common—Construction. See HINDU LAW (WILL), No. 4, 7 A.L.J. 941.

(2) Two species of property devised—Property not strictly corresponding to description in will to be excluded—Presumption. See WILL, No. 14, 7 A.L.J. 1033.

—5.—(Of Words).

(1) "family" meaning of the word—When used in grants of property. See SHAMILAT, No. 1, 20 P.R. 1910.

(2) Meaning of "ekopithu." See WILL, No. 7, 20 M.L.J. 99.

(3) Meaning of "Sharik." See PRE-EMPTION, No. 12, 7 A.L.J. 415.

(4) Meaning of "Nochi." See HINDU LAW (SUCCESSION), No. 9, 6 Ind. Cas. 210.

(5) Agreement to sell "the entire stock at Shalimar Depot or 700-800, say seven to eight hundred tons of coal."—Meaning of the words—Words of description, and not of estimation.—See CONTRACT, No. 4, 37 C. 334.

(6) "Person" in S. 539, C.P.C., includes a minor.—See CIV. PRO. CODE (1882), No. 209, 6 Ind. Cas. 119.

(7) Meaning of "Rishtadaran Karibi." See PRE-EMPTION, No. 16, 5 Ind. Cas. 669.

(8) Meaning of "malik." See WILL, No. 9, 6 Ind. Cas. 141.

(9) "Welfare".—Meaning of. See MINOR, No. 1, 8 M.L.T. 47.

(10) Meaning of "anla." See LANDLORD AND TENANT, No. 25, 6 Ind. Cas. 399.

(11) "Family," "undivided family" and "house," meaning of. See ACT IV OF 1893, (PARTITION), No. 1, 7 Ind. Cas. 436.

(12) Meaning of "gaddi nashini." See ACT I OF 1869 (ODDH ESTATES), No. 1-a, 8 Ind. Cas. 422.

(13) Meaning of "Svikara nemanam." See HINDU LAW (WILL), No. 5, 8 Ind. Cas. 517.

Constructive notice.

(1) Doctrine of, when applies. See CIV. PRO. CODE (1882), No. 164-a, 12 Bom. L.R. 1044.

Constructive possession.

(1) Doctrine of, not applicable to wrong-doer. See ADVERSE POSSESSION, No. 3, 6 Ind. Cas. 359.

Constructive possession—(Concluded).

(2) Doctrine of, not to be extended in favour of wrong-doer. See ACT XV OF 1891 (MURSHIDABAD), No. 1, 6 Ind. Cas. 392.

Contract.

(1) *Contract—Promise to bequeath a village in consideration of plaintiff and her husband living with the deceased—Whether complete contract.*

P was very fond of the plaintiff, brought her up and got her married, had the plaintiff and her husband live with her, maintained them and made the husband a handsome allowance, and purchased and conveyed to the plaintiff two other villages, besides presenting to her a large quantity of valuable jewels. The plaintiff claimed another village, as having been promised to her.

Held, on evidence, that there was no subsequent contract, by which the plaintiff and her husband had agreed to go on living with P till her death, in consideration of her undertaking to leave the plaintiff the village at her death. **Sree Rajah Venkata Appa Row Bahadur v. Sree Rajah Malraju Lakshimi Yenkeyamma Row Bahadur**, 7 M.L.T. 296 = 5 Ind. Cas. 102.

WHITE, C.J., WALLIS and MILLER, J.J.

(2) *Contract, procuring breach of,—Breach of promise to marry—Mother inducing son not to marry—Liability of mother—Malice—Effect—Justification—Tort.*

The doctrine that the procuring of a breach of contract by a third party is an actionable wrong is equally applicable, when the breach is a breach of promise to marry, when the relation between the party who procures the breach and the party who broke the contract is that of mother and son (a).

Malice is not the gist of an action for procuring breach of contract. But if malice is alleged and proved, it will displace the protection, privilege or justification, or whatever we may call it, which arises from the relation between the party who procures the breaking of the contract, and the party who breaks the contract. A person, who procures a breach maliciously and by misrepresentations, is not protected. **Irene Fanny Colquhoun v. Mrs. Fanny Smither**, 7 M.L.T. 394 = 5 Ind. Cas. 475.

WHITE, C.J., and KRISHNASWAMI IYER, J.

References :—(a) (1852) 2 E. & B. 216, (1901) A. 495, (1903) 2 K.B. 545, (1908) 1 Ch. 335, (1898) A.C. 1, (1906) A.C. 506, *R.*

Contract—(Continued).

- (3) *Contract—Agreement to sell corn at a future date—Seller's failure to make delivery—Damages—Rate varying during the course of the day.*

The defendant agreed to sell gram on a particular date at a fixed rate, but failed to perform the agreement. The plaintiff sued for compensation and established that, on the particular date, high rate prevailed till 1 P.M., when a panchayat assembled and fixed a certain lower rate for the day in relation to contracts to be carried out on that day.

Held, that the plaintiff was in no way bound by the decision of the panchayat, and was entitled to calculate compensation at the high rate which prevailed in the early part of the day. **Tara Chand v. Budh Ram**, 2 P.L.R. 1910=14 P.W.R. 1910 - 6 Ind. Cas. 485.

JOHNSTONE, J.

- (4) *Agreement to sell "the entire stock at Shalimar Depot or 700-800, say seven to eight hundred tons of coal"—Construction of the words—Words of description and not of estimation—Warranty—Breach of contract—Unascertained damages—Equitable set-off—S. 111, C.P.C. (1882).*

A, the owner of a stock of coal at Shalimar Depot, agreed to sell to B "the entire stock at Shalimar Depot or 700 800, say seven to eight hundred tons of coal." But the entire stock at the Depot really amounted to 469 tons only which A duly delivered. A then brought a suit for the price of the coal sold and delivered by him. B contended that, since 469 tons only were delivered by A, there has been a breach of the contract, and he was therefore entitled to set-off a certain sum fixed by him by way of damages against the sum claimed by A.

Held, that, since in this case A was himself a coal dealer, and the goods were actually in existence at the date of the contract and at the Depot, it must be assumed that the seller knew what the quantity was which he was selling, and that therefore the words "700 or 800" tons were not a mere collateral estimate of quantity, but an integral part of the contract, that is to say, they were words descriptive of the preceding words "entire stock."

Held also, that the delivery of only 469 tons of coal amounted to a breach of the contract by A, and B was therefore entitled, by way of equitable set-off, to set off against A's claim the damages caused by such breach, though the

Contract—(Continued).

damages were not then ascertained, and the case did not therefore come within S. 111, C.P.C. (1882), or the corresponding order of the present Code. **Kallyanjee Sham Jee v. Shorrock**, 37 C. 334 - 6 Ind. Cas. 924.

JENKINS, C.J., and WOODROFFE, J.

- (5) *Privity of contract between plaintiff and defendants—Rukka executed by defendants Nos. 1 and 2 in favour of plaintiff—Contract between defendants Nos. 1, 2 and 3 to treat debt as joint—Liability of defendant No. 3 to plaintiff.*

The plaintiffs sued defendants Nos. 1, 2 and 3 upon a *rukka* executed by defendants Nos. 1 and 2, on the ground that, upon a memorandum executed by the three defendants as a family arrangement, this liability was to be treated as a joint liability, and that, therefore, the defendant No. 3 was also liable upon the *rukka*.

Held, that, as the plaintiffs were not parties to the memorandum, there was no contractual relation between them and defendant No. 3, and that there was nothing to base a liability arising out of contract, and that, therefore, the defendant No. 3 was not liable to the plaintiffs. **Grihi Nath Chowdhry v. Baijnath Ram Marwari**, 6 Ind. Cas. 412.

JENKINS, C.J., and DOSS, J.

- (6) *Fraud—Undue influence—Woman repudiating her contract—A Pradanashin woman.*

A widow's deceased husband's brother's son G applied to be appointed guardian of her person and property, on the ground that she was a minor while she was in reality *sui juris*. Steps were taken to secure the property, and a Munsif at H, where she was also dragged, was directed to draw up lists and take possession of moveable property left by her husband. The District Judge found she was *sui juris* and G withdrew his application.

While this application was pending, and she was accompanied by her younger brother, she was persuaded at H to execute a registered agreement, providing that G would take half of her husband's property, and the other half she could give to any one, i.e., brother, &c., whom she pleased, and that she could also keep whole of the ornaments worn by her. G was about twice the widow's age. G sued her (within six weeks of the execution of the deed and less than a fortnight of the guardianship application) to get, on the basis of the said

Contract—(Continued).

deed, half of her husband's property, and at the same time set up a custom limiting her right in her husband's property to maintenance only, which he failed to establish. Both the Courts below decreed the claim.

Held, by the Chief Court, that, although she is not a *pardhanashin* woman in the strict sense of the term, the terms are so very favourable to G that the irresistible inference from all the circumstances is that she accepted them under pressure and undue influence and without competent advice. She has thus been defrauded and is entitled to repudiate the contract. **Mussammat Bhagan alias Jatto v. Guranditta Mall**, 77 P.W.R. 1910.

REID, C.J., and RATTIGAN, J.

- (7) *Contract—Sale falling through owing to vendor's neglect—Agent negotiating sale—Right to commission or damages—Contract Act, S. 55.*

Where an agent brings about a sale, and the sale goes off through the caprice of the vendor, the agent is entitled to his commission, whether it is to be treated as already earned when once a completed contract for sale is made, or whether it is to be considered as damages for breach of contract by the principal that he would carry through the sale, so as to enable the agent to earn his commission if he brought about the contract (*a*). **Annaswami Iyer v. Zamindar of Ayakudi**, 8 M.L.T. 40 -6 Ind. Cas. 740.

WALLIS, J.

References:—(a) 33 L.J.N.S. 584; 1 C.B.N. S. 296; 30 C. 202, R.

- (8) *Non-performance—Suit for damages.*

Where, in a suit for the recovery of advance made under a contract, performance under a substituted contract was pleaded but not proved, *held*, that the plaintiff was entitled to get back the advance, and there need be no express stipulation for re-payment, as the obligation would arise on the non-performance of the work for which the amount was advanced. **Yenkata-gowda v. Chikvenkatappa**, 15 M.C.C.R. 30.

NANJUNDAYYA, J.

- (9) *Contract—Warranty—Sale of goods—Tender for sale giving measurement and weight—Contract not referring to weight—Shortage of weight—Warranty—Claim for damages.*

The Government called for tenders for the purchase of 8,500 tons of junglewood at so

Contract—(Continued).

much per 100 cubic feet and, as against certain classes of wood, weight of 100 cubic feet of the class was given. Plaintiffs' tender was accepted and a formal deed of contract was drawn up, which simply recited that the plaintiffs had agreed to purchase 8,500 tons of wood from the Government at the prices per 100 cubic feet with respect to the different kinds of wood stated in the tender and in the document accepting the tender. The recital contained no reference to the weight. Plaintiff sued for damages for breach of contract on account of shortfall of weight of the wood applied by the Government.

Held (per Chief Justice), that the contract between the parties was to sell timber by measurement and not by weight, and that, into this contract, one cannot read a warranty that every 100 cubic feet measurement of timber weighed the amount in tons, which, in the notification, is to be found set out along-side the 100 cubic feet (1).

Held (per Abdur Rahim, J.), that there was a breach of warranty, the warranty being one of quality within the meaning of the Contract Act. The weight of wood of this description would affect its quality and hence its value. **The Secretary of State for India in Council v. T.S.P.L. Palaniappa Chetty**, 8 M.L.T. 181 =7 Ind. Cas. 226.

SIR ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

- (10) *Hire and purchase agreement—Breach of—Damages.*

Held, in this case, that the agreement is simply one of agreement to sell and buy a machine for Rs. 110 by a payment down and by monthly instalments afterwards, and that for its breach the aggrieved party is only entitled to damages.

The mere fact that the man placed in possession of the machine is called the hirer cannot suffice to make him a hirer and nothing else. The terms of the contract must be looked at as a whole, so as to see what it really means and what was the intention of the parties when it was entered into. **Musa Mia alias Maung Musa v. M. Dorabjee**, 5 L.B.R. 201.

HARTNOLL, J.

*References:—*2 U.B.R. (1892-1896), 291, L.R. 2 Q.B. 262, 2 Q.B. 318, F.

Contract—(Continued).

(10-a) *Contract—Offer and acceptance—Statement of lowest price in answer to enquiry not an offer to sell—Broker prima facie agent of first employer.*

In answer to a telegram from a broker "Have likely purchaser your three properties. Telegraph lowest price for each," the owner replied stating his lowest price for each property. The broker accepted earnest money for one property and wired back informing the owner of the receipt thereof and asking for the title-deeds. The owner refused to sell one alone:—

Held, that there was no complete contract.

A statement of the lowest price, made in answer to an enquiry as to the lowest price for cash, is not an offer, but only evidence of a willingness to treat (a).

A broker is *prima facie* the agent of the party who first employs him. To make him the agent of the other party, there must be something more than mere negotiation. There must be some words or conduct by which an authorization to act on behalf of the other party is expressed or is to be affirmatively inferred. **Handandass v. Rani Mohori Bibi**, 8 Ind. Cas. 601.

ROBINSON, J.

References:—(a) (1893) L.R. App. Cas. 552; 1.R. 428; 69 L.T. 504; 42 W.R. 129; 62 L.J. P.C. 127, P.

(10-b) *Contract—Construction—Compensation.*

Where, under the terms of a contract, delivery of goods had to be made by the defendant on demand within three months of the contract, and where the plaintiffs were ready to pay for goods supplied on the presentation of a bill according to the course of business, and where there was failure to supply goods;

held, that the plaintiffs were entitled to compensation. **Raman v. Manecji**, 8 M.L.T. 443.

MILLER, J.

(11) Breach of—Of sale of goods—Damages, measure of—Incidents of sale C.I.F. See **SALE**, No. 1, 5 L.B.R. 144.

(12) Commercial contract—Construction of—. See **JURISDICTION (GENERAL)**, No. 3, 6 Ind. Cas. 111.

(13) Suit by manager on—Rules for joinder of parties. See **HINDU LAW (JOINT FAMILY)**, No. 11, 4 S.L.R. 2.

Contract—(Concluded).

(14) Document signed by only one of the executants on the understanding that others would join it—Imperfect contract—Enforcement of. See **SPECIFIC RELIEF ACT**, No. 10, 7 Ind. Cas. 393.

(15) Contract without power of performance—Subsequent acquisition of power—Effect. See **BENAMI TRANSACTIONS**, No. 1-a, 7 Ind. Cas. 218.

Contract Act.

(1) S. 2. See **CONSIDERATION**, No. 1, 5 L.B.R. 192.

(2) S. 2 (d)—*Consideration—Pro-note executed merely as name-lender—Negotiable Instruments Act*, Ss. 8, 43 and 78.

Where the maker of a pro-note admitted execution, but stated that, at the request of the payee and one N, he executed it as a mere name-lender for N, as the parties wished that the name of N should not appear in any documents, the Sub-Judge held that, though consideration did not pass to the maker, it did pass to N, and the maker was therefore liable.

Held that the definition of consideration in S. 2 (d) shows that *consideration* means an act, abstinence or promise made by the promisee or some other person at the desire of the promisor. As the promisee did not do anything at the request of the maker, the promissory note is not supported by consideration so far as the maker is concerned.

Per Rahim, J.—S. 43 of the Negotiable Instruments Act in so many words permits the defendant to resist a suit for want of consideration, and justice requires that such a plea should prevail where no rights of transferees for consideration are involved (a).

Obiter:—It is open to the defendant to show that he signed the pro-note as a mere "name-lender," which means that it was agreed that he was not to be sued upon it. **Sesha Iyer v. Bayaji**, 7 M.L.T. 85 = 20 M.L.J. 144 = 5 Ind. Cas. 757.

MUNRO and ABDUR RAHIM, JJ.

(3) S. 2 (h), (e), (d)—*Purchase with intention to gift property to another—Implied contract—Consideration—Residence with promisee whether constitutes consideration—Civ. Pro. Code (Act XIV of 1882), S. 514—Appellate decree in favour of respondents, whether enures for the benefit of respondent who did not appeal—Civ. Pro. Code (Act V*

Contract Act—(Continued).

of 1908)—Retrospective operation—Construction of Statute.

A promised to leave a village, which she had purchased, to B in consideration of B and her husband, living with A. To a letter of B asking A to confirm the promised gift, A wrote an evasive reply that she was much interested in B's welfare and that she would feel very happy if time was allowed to pass away with the intention entertained by her from the very beginning. B and her husband actually lived with A till her death. In a suit by B to recover possession of the property after A's death on the basis of the above-mentioned promise :

Held, that there was not even an implied contract between A and B so as to make it enforceable at law.

Held, also, that the 2nd respondent, who did not appeal, was not entitled to the benefit of the decree in this appeal, as the present appeal was not against the whole decree, and the plaintiff having become entitled to hold her decree against this respondent before the Civil Procedure Code of 1908 came into force ; the provisions of the latter could not be applied retrospectively so as to deprive her of it. **Sree Rajah Venkata Narasimha Appa Row Bahadur v. Sree Rajah Malraju Lakshmi Yenkeyamma Row Bahadur**, 5 Ind. Cas. 102=7 M.L.T. 296.

WHITE, C.J., WALLIS and MILLER, JJ.

Reference:—(1905) A.C. 369, R.

(4) *Ss. 11, 64, 75, 70—Sale by a minor—Discharge of mortgage by vendee—Whether money recoverable—Subrogation—Quasi contract—Necessaries.*

R executed a sale-deed in favour of the plaintiffs while she was a minor. The plaintiffs paid up the sale consideration partly in cash, partly by discharging a mortgage on that property which R was bound to pay. The sale-deed was not registered, and the plaintiffs brought this suit to recover the amount paid as consideration. *Held*, that according to the law as prevailing and understood in the Province of Agra, the plaintiffs did not acquire any interest in the property sold. So far as the payment to the vendor was concerned, it was not a payment for necessities, and the payment to the mortgagee was payment by a person who had no interest to protect and was only a voluntary payment. **Shiam Lal v. Ram Plari**, 6 A.L.J. 947=32 A. 25-4 Ind. Cas 706.

KNOX, A.C.J., and RICHARDS, J.

Contract Act—(Continued).

(5) *S. 16—Undue influence—Position to dominate the will of another—Money-lender—Spendthrift young man of weak intellect.*

Where the defendant was a spendthrift young man of weak intellect, whose inbecility was so great that, in order to prevent him from squandering his estate, his relatives caused him to execute a deed of trust in favour of his mother, and the plaintiff, who was professional money-lender, lent him money at a high rate of interest, being fully aware of the above facts and of the history of the defendant who was his landlord, and where it was found that that rate of interest was never charged against any other debtor of the plaintiff :

Held that the plaintiff was in a position to dominate the will of the defendant, and used that position to obtain an unfair advantage over the defendant.

The High Court reduced the rate of interest to 2½ per cent. per mensem simple interest. **Raj Kumar Gope v. Hira Lal Roy Chowdhury**, 5 Ind. Cas. 486.

CASPERSZ and DOSS, JJ.

References:—33 I. A. 118; 4 C.L.J. 1; 1 M.L.T. 205; 3 A.L.J. 495; 9 O.C. 188; 8 Bom. L.R. 491; 10 C.W.N. 849; 16 M.L.J. 292; 28 A. 570; 13 C.W.N. 1069; 10 C.L.J. 76; 6 A.L.J. 707; 11 Bom. L.R. 864; 6 M.L.T. 71; 19 M.L.J. 438; 31 A. 386; 3 Ind. Cas. 385, R.

(6) *S. 16—High rate of interest—Debtors under arrest—Temporary release—Dominating the will of debtor.*

Appellants were under arrest for non-payment of Government revenue. They obtained a temporary release from the tahsildar to go to the respondent to borrow money, and agreed to pay 37½ per cent. compound interest. The fact of their arrest was known to the respondent. The family property was mortgaged as security. *Held* that the creditor was in a position to dominate the will of the debtor, and that the bargain was an unconscionable one. **Baldeo Singh v. Bulaki Das**, 7 A.L.J. 591.

RICHARDS and TUDBALL, JJ.

References:—28 A. 570; 29 C. 823; 9 A. 228, R.

(7) *S. 16—Indebtedness of mortgagors—No undue influence—Dominating the will of debtor.*

A mortgagor, before the mortgage, was indebted to the mortgagees. He executed the mortgage, promising to pay compound interest at

Contract Act—(Continued).

24 per cent. with half-yearly rests. *Held* that, in the absence of any special circumstance from which an inference of undue influence could be drawn, the previous indebtedness alone could not be said to have placed the mortgagee in a position to dominate the will of the mortgagor. **Meghraj v. Ganga Bakhsh**, 7 A.L.J. 729—7 Ind. Cas. 286.

STANLEY, C.J., and GRIFFIN, J.

Reference :—34 C. 150 (P.C.), R.

- (8) *Ss. 16, 19—Undue influence—Unconscionable bargain—Interest at contractual rate not to be interfered with unless undue influence shown—Presumption—Pleading.*

Where the lender is in a position to dominate the will of the borrower, a presumption arises that a transaction, which on the face of it appears to be unconscionable, was induced by undue influence (a).

Where undue influence was neither proved nor pleaded, the contract could not be said to be unconscionable. **Debi Sahai v. Ganga Sahai**, 6 Ind. Cas. 572.

RICHARDS and TUDBALL, JJ.

References :—(a) 28 A. 570; 4 C.L.J. 1; 1 M.L.T. 205; 3 A.L.J. 495; 9 O.C. 188; 8 Bom. L.R. 491; 10 C.W.N. 849; 16 M.L.J. 292; A.W.N. (1907) 55; 29 A. 303; 4 A.L.J. 222; 25 A. 284, R.

(9) *Ss. 16, 19-A—Loan to helpless widow—Undue influence.* See TRANSFER OF PROPERTY ACT, No. 5, 6 Ind. Cas. 439.

- (10) *Ss. 16 (3), 19—Unconscionable bargain—High rate of interest—Undue influence—Presumption of Unfair dealing.*

The Court's power to interfere with contracts of loan, where a high rate of interest has been charged though the security is good, is limited to the provisions of S. 16, Contract Act. Unless it is found that the lender was in a position to dominate the will of the borrower, when the contract was entered into, the presumption of undue influence will not arise within the meaning of clause 3, S. 16 of the Act, even if having regard to the security, the interest is excessive (a).

Per Tudball, J.—Unless in a case there is unfair dealing, the Court must enforce the contract made by the parties. **Megh Raj v. Hargayan**, 7 A.L.J. 655=7 Ind. Cas. 261.

RICHARDS and TUDBALL, JJ.

Reference :—(a) A.W.N. 1907, p. 55, D.

Contract Act—(Continued).

(11) S. 17 (3)—Representation that sale-deed would not be enforced as sale-deed—Mortgage deed—Fraud—Proof. See EVIDENCE ACT, No. 20, 12 Bom. L.R. 972.

- (12) *S. 19—Agreements—Want of free consent—Nature of proof.*

When a party wishes to avoid a contract on the ground that his consent to the agreement was not a free consent, it is incumbent on him to plead and prove the specific circumstances under which his consent was caused. **Latiff Saheb v. Chikkannia**, 15 M.C.C.R. 310.

ISMAY, C. J., and CHANDRASEKHARA Aiyar, O.J.

Reference :—11 B. 620, R.

(12-a) S. 19 See Nos. 8 and 10, *supra*.

(12-b) S. 19-A—See No. 9, *supra*.

(13) S. 20—Agreement come to under mistake of fact void. See REGISTRATION ACT (1877), No. 5, 6 Ind. Cas. 651.

- (14) *S. 23—Transfer of Property Act (IV of 1882), S. 51—Consideration unlawful—Unregistered sale deed—Registered mortgage bond for consideration money, validity of.*

Plaintiff purchased certain properties belonging to defendant in an execution sale. Afterwards there was an agreement between the parties, which was embodied in an unregistered deed of sale, to the effect that the plaintiff re-conveyed the properties to the defendant for Rs. 300. But as the defendant could not pay the money, he executed a mortgage-bond in favour of the plaintiff for the amount. The Court below held that the consideration of the bond was unlawful as it would defeat the provisions of S. 51 of the Transfer of Property Act which required the sale to be made by a registered document :

Held, that the plaintiff sought to recover the consideration which was given for his abstinence from enforcing his right, and that there was nothing to indicate that the consideration was unlawful or that the bond was invalid on that account. **Fanindra Narain Roy v. Sheikh Badar-ud-din**, 5 Ind. Cas. 581.

BRETT and SHARFUDDIN, JJ.

Reference :—6 C.W.N. 27, It.

(15) S. 23—Agreement of putnidar with stranger for purchase by latter and reconveyance to former—Legality. See REGULATION VIII of 1819 (PUTNI), No. 1, 14 C.W.N. 1031.

Contract Act—(Continued).

(15-a) Ss. 23, 30—See **CHAMPERTY**, No. 1, 3 Ind. Cas. 500.

(16) S. 24. See **CIV. PRO. CODE** (1882), No. 183, 7 A.L.J. 778.

(17) S. 25, cl. (3)—*Pro-note for barred debt—No express recital of the barred debt—Validity.*

Where a pro-note was executed in renewal of a prior promissory note which was barred by limitation at the date of the former, and there is no reference in it of a barred debt, nor any promise to pay it,

held that a party to a contract may prove that the actual consideration was something different to that recited in the document itself, and effect must be given to the real consideration (a).

Recitals are not in themselves conclusive, and do not preclude the Courts from ascertaining and giving effect to the intention of the parties.

Held, also that the pro-note was enforceable as a contract under S. 25, cl. (3). Full effect is given to the section by taking it to mean that, when a man promises to pay what in fact is proved to be a debt which is barred, that agreement will be enforced (b). **Ganapathy Mudaly v. Munisawmy Mudaly**, 7 M.L.T. 31=5 Ind. Cas. 754=33 B. 159.

BENSON, O.C.J., and SANKARAN NAIR, J.

References :—5 M. 6 (8) ; 11 M. 213 (215), R ; 23 M. 94, D.

(18) S. 25, cl. 3—*Debtor signing in creditor's books—Promise to pay barred debts—Whether amounts to—Essentials.*

Where the debtor put his signature to the words "balance, due Rs. 80" written in his creditor's books,

held that the signature does not amount to an implied promise to pay a barred debt within the meaning of S. 25, cl. 3, Contract Act.

The promise to pay which S. 25 seems to refer to is a promise to pay despite the consciousness that the debt is barred (a). **Ramaswami Pillai v. Kuppasami Pillai**, 20 M.L.J. 656=8 M.L.T. 282.

MILLER, J.

Reference :—(a) 30 A. 268, F.

(19) S. 25 (3) *Balance—Promise to pay interest—Bond—Limitation.*

Contract Act—(Continued).

Held, that a balance of account struck by a debtor in his creditor's books, which contains a distinct promise to pay interest thereon, is more than a mere acknowledgment of pre-existing debt and amounts to a bond, and consequently is a good contract under S. 25 (III) even if it consists of time-barred items. **Nanak Chand v. Diwan Chand**, 135 P.W.R. 1910.

RATTIGAN, J.

(20) S. 25 (3)—Sarkhat executed in lieu of debt partly barred and partly new—Effect. See **LIMITATION ACT** (1877), No. 21, 5 Ind. Cas. 418.

(21) S. 25 (3)—Contract to revive barred items—Balance struck—Limitation. See **DEBTOR AND CREDITOR**, No. 1, 138 P.W.R. 1910.

(22) S. 30—*Bombay Act, III of 1865—Wagering contracts—Teji Mandi transactions—Duties of agent.*

Teji Mandi transactions are in the nature of gambling transactions. The prohibition contained in S. 30, Contract Act, 1872, applies only to the case of winners. A person, who has won a wager or a bet, cannot sue to recover the amount deposited by the loser with the stake-holder.

Under the general law of wagering administered in England and India (with the exception of the Bombay Presidency) an agent, who has received moneys on behalf of his principal, must pay those moneys to the principal even though the contracts under which he received them were not only void but actually illegal.

The Bombay Act III of 1865 embraces not only every conceivable form of wagering contracts, but contracts made in furtherance of wagering contracts, and all contracts made by way of security or guarantee of wagering contracts; and it prohibits all suits for moneys paid or payable in respect of wagering contracts. **Ramchandra Shivdar v. Ganga Bison Jaldeo**, 12 Bom. L. R. 590.

BEAMAN, J.

(23) S. 30—*Wagering contract—Principal and agent—Liability of agent.*

An agent, who has paid losses on a wagering contract on behalf of his principal, is entitled to recover it from the latter. Where *Hundis* were drawn up in favour of the plaintiff in consideration of money paid on behalf of defendants on a wagering contract, *held* that the consideration was not illegal within the meaning

Contract Act—(Continued).

of S. 30, Contract Act. **Jagat Narain v. Sri Kishan Das**, 7 A.L.J. 1146.

RICHARDS and TUDBALL, JJ.

Reference :—23 All. 165, *F*.

(23-a) S. 30—See No. 15-a, *supra*.

(24) Ss. 38, 45, 165—Tender—Offer of performance—Effect. See **HINDU LAW (PARTITION)**, No. 7, 5 Ind. Cas. 343.

(25) Ss. 39, 73—*A party performing his part of a contract may sue the other party committing a breach to recover any debt arising from the contract instead of for compensation for the breach—Part-performance—Absence of a provision in an Act as not legislative withdrawal*

The Indian Contract Act, 1872, has not altered the law relating to the recovery of debts and liquidated demands.

The fact that a party to a contract under S. 39 of the Act, when the other side has refused to perform it, may put an end to it and sue for compensation for the breach, does not oblige him to take that course at his peril; he may, if he prefers it, sue to recover any debt due to him which has arisen from his execution of his part of the contract.

Before the passing of the Indian Contract Act, wherever a consideration was executed, for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law, the debt might be sued for in an *indebitatus* count. Thus this count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

Per Batchelor, J.—S. 73 of the Indian Contract Act, prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract, which he, for his part, keeps on foot.

The mere absence from the Act of a specific provision giving the remedy of a suit to recover the price, cannot be construed as the distinct legislative withdrawal of that remedy.

Contract Act—(Continued).

P.R. and Co. v. Bhagvandas Chaturbhuj, 17 Bom. L.R. 335=2 Ind. Cas. 475=34 B. 192.

SCOTT, C.J., and BATCHELOR, J.

(26) S. 43—Liability of joint tenants—whether joint—Liability of heirs of tenant. See **LANDLORD AND TENANT**, No. 48, 7 Ind. Cas. 840.

(26-a) S. 43—Joint promisors—Suit and judgment against one, whether bars suit against the another. See **CIV. PRO. CODE (1882)**, No. 42, 7 M.L.T. 373.

(27) Ss. 43, 70—*Deposit by co-tenant, not made party in co-sharer landlord's suit for share of rent, to set aside sale—Civil Procedure Code (Act XIV of 1882), S. 310-A—Sale set aside—Liability of other co-tenants to contribute.*

A co-sharer landlord brought a suit for his share of the rent against all except one of several co-tenants, and sold the holding in execution of the decree obtained therein. A purchaser of the interest of the remaining co-tenant applied under S. 310-A, C.P.C., and the sale was set aside on his making the required deposit:

Held by Jenkins, C.J.—That, on the findings of fact of the lower appellate Court, the plaintiff did not intend to make the deposit gratuitously, and that the defendants enjoyed the benefits thereof, and the deposit having moreover been made lawfully in that it was done with the approval of the Court, S. 70 of the Contract Act applied;

that the plaintiff was entitled to sue the defendants in contribution, but only in respect of their share of the decretal debt, and not in respect of the penalty of 5 per cent. on the purchase-money payable under S. 310-A, C. P.C.

Per Doss, J.—That the plaintiff was entitled to recover the defendant's share of the decretal debt, not under S. 70, as, being a co-tenant, he was himself liable to the landlord for the whole debt, but under S. 43, his obligation to pay remaining, notwithstanding that the decree was passed against the other co-tenants only.

That, the sale not having been confirmed and the sale proceeds withdrawn when the deposit was made, the decree remained undischarged and was only satisfied when the money deposited by plaintiff was withdrawn. **Mohendra Ghoshal v. Bhuban Mardana**, 14 C.W.N. 945=6 Ind. Cas. 810.

JENKINS, C.J., and DOSS, J.

Contract Act—(Continued).

- (28) S. 45—*Joint mortgagees—Effect of payment to one—Discharge of mortgage-debt—Consent of all mortgagees necessary to effect a valid discharge.*

One of several joint mortgagees cannot give a valid discharge without the consent of the others. **Hans Singh v. Chet Singh**, 8 Ind. Cas. 416.

LINDSAY, O.A.J.C.

References:—32 A. 164; 7 A.L.J. 99; 5 Ind. Cas. 129, F; 20 M. 461, diss; 25 M. 26 at p. 39, R.

(28-a) S. 45—Debt due to partnership firm—Suit to recover—Parties—Applicability of section. See **PARTNERSHIP**, No. 5. 7 A.L.J. 759.

(28-b) S. 45—See No. 24, *supra*.

(29) S. 55. See **CONTRACT**, No. 7, 9 M. L.T. 10.

- (30) S. 56—"Impossibility"—*English and Indian Law—Contract to pay rent—Failure of crop for want of rain—Effect.*

According to English law, a contract to do an act which becomes impossible in law after the contract is made, becomes void when the Act becomes impossible, but a contract to do an act which becomes impossible in fact does not become void, unless, according to the true intention of the parties, the agreement was conditional on its performance being or continuing possible in fact. The Indian Contract Act makes no distinction of this kind. In the second paragraph of S. 56, so far as contracts to do an act which becomes impossible in fact are concerned, it lays down as a general rule what was the English law only in certain exceptional cases.

Impossibility discussed and explained.

Neither the Civil law nor the Transfer of Property Act provides that the contract to pay rent is to be void, if owing to a failure of rain the tenant does not get a crop. **Mi Me v. Nga on Gaing**, U.B.R. 2nd. Qr., 22.

SHAW, J.C.

- (30-1) Ss. 56, 74—*Meaning of 'impossible'—Exception—Penalty.*

For the purpose of S. 56, "impossible" may include what has become impracticable.

Where a person enters into a bond with a District Board under Art. 498 of the Local Fund Code, which provides for forfeiture of the amount deposited as earnest money or security for the due fulfilment of the contract, the contract falls within the exception to S. 74 of the

Contract Act—(Continued).

Contract Act, and the whole sum mentioned as penalty is payable. **Rajaram Rao v. District Board of Tanjore**, 8 Ind. Cas. 565.

ABDUR RAHIM and AYLING, JJ.

(30-a) S. 57—Payment of differences. See **WAGER**, No. 1, 34 B. 519.

(31) Ss. 59, 60. See **ACT I OF 1895 (PUBLIC DEMANDS RECOVERY)**, No. 1, 11 C.L.J. 266.

(31-a) S. 60—See No. 31, *supra*.

- (32) S. 63—*Release by a creditor contingent upon a condition—Condition fulfilled—Validity—English and Indian Law—Evidence Act. S. 95.*

Suit on a pro-note executed in favour of A. A had executed a release deed in favour of the promisors, agreeing that, if the Masonic Lodge building * * * is resuscitated, he shall have no claim upon the building or any of the property of the said Masonic Lodge.

Held, that the release was valid, and the suit not maintainable.

The fact that the promissory note is not referred to will not make the release any the less valid, since the evidence on the point which is admissible under S. 95, I. E. Act, makes it quite plain that the claim referred to in the release deed is with reference to the money due under the suit pro-note.

Though the operation of the release deed is made conditional upon a future event, it is valid, as the words of S. 63 of the Contract Act are wide enough to cover conditional releases, and there is no reason to think that the Indian Legislature contemplated a departure on this point from the English Law, under which a release contingent on the happening of a future event is a good release. The point on which S. 63 differs from English Law is, that it does not require consideration to support a release, while under English Law a release without consideration is a *nulum pactum* (a).

Where the releasor says 'I agree to release' and not 'I release,' it is not a mere contract to release, but an actual release, where he did not contemplate the doing of any further act on his part. **Mathew Henry Abraham v. The Lodge "Good Will,"** 7 M.L.T. 392 = 20 M.L.J. 383 = 6 Ind. Cas. 758.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 19 M. 398; 15 C. 319; 20 B. 636 (644), R.

(32-a) S. 64—See No. 4, *supra*.

Contract Act—(Continued).

(33) Ss. 64, 65—Sale by minor— Suit by him for recovery of possession—Refund of price. See SPECIFIC RELIEF ACT, No. 17, 76 P.R. 1910.

(34) S. 65. See ACT II OF 1901, AGRA TENANCY, No. 2, 7 A.L.J. 330.

(34-a) S. 65—See No. 33, *supra*.

(35) S. 68 Meaning of "necessaries"— See HINDU LAW (MARRIAGE), No. 2, 7 A.L.J. 236.

(36) S. 69—*Interested in the payment of money*—*Property attached before judgment as that of another Real owner paying money—Suit to recover money so paid.*

Where property purchased by the plaintiffs from the defendant was attached before judgment in a suit instituted by a third party for the recovery of a debt due by the defendant, and where the plaintiffs paid by the money and sued for its recovery, *held*, that, the plaintiffs were interested in the payment of the money, within the meaning of S. 69 of the Contract Act (a).

Quere.—It may be doubtful whether the word 'interest' covers any interest other than pecuniary (b). **Subramania Iyer v. Vengappa Reddy and another**, 19 M.L.J. 750=4 Ind. Cas. 1083.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) 28 A. 563; 7 C. 648; 68 R. 778 and 30 M. 35, *It.* (b) 26 M. 497 and 23 M. 512, *R.*

(36-a) S. 69—Payment of revenue by party interested in saving property—Private sale of property—Liability of vendor. See TRANSFER OF PROPERTY ACT, No. 32-c, 8 Ind. Cas. 435.

(37) S. 69. See CONTRIBUTION, No. 1, 13 O.C. 23.

(38) S. 69—Applicability. See MORTGAGE (GENERAL), No. 4, 14 C.W.N. 361.

(39) S. 69—Principle of section—Payment of revenue—Payment under compulsion of law by a party interested in the payment—Right of reimbursement. See ACT XVIII OF 1881 (CENTRAL PROVINCES LAND REVENUE), No. 3, 6 N.L.R. 27.

(40) Ss. 69 and 70—*Payment by one for the benefit of another—Suit for payments made—Voluntary payment.*

The plaintiff deposited a certain amount under S. 310-A, C.P.C. The amount was paid to the decree-holder, the sale set aside and the

Contract Act—(Continued).

defendant got back her lands, the decree debt due by her having been extinguished by plaintiff's payment. At the time the plaintiff made the payment, he was in possession of the property claiming it as a reversioner and as assignee of one L to whom it was alleged the defendant had given a lease. But this was found against in another suit. Then the plaintiff sued for the recovery of the amount he deposited.

Held, that, S. 69 did not apply, as the defendant was not bound to pay the debt, for which her property had been already sold, and she had not disputed the validity of the sale.

That S. 70 also did not apply, because the application by the plaintiff was made to protect his own interests and the debt was discharged without defendant's consent and she had not adopted it. It cannot be said that the defendant has "enjoyed" the benefit of the payment, by plaintiff paying off her debt, because she had no option of declining or accepting it.

S. 70, applies where the claimant does anything for another person, not intending to do so gratuitously, and the other person enjoys the benefit thereof (a).

A person cannot be said to adopt and enjoy a benefit, when he has no option of declining or accepting it.

When a person is interested in the act, he cannot be presumed to be doing it for another or expecting payment from him. **Yogambal v. Nyana Pillai Marakayar**, 6 M.L.T. 162=3 Ind. Cas. 110=19 M.L.J. 489=33 M. 15.

MUNRO and SANKARAN NAIR, JJ.

References :—(a) 21 M. 143; 2 I.A. 131=15 B.L.R. 208=23 W.R. 305 (P.C.); C. and M. 810; 15 M. and W. 87; 4 Bing. N.C. 448; 1 C.B.N.S. 121 (151); 34 Ch. D. 234 (250); 23 Ch. D. 552; 15 Q.B.D. 60 (65); 1 Sm. L. C. 160; 7 C. 573, *It.*; 21 C. 496 (P.C.), *F.*; 18 M. 88, *Expl.*

(41) Ss. 69, 70—*Suit for contribution, if lies for payment by one judgment-debtor of joint-decree—'Lawfully paid,' money paid by one judgment-debtor to satisfy joint-decree, if—Res judicata—Plea of non-liability in contribution suit, if barred in equity where defendant acquiesced in original claim.*

A decree was passed against several persons jointly in a rent suit, and one of them paid the whole amount of the decree. This judgment-debtor subsequently brought a suit for

Contract Act—(Continued).

contribution against some of his co-judgment-debtors. The defendants pleaded that they were benamidars and not really liable for payment under the decree.

Held, that although the decree in the rent suit was not *res judicata* as between the co-defendants, the co-judgment-debtors should not be allowed to plead non-liability in the contribution suit. If they had such a plea, they ought to have raised it in the rent suit (a).

It is a recognised principle of equity that, where, of two innocent persons, one must suffer by the act of a third, he by whose negligence it happened must be the sufferer. So, even if the defendants were benamidars, as they allowed their names to be used in the *kobala* and the zemindar's *sherista*, and did not object when the zemindar brought a suit against them, they cannot be heard to complain, if there are compelled to reimburse the plaintiff for what he had done for them (b).

No hard and fast rule can be laid down barring the application of S. 69, Contract Act, to the payment of a joint decree by one of the joint judgment-debtors (c).

But where the decree was for a share of the rent by a fractional proprietor, and was executed against the plaintiff alone, any interest other than that of the plaintiff was not imperilled, and the plaintiff could not be said to have been interested in the payment of that part of the decree which was leviable from the defendants, and could not recover the amount so paid by a suit for contribution under S. 69, Contract Act.

But the payment by the plaintiff was 'lawful' within the meaning of the Contract Act, and he could recover on it under that section from the defendants who had been benefited by it. An interest in making the payment should be a criterion for deciding whether the payment was 'lawful' within the meaning of S. 70 of the Contract Act (d). **Ajodhya Singh v. Jamroo Lal**, 14 C.W.N. 699=6 Ind. Cas. 341.

CASPERSZ and CHATTERJEE, JJ. *

References :—(a) 25 M. 599, R. (b) 34 C. 92, R. (c) 8 C. 113; 4 C. 369 and 9 C.W.N. 670, Diss. (d) 11 A. 234; 18 M. 88; 26 B. 504; 12 C. 213; 2 C.L.J. 311 (313), *discussed*.

(42) *Ss. 69, 70—Contract, implied—Suit for money paid for Defendant at his request—Payment of Government demands by the*

Contract Act—(Continued).

registered proprietor—Recovery thereof from an unregistered proprietor—Refusal to consent to separate Registry—Effect—Act I of 1876 (Madras Separate Assessment Act)—Act VII of 1865—Right of Government to collect water-cess from land-holder.

Under Act VII of 1865, the water-cess is charged on the land, and the Government is entitled to levy it from the land-holder, both under the original Act and the Act as amended in 1900.

Where the plaintiff, the registered holder of a village in which the Defendant was also entitled to a share, went on paying the Government demands by consent of all parties including the defendant, and, after separate registry in the name of the defendant and apportionment of the *peishkash*, etc., payable by the defendant, sued the latter for recovery of the amount paid on the latter's behalf in respect of the Government demands;

held, under Act I of 1876, unless all parties to the alienation concur, the claimant is driven to a separate suit. There is no provision in the Act that any party wrongfully withholding his assent is to be liable for any loss which the claimant may incur in consequence of his refusal to consent, except a liability to pay the costs of the other party in a successful suit in which he (non-consenting party) is made a defendant. The plaintiff is entitled to maintain this suit as one for money paid by the plaintiff for the defendant at his request. A request will generally be implied, where the defendant has notice of the payment being made for him and does not dissent (a). The inference of an understanding between the parties, *viz.*, an implied contract, is an inference which will unhesitatingly be drawn, in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid (b).

The Court is against putting obstacles in the way of a litigant seeking to recover money paid pending litigation for the preservation of the property and properly payable by the successful party (c).

As the defendant was bound either to pay the *peishkash* on the village himself or put the plaintiff in funds to pay it, and the plaintiff was interested in paying it in view of his claim in the pending litigation, the case comes also

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within S. 69 of the Contract Act. **Narayana sami Naidu Garu v. Sree Raja Yellanki Sri nivasa Jagannada Rao Bahadur Garu**, 7 M. L.T. 249=5 Ind. Cas. 318=33 M. 189.

WALLIS and MILLER, JJ.

References :—(a) 1 C. & M. 810; 1 M. & W. 511; Bullen and Leakes Pleadings, 3rd Ed., p. 42, R. (b) 56 L. J. (Ch) 707, *Appl.*; 7 C. 573; 18 M. 88; 32 C. 374, R. (c) 21 C. 495 (P.C.). *Appl.*

(13) S. 70—*Payment of revenue for lands of another—When amounts to payment 'for' that other—Whether recoverable.*

A person who did not even know that he was making payment of revenue, for lands which belonged to the defendant, when the defendant was not bound to pay the revenue as he was not the pattadar, cannot be deemed to have made the payment 'for' the defendant and cannot recover the money as such payment (a). **Subbiah Mudaliar v. Seshappier**, 7 M. L.T. 200=5 Ind. Cas. 422.

BENSON and ABDUR RAHIM, JJ.

References :—(a) 30 M. 35; 19 M.L.J. 489; M. 277, R.

(14) S. 70—Irrigation work done against defendant's will—Suit for contribution—Maintainability. See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 7, 7 M.L.T. 74.

(14-a) S. 70—See Nos. 4, 27, 40, 41 and 42, *supra*.

(15) Ss. 70 and 222—Agent—Suit for recovery of money spent by him in the course of agency—Money recoverable under S. 70—Principal's duty to indemnify under S. 222—Limitation. See PRINCIPAL AND AGENT, No. 5, 8 M.L.T. 194.

(16) S. 73—Damage not sustained in the usual course of things—Absence of knowledge that damage was likely to result—Effect. See INSURANCE, No. 1, 3 Sind L. R. 191.

(17) S. 73—Right to interest over arrears of rent payable in kind—Unliquidated damages. See MULGENT LEASE, No. 1, 12 Bom. L.R. 831.

(17-a) S. 73—See No. 25, *supra*.

(18) S. 74—*Covenant to pay interest at 75 per cent. in default of payment of any one instalment — Penalty — Consideration—Execution of bond admitted—Burden of proof of non-receipt of consideration.*

Where the execution of a bond is admitted by its executant, the burden of proving want of consideration lies upon him.

Contract Act—(Continued).

Where the defendant agreed to pay a debt by monthly instalments of Rs. 10 each and further agreed to pay the whole debt with interest at 75 per cent., in case of default in the payment of any one instalment, and he made a default.

Held, that the provision to pay interest at the stipulated rate was not a penalty within the meaning of S. 74 of the Contract Act.

Interest at the rate of 75 per cent. was allowed, where there was nothing to show that the defendants did not enter into the contract with their eyes wide open, or that any undue advantage was taken of them. **Periathambi Udayan v. Angammal**, 4 Ind. Cas. 725=19 M.L.J. 630.

MUNRO, J.

(19) S. 74 *Mortgage—Provision for higher rate of interest in default of punctual payment—Lower rate otherwise—Penalty.*

If a mortgagee stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as payable under the mortgage, and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate. But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in the nature of a penalty.

Hence, where a mortgage-deed provided for interest at the rate of Rs. 2 per cent. per mensem, but further provided that, in the event of interest being punctually paid, the rate of Rs. 1-4-0 per cent. per mensem would be accepted, and no undue influence or fraud is proved to have been resorted to in the matter of getting the rate of interest, *held* that the provision was not by way of a penalty, and the mortgagee was entitled to get interest at the higher rate by reason of the mortgagor's default. **Kutub-ud-din Ahmad v. Bashir-ud-din**, 7 A.L.J. 394=5 Ind. Cas. 665=32 A. 448.

STANLEY, C.J., and BANERJI, J.

(20) S. 74—*Default in payment of simple interest—Agreement to pay compound interest at enhanced rate—Penalty—Duty of Court.*

An agreement to pay compound interest at an enhanced rate on default of paying simple interest at a lower rate is a penalty. In such a case, the Court may, under S. 74 of the Act, give either compound interest at the original

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rate or simple interest at an enhanced rate.

Dadnu v. Somnath, 6 N.L.R. 109.

SKINNER, A.J.C.

Reference :—34 C. 150, R.

(51) S. 74—*Penal interest*.

Where a document provided that, on the expiry of two years if the principal was not paid, interest at the rate of $1\frac{1}{2}$ per cent. per mensem should be paid, *held*, that the stipulation was not penal. **Titti Balakrishnayya v. Dooda Rajamma**, 8 Ind. Cas. 301.

MUNRO and KRISHNASWAMI AIYAR, JJ.

(51-a) S. 74—Breach of contract—Measure of damages—When Courts will not interfere. See DAMAGES, No. 2, 81 P.R. 1910.

(51-b) S. 75—See No. 4, *supra*.

(52) Ss. 79 and 83—Sale of unascertained goods—Completion of sale. See CIV. PRO. CODE (1882), No. 24, 3 Sind L.R. 156.

(53) Ss. 82, 83—Sale of unascertained goods when complete. See ACT IX OF 1899 (ARBITRATION), No. 1, 4 S.L.R. 20.

(53-a) S. 83. See Nos. 52 and 53, *supra*.

(54) S. 92—Applicability. See CURRENCY NOTES, No. 1, 5 Ind. Cas. 202.

(55) S. 99—*Stoppage in transitu—Right of stoppage exercised by unpaid vendor—Conflicting rights of the pledgee for value of the bills of lading of the consignment stopped—Goods directed to new destination—End of transitu—Measure of damages*.

In 1906, B arranged a hardware consignment business with M and Co. The business was to be at the risk of M and Co., who were to consign the goods, and to hand over to B complete shipping documents in exchange for 65 per cent. of the invoice value of the goods. If the goods, after deducting all charges, realised less than the 65 per cent. advanced, M and Co., were to refund to B any shortfall; and if there was any surplus, it was to be credited to M and Co., in account. In consideration of B putting M and Co., in direct communication with his constituents in India and of his financing the business, his commission was to be $3\frac{1}{2}$ per cent. on the invoice value of the goods. The plaintiffs were the Indian constituents who were to realise the goods and to look to M and Co., for the shortfall if any; and, failing M and Co., B was to make it good as guarantor. The plaintiffs arranged with the National Bank of India in London to finance

Contract Act—(Continued).

the consignments that might be sent to the plaintiffs by M and Co., through B by paying to B 65 per cent. of the invoice value of the goods on his handing to the Bank complete shipping documents for the same, the Bank being bound to hand over the documents to the plaintiffs' firm in Bombay, and the plaintiffs were to be responsible to the Bank for any shortfall in the advances made by the Bank to B.

On the 12th February 1907, M and Co., entered into a contract with L and Co. in England, whereby the latter agreed to sell the former 250 cases of tin-plates. The terms of the contract were that delivery should be F.O.B. Newport in four or five weeks from its date—terms of payment less 4 per cent. discount in fourteen days. On the 26th February 1907, M and Co. wrote to L and Co., wherein the former handed to the latter instructions and marks for shipment of the 250 cases to Bombay. On the 21st March 1907, L and Co., enclosed to M and Co. an invoice for 200 cases, and again on the 27th idem, another invoice for the remaining 50 cases, the main condition of both the invoices being: "No claim concerning these goods can be recognised unless made within 15 days from delivery to W and Co., Newport, for shipment on your account." It appeared that W and Co., were the agents of L and Co., for putting the 250 boxes upon the steamer SS. Clan Macleod under the contract for delivery F.O.B., and they were paid by L and Co., for that service: W and Co. were also the agents of M and Co., and they obtained on behalf of M and Co. from the agents of SS. Clan Macleod the bill of lading for the 250 cases supplied by L and Co. and for another 250 cases belonging to M and Co. received from other suppliers.

On the 5th April 1907, M and Co. delivered to B the bills of lading and invoices for the 500 cases of tin plates shipped to plaintiffs in Bombay, and requested payment of the advance of 65 per cent. upon the invoice value, i.e., £255-5-2. On the same day B enclosed a cheque for the amount which reached M and Co. on the next day. On the 5th April B handed to the National Bank of India in London the documents for 500 cases and obtained from them payment of £255-5-2 on the 6th of April. On the same day, M and Co., suspended payment and called a meeting of their creditors for the 12th April.

Contract Act—(Continued).

On the 9th April 1907, whilst the consignment was still in transit, L and Co., who were the unpaid vendors of the 250 cases, gave a notice to the owners of the SS. Clan Macleod at Liverpool to stop the goods in transit.

The shipping documents were in due course handed over by the Bank to the plaintiffs in Bombay on the 29th of April in exchange for a trust receipt of that date, the plaintiffs guaranteeing to the Bank the payment of £ 255-5-2. with interest.

SS. Clan Macleod arrived in Bombay on the 13th May 1907, when the plaintiffs duly presented bills of lading for the 500 cases, but they were informed by the owners of the steamer of the stop put by L and Co., on 250 cases; and a delivery order of the remaining 250 cases was sent to them; but the plaintiffs declined to accept any thing but the full payment of the advance or the full amount of the goods. The remaining 250 boxes were eventually sold and realised about Rs. 600.

The plaintiffs sued the ship-owners and their agents in damages :—

Held, (1) that the transit of the goods did not cease at Newport, and that L and Co., were entitled to stop the goods as they did after they had started on a voyage to Bombay.

(2) That the plaintiffs were the pledgees for value of the bill of lading.

(3) That the defendants were liable for conversion and the plaintiffs were entitled to join them both in one suit, because they refused delivery to the holders of the bill of lading under an indemnity received from L and Co., but as the latter had not offered to discharge the lien for £ 255-5-2, L and Co., were not entitled to receive the goods.

(4) That the utmost benefit which the defendants were entitled to obtain from the position of L and Co., as sureties was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs and which were therefore available for sale in or towards satisfaction of the advance made against the bill of lading; and that the plaintiffs, by refusing to take delivery of the 250 boxes, had omitted to do an act which their duty to the surety required them to do, and to the extent to which that act had resulted in loss the surety was discharged.

(5) That the plaintiffs were entitled to recover from the defendants the difference between

Contract Act—(Continued).

Rs. 2,000 (the price which the 250 cases would have realised at a forced sale in May 1907), and £255-5-2 calculated at 1s. 4d. per rupee, with interest at 6 per cent., per annum. **Bapuji Sorabji Framji v. The Clan Line Steamers Ltd.**, 12 Bom. L.R. 553 = 34 B. 292.

SCOTT, C.J., and BATCHELOR, J.

(55-a) S. 107 — *Vendor's power to re-sell goods in his possession.*

When goods sold remain in the possession of the vendor and it is agreed between the vendor and the purchaser that the former shall hold the goods, not as vendor, but as bailee for the purchaser, then the vendor's lien over the goods is lost, and he is not entitled to resell under S. 107 of the Contract Act. **Peeran Pachamiya Saib v. Shroff Subba Rao**, 15 M.C.C.R. 254.

STANLEY ISMAI, C.J., and KRISHNA RAO, J.

(56) Ss. 134, 137—Omission to sue principal debtor within time—Discharge of surety. See LIMITATION ACT (1877), No. 64, 20 M.L.J. 633 = 33 M. 308.

(56-a) S. 137—See No. 56, *supra*.

(56-b) S. 165—See No. 24, *supra*.

(57) S. 171 —Lien of Bankers only in respect of general balance of account. See INSOLVENCY ACT (11 and 12 VIC., CHAP. 21), No. 5, 33 M. 53.

(58) S. 178—*Goods—Shares in a limited company—Pledge of the shares for valuable consideration—Executor in sole possession, of the shares—Judicial possession.*

The term "goods" as used in S. 178, Contract Act, includes shares in joint stock companies.

For a transaction to fall within the proviso to S. 178, it must be established that the fraud or offence was committed by the *parvor* against the lawful owner, and that the *parvor* obtained the goods or documents pledged by means of an offence or fraud perpetrated by him against the lawful owner.

The proviso has no application to the case of a sole executor who, being in juridical possession of shares belonging to his testator's estate, gets them transferred to himself with the fraudulent intention of misappropriating the same, and then in his personal capacity pledges them with a third party who has no knowledge of his fraud. **R. D. Sethna v. The National Bank of India**, 12 Bom. L.R. 870.

DAVAR, J.

Contract Act—(Continued).

(59) Ss. 178, 179—Meaning of "possession."
See **CONVERSION**, No. 1, 12 Bom. L.R. 316.

(59-a) S. 179. See No. 59, *supra*.

(60) S. 188—*Agent's authority to do what is necessary and useful—Power to refer disputes to arbitration.*

Where an agent has authority to make contracts for the purchase of produce on behalf of plaintiff, he has authority to sign the ordinary form of contract, and his signature will make the firm liable under all such terms of it as are useful in such contracts. As it is necessary and useful for all persons, who sell produce to European firms on "*Karachi Pass terms*," to bind themselves by an arbitration clause, under which all disputes are referred to two European merchants in Karachi, an agent, who has authority to enter into such a contract, has also authority to sign the ordinary form of contract, which includes a reference to arbitration. **Louis Dreyfus & Co. v. Araromal**, 3 Sind. L.R. 164 = 4 Ind. Cas. 1151.

CROUCH, A.J.C.

(61) S. 188—Agent having authority to receive supply of goods, whether has authority to sign acknowledgment on behalf of principal. See **LIMITATION ACT** (1877), No. 25, 55 P. R. 1910.

(62) Ss. 215, 216—*Principal and Agent—Agent dealing on his own account in business of agency.*

Where an agent, appointed to sell his principal's goods for a fixed price, buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction, under the circumstances mentioned in S. 215, Contract Act, 1872, or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent, such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent, as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

S. 216, Contract Act, 1872, is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related,

Contract Act—(Concluded).

where the agent, without the knowledge of the principal, had dealt with the business on his own account, instead of an account of the former. The principal is free to exercise that right or not. **N. Joachimson v. Meghji Valji**, 11 Bom. L. R. 779 = 34 B. 292.

CHANDAVARKAR and HEATON, J.

(62-a) S. 216—See No. 62, *supra*.

(63) S. 218—See **HINDU LAW (DEBTS)**, No. 3, 19 M.L.J. 759.

(63-a) S. 222—See No. 45, *supra*.

(64) Ss. 230, 235—*Liability of broker—Liability of agent.* See **SALW**, No. 11, 8 M.L.T. 353.

(65) S. 235—See No. 64, *supra*.

Contribution.

(1) *Contribution, suit for—Cause of action in a suit for contribution—Limitation Act, Sch. II, Art. 61—Contract Act, S. 69.*

Held, that, in the case of co-sureties and of joint-debtors, a right of contribution arises as soon as one co-surety or joint-promisor pays more than the proportion which is due from him.

Where the plaintiff, as one of two joint-debtors, paid up the whole debt by a series of payments and brought a suit for contribution, *held*, that the period of limitation prescribed by Art. 61 of Sch. II of the Limitation Act ran, not from the time when the last payment was made by the plaintiff, but, with respect to each payment made in excess of the proportion due from him, from the time of such payment. **Debi Sahai v. Gauri Shankar Sahai**, 13 O.C. 23 = 5 Ind. Cas. 440.

CHAMIER, J.C.

References:—25 C. 844; 8 M.L.J. 271; 6 M. and W. 153; 26 M. 686; 26 A. 407, R.

(2) *Contribution, suit for—Joint decree—Non-appearance by one of the defendant—Effect of decree—His subsequent right to contest contribution suit.*

The landlord sued both the plaintiff and defendant jointly for rent in respect of a holding. The defendant did not defend that suit, and the landlord got a decree, and the whole amount of the decretal money was paid by the plaintiff who sued for contribution:—

Held, that the circumstance that the defendant submitted to a judgment jointly with the plaintiff shows that he was jointly liable for the rent with the plaintiff, and that the suit

Contribution—(Continued).

for contribution was maintainable. **Rama Pande v. Ramdhari Pande**, 5 Ind. Cas. 16.

HARINGTON and CHATTERJEE, JJ.

- (3) *Suit for—Decree passed against plaintiff and defendant—Payment of decretal amount by plaintiff—Right to claim contribution from defendant.*

After the passing of a decree in a partition suit, a decree was passed binding the plaintiff and defendant, both parties to the partition suit, for a debt due by them. Plaintiff paid the amount of the decree. *Held*, that the plaintiff's right to claim contribution from the defendant in respect of such payment arose on the date of payment, and that the partition decree was no bar to such claim. **Punchapagesa Aiyar v. Subramanya Aiyar**, 4 Ind. Cas. 872—19 M.L.J. 487.

BENSON and SANKARAN NAIR, JJ.

- (4) *When right of contribution arises.*

The right of contribution arises when two or more persons are liable to discharge a common burden. A creditor, who before judgment attaches the property of the judgment-debtor, does not acquire any lien or charge on the property. Where, therefore, a portion of the attached property is purchased by a third person, who pays up the amount due to the attaching creditor, the payment is gratuitous, and he does not acquire any right of contribution. **Sahu Lalita Prasad v. Zahur-ud-din**, 7 A.L.J. 409—6 Ind. Cas. 113.

STANLEY, C.J., and GRIFFIN, J.

References :—25 C. 179; 29 C. 428; 28 C. 419, R.

- (5) *Contribution—Decree for costs—Some defendants not contesting suit—No exemption—Liability inter se.*

Before a plaintiff can obtain contribution in respect of decree for costs, he must show that some equity exists between him and his co-judgment-debtors making the latter liable to contribution. A suit was brought against several persons amongst whom were included the plaintiff and defendant to the present suit. The suit was dismissed in appeal; neither the plaintiff nor the defendant who were made *pro forma* defendants contested the claim. A decree for costs was made against all the defendants, including parties to the present suit. The costs were recovered from the plaintiffs to the present suit. In a suit by the plaintiff against the defendant for contribution, it

Contribution—(Concluded).

was *held*, that the suit was not maintainable. **Mulla Singh v. Jagannath Singh**, 7 A.L.J. 720—6 Ind. Cas. 684.

RICHARDS and TUDBAL, JJ.

- (6) *Contribution, suit for—Costs to be recovered from plaintiffs and defendants—Bona fide parties.*

A suit was brought for maintenance against a *kumanathi* and her *anandavans* which was decreed against the former and dismissed with costs against the latter. The present suit was brought for contribution by some of the plaintiffs in that suit, from whom the costs were recovered, against others: *Held*, that as there was no misconduct on the part of the plaintiffs in impleading the *anandavans* as defendants, and as costs had been ordered in a *bona fide* litigation, the defendants were bound to contribute (a). **Shruvararayan alias Anujan Kunjuni Raja v. Pulthia Kovila Kattivararayan alias Unni Anujan Raja**, 7 Ind. Cas. 268.

BENSON and KRISHNASAWMY IYER, JJ.

References :—(a) 26 M. 373 at p. 375, *Ref. to*, 16 R.R. 810; 8 Term Report 186. *doubted*.

(7) *Irrigation work done against defendant's will—Suit for—Maintainability.* See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 7, 7 M. L.T. 74.

(8) *Mortgage sale set aside by consent on one of co-mortgagors paying off decree—Liability of other co-mortgagors to contribute.* See MORTGAGE (GENERAL), No. 4, 14 C.W.N. 361.

(9) *Suit for, when lies.* See CONTRACT ACT, No. 41, 14 C.W.N. 699.

(10) *Deposit by co-tenant—Sale set aside—Liability of other co-tenants to.* See CONTRACT ACT, No. 27, 14 C.W.N. 945.

Conversion.

- (1) *Conversion—Possession of goods, however innocent, may be conversion—Indian Contract Act (IX of 1872), Ss. 178 and 179—“Possession” meaning of—The amount of damages, is the value of the goods at the time of conversion.*

Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion (a).

Conversion—(Concluded).

In an action for conversion of goods, the plaintiff is entitled to the value of the goods at the time of the conversion; and in the absence of any evidence that the value of the goods at the time of the conversion is different from the value of the goods at the time of the payment for them, the amount he is entitled to is the amount paid by the plaintiff for the goods.

Per Batchelor, J.—S. 178, Contract Act, should be read with S. 179, which provides for the case where the pledger has only a limited interest in the goods pledged. That suggests that S. 178 deals with the case where the pledger has more than a limited interest. The possession intended in this section is such possession as a factor has; in other words, such possession as is had by an agent entrusted as such, and ordinarily having, as such agent, a power of sale or pledge. **Nandlal Thakersey v. The Bank of Bombay**, 12 Bom. L.R. 316 = 5 Ind. Cas. 457.

SCOTT, C.J., and BATCHELOR, J.

Reference :—L.R. 7 H.L. 757, 795, F.

Converts.

(1) Marriage of a Hindu sudra with a Christian woman converted to Hinduism—Legality—Effect—Essentials of such marriage—Custom. See **HINDU LAW (MARRIAGE)**, No. 1, 7 M.L.T. 17.

(2)—Christianity—Dying intestate as Christian—Law of succession applicable. See **ACT X OF 1865 (SUCCESSION)**, No. 1, 12 C.L. J. 469.

(3) Effect of, conversion upon marriage. See **MAHOMEDAN LAW (MARRIAGE)**, No. 2, 7 A.L.J. 956.

(4) Decree for custody of wife—Conversion and re-conversion of wife—Effect on execution of decree. See **RES JUDICATA**, No. 8, 59 P.W.R. 1910.

Co-occupant.

Co-occupant of land in Berar—Mortgagee acquiring full ownership of a share in land by foreclosure of his mortgage, position of—When a co-sharer loses his right of pre-emption. See **PRE-EMPTION**, No. 28, 6 N.L.R. 86.

Copyright.

(1) *Copyright—Almanac—Burden of proof—Injunction.*

In a suit for injunction on the ground of infringement of plaintiff's copyright in an almanac published by him, it was found that

Copyright—(Concluded).

the tables given in the parties' almanacs tallied, except as regards minutes and seconds, that the calculations were admittedly worked out on what are known as *Makrand* and that there were other almanacs which resembled the defendants.

Held that these findings were not sufficient to establish piracy on the part of the defendants.

Held also, that the fact that in previous years the defendants obtained information for their almanacs from plaintiff on payment of money did not affect the case.

The weakness of the defence does not make up for want of proof of the allegation of the plaintiff. **Girdhari Lal v. Devi Dial**, 95 P.L.R. 1910.

CHEVIS, J.

Copyright Act.

See **ACT XX OF 1847**.

Correspondence.

Ordinary—Conducted by officials, whether comes within the meaning of S. 35, Evidence Act. See **EVIDENCE ACT**, No. 7, 7 M.L.T. 117.

Co-sharers.

(1) *Limitation—Adverse possession—Possession of a co-sharer—Deed of exchange—Registration—Res judicata—Indian Limitation Act, XI of 1877 (now IX of 1908), Art. 144—Indian Registration Act XVII of 1877 (now Act XVI of 1908) S. 17.*

Held, that, in the absence of any indication to the contrary, the possession of a sharer is possession of all the co-sharers.

Mere possession of a co-sharer, even for 40 years, is no bar to a claim for getting a share in the joint property, unless it has been exclusive in intention and adverse.

Held, also, that the deed of exchange relating to immoveable property of the value of Rs. 100 or more requires, and is not admissible in evidence for want of registration.

Quere :—Whether the question of *Khanadama* is *res jurisdicta*? **Shams Shah, representative of Mir Haidar Shah v. Hussain Shah**, 145 P.W.R. 1909.

JOHNSTONE, J.

(2) *Transferability of holding—Suit by mortgagee—Co-sharer landlord—Purchase in execution.*

Co-sharers—(Continued).

A co-sharer landlord, who has purchased the holding in execution of a decree of his own, cannot raise the question of the transferability of the holding in a suit by the mortgagee, **Hara Chandra Poddar v. Umesh Chandra Bhattacharjee**, 11 C.L.J. 20—14 C.W.N. 71 = 5 Ind. Cas. 39.

COXE and CHATTERJEE, JJ.

References :—11 C.W.N. 76, F.; 9 C.W.N. 24 S.N., *not F.*

(3) *Tenancy Act—Position of, in relation to sir—Proper rent—Farzi rate.*

A co-sharer cultivating a portion of land in the village as his *sir* cannot be regarded as a tenant of the co-parcenary body, but, he holds the land at a proper rate of rent, and when accounts are taken between the parties they should not be taken with reference to a *farzi* rate of rent.

The admission by the plaintiff's Revenue Agent as to the proper rate of rent is binding on the plaintiff and he cannot subsequently resile from that admission. **Gendan Lal v. Rustum Singh**, 7 A.L.J. 90 = 1 Ind. Cas. 975.

KARAMAT HUSAIN, J.

(4) *Co-owners — Joint tenants — Ouster — Ejectment—Possession, joint—Injunction —Demolition of buildings—Justice, equity and good conscience.*

It cannot be laid down as an inflexible rule of law that the sole occupation of a part of the joint estate by one co-owner inevitably implies an ouster of the other co-owner. It cannot also be laid down as a universal proposition of law, that the erection of a substantial building by one co-owner upon a portion of the joint property, without the assent of the other co-owner, is conclusive evidence of ouster. What constitutes ouster in a particular case must depend upon its special facts (a).

Whether a co-owner seeks a decree for ejectment and joint possession against his co-sharers on the ground of ouster, or asks for an injunction, perpetual or mandatory, to prevent the change of condition of the joint property or to restore it to its original condition, the Court is bound to decide the question on equitable grounds. The artificial distinction between a common law action of ejectment and an equity suit for an injunction recognized in England should not be introduced in this country, where the Courts are bound, in all matters for which no specific rule may exist, to act according to justice, equity and good conscience.

Co-sharers—(Continued).

The authorities on the subject of the rights of joint-owners reviewed. **Dwijender Narain Roy v. Purnendu Narain Roy**, 11 C.L.J. 189 = 5 Ind. Cas. 171.

MOOKERJEE and TEUNON, JJ.

Reference :—4 C.L.J. 198, F.

(5) *Abandonment of land—Absentee—Co-sharer—Adverse possession.*

At the settlement of 1962, ancestors of plaintiffs and defendants were recorded as co-owners, but defendants' ancestors recorded as absentees.

Defendant's grandfather died many years ago, but neither he nor his son, D, made any attempt to regain possession of the land though living only a few *Kos* from the village, and paying visits to it from time to time. On D's death, the defendants were recorded in the revenue papers as owners *ghair kabiz*. In 1905 plaintiffs applied to the revenue authorities to strike out the defendant's name as owners, but they were referred to the Civil Court. Hence the present suit.

Found.—That there was neither abandonment nor adverse possession.

Held.—(1) Before a co-sharer can establish a plea of adverse possession, he must prove, by the clearest and most unequivocal conduct on his part, that he, openly and to the knowledge of his co-sharer, asserted and claimed exclusive ownership of the land claimed more than 12 years before suit. In the present case, there was no such overt act before 1905.

(2) As to relinquishment, no doubt, a co-sharer can relinquish his share in a joint holding, but the evidence of such relinquishment, when the property is originally left in the possession of a co-sharer, must be very clear and unequivocal, either by direct act or course of conduct. The right of absentees, especially in cases in which their lands are left in the hands of co-sharers, to return even after prolonged absence and resume their lands, is very largely recognized in Punjab (b).

(3) Question of abandonment is one of fact and must in each case be decided upon the evidence given in it. **Kirpa v. Jiwa**, 13 P.W.R. 1910 = 5 Ind. Cas. 840.

RATTIGAN, J.

References :—(a) 120 P.R. = 172 P.W.R. ; 1908, F. and Appr. ; 17 P.W.R. 1910, compare, 141 P.R. 1893 ; 88 P.R. 1885 ; 118 P.R. 1893 ; 30 P.R. 1901, D.

Co-sharers—(Continued).

- (6) *Adverse possession—Non-payment of profits by some co-sharers to others—Suit by co-sharers for their share of profits.*

Where certain co-sharers withheld from other co-sharers the payment of their shares of the profits of the *shamlut* land, but there was no evidence of adverse claim or repudiation of the title of the plaintiffs, *held* that the claim of the plaintiffs was not time-barred.

Seemle.—There is no distinction between the case of a *lambardar* and the case of co-sharers making collections for the whole co-parcenary body. Co-sharers who make collection for themselves and other co-sharers are in the same position as regards the amounts collected as a *lambardar*. The appropriation of profits by one co-sharer cannot be regarded as notice to other co-sharers that their title was repudiated. **Har Charan v. Bindu**, 7 A.L.J. 298 = 5 Ind. Cas. 559.

STANLEY, C.J., and BANERJI, J.

- (7) *Co-sharers—Exclusive occupation of small piece of land by one co-sharer—No substantial injury caused—Possibility of ultimate improvement—Whether injunction should issue.*

Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases (a).

If it should be found that one-sharer is in the act of occupying a portion of the lands which is not being actually used by another, the former should not be restrained in his occupation (b).

Where, by reason of the exclusive occupation by the defendant, a co-sharer of the plaintiff, of a small piece of land, the plaintiff has sustained no substantial injury, and where the nature of the occupation is such that it may ultimately prove to be an improvement :

Held, that the plaintiff's claim for an injunction on the defendant should not be entertained. **Brahmamoyee Chaudhurani v. Gopi Mohan Rai Chowdhury**, 7 Ind. Cas. 124.

SHARFUDDIN and DOSS, JJ.

References:—(a) 19 C. 253; 19 I.A. 48, F. (b) 17 I.A. 10; 119 C. 10, *relied upon*.

- (8) *"Laches," meaning of—Revenue sale—Issue of certificate, effect of—Mortgagee in possession—Trustee of mortgagor—Co-sharers in joint estate—Relation of mutual*

Co-sharers—(Continued).

confidence—Non-payment of revenue by co-sharer—Purchase by himself—Transfer of Property Act (IV of 1882), S. 76.

Laches signify knowledge or at least such abstinence from legitimate enquiry as to amount to constructive notice of the risk incurred.

A revenue sale having been confirmed and a certificate of sale issued to the purchaser, the notices under the sale law must be taken as duly served; but that is only so far as the setting aside of the sale on the ground of irregularity in the service of the notices is concerned. So far as the actual notice on the parties is concerned, for the purpose of ascertaining whether they knew of the proceedings and could have averted the sale, the Court is entitled to see whether the notices were in fact so served as to fix knowledge of them upon the plaintiffs who sought to set aside the sale, or so as to keep them from all knowledge of the same.

In certain respect and for certain purposes, the mortgagee in possession is a trustee for the mortgagor and cannot take advantage of that position to the detriment of the mortgagor (a).

Between co-sharers in a joint estate, all being liable to pay their quota of the Government revenue according to their respective shares, a relation of mutual confidence exists (b).

Therefore, where a co-sharer of a revenue-paying estate, by suffering a default, intentionally allows the property to be sold and makes the purchase for himself to the exclusion of his co-sharers, he cannot be allowed to derive any benefit for himself by committing the breach of trust, and he must share the acquisition with his other co-sharers. **Janki Singh v. Del. Nandan Prasad**, 7 Ind. Cas. 772.

HOLMWOOD and CHATTERJEE, JJ.

References:—(a) 10 M.I.A. 540; 5 W.R. 83 (P.C.), *Rel* (b) 16 C. 194, *disapproved*.

- (9) *Jurisdiction of Civil Court—Shamlut land—Partition—Land left joint as a road—Obstruction by one of the co-sharers—Cause of action—Special damage not necessary to prove.*

At the time of partition of common land of a *patti*, land in suit was left joint to serve as a road. Upon defendants' attempting to close the way, the plaintiffs, who were co-sharers in the

Co-sharers—(Concluded).

patti, sued the defendants, who were also co-sharers, for a permanent injunction to restrain them. The Divisional Judge, on appeal, dismissed the suit on the ground that, no special damage having been proved by the plaintiffs, the suit was not maintainable.

Held, that the order of dismissal was wrong. It must be held that the land was not a public road, and that the suit was one by certain co-sharers to restrain other co-sharers in joint property from using that property in contravention of agreement regarding it, in defiance of the objections of the plaintiffs. **Imam Din v. Kishen Singh**, 218 P.L.R. 1910.

JOHNSTONE, J.

References:—134 P.R. 1882; 39 P.R. 1888; 4 P.R. 95, R.

(10) Settlement by all—Ejectment—Right of one co-owner. See **LEASE**, No. 9, 5 Ind. Cas. 277.

(11) Effect of S. 90, Trusts Act. See **ACT II OF 1882 (TRUSTS)**, No. 3, 6 N.L.R. 12.

(12) Joint holding—Absence of one co-sharer—Long silence and inaction—Abandonment—Adverse possession—Arts. 142 and 144, Limitation Act (1877). See **POSSESSION**, No. 1, 29 P.R. 1910.

(13) Improvements by co-owner upon common property—Effect upon partition. See **PARTITION**, No. 10, 6 Ind. Cas. 346.

(14) Entry by one—Effect. See **ADVERSE POSSESSION**, No. 4, 79 P.W.R. 1910.

(15) Suit against, for share of sale-proceeds of trees growing in joint holding—Jurisdiction. See **JURISDICTION OF REVENUE COURTS**, No. 1, 52 P.R. 1910.

(16) Suit by transferee of a share for joint possession with co-sharers—Maintainability—Estoppel. See **OCCUPANCY RIGHT**, No. 2, 14 C.W.N. 779.

(17) Suit for possession by one co-sharer of his share—Maintainability. See **BENAMI TRANSACTIONS**, No. 1-a, 7 Ind. Cas. 219.

(17-a) See **LAMBARDAR AND CO-SHARER**.

(18) Making gift in favour of another cosharer—Delivery of possession. See **MAHOMEDAN LAW (GIFT)**, No. 5, 8 Ind. Cas. 38.

Costs.

(1) *Costs—Pleader's fee—Suit withdrawn.*

Where a suit is not decided on the merits after contest but is withdrawn, the Court acts rightly in awarding the defendant only half his

Costs—(Continued).

pleader's fee as costs. **Kunwar Mahomed Beattmed Ali Khan v. Bibi Ahmadi Begam**, 5 Ind. Cas. 121.

STANLEY, C.J. and BANERJEE, J.

2 *Execution of decree—Costs, separate sets of, recorded in favour of defendants—Decree reversed on appeal by defendants jointly—Defendants entitled to costs recorded in decree of first Court.*

A decree in favour of the plaintiff recorded the costs of the several defendants separately, each being credited with full pleader's fee. This decree was reversed on appeal preferred by all the defendants jointly. The appellate decree ordered the plaintiff to pay the defendants the costs of the appeal, the details and amount of which were given, and the costs incurred by them in the lower Court.

Held, that the defendants were entitled to the separate costs as entered in the decree of the first Court. **Raghunandan Lal v. Rajendra Prasad Narain Singh**, 11 C.L.J. 207 = 14 C.W.N. 556 = 5 Ind. Cas. 342.

HARRINGTON and CHATTERJEE, JJ.

(3) *High Court, General Rules and Circular Orders (Civil), Chap. VI, Rules 36 (b), 37 (b)—Land Acquisition case—Costs—Dismissal—Withdrawal.*

Full costs can be allowed in a land acquisition case only if the suit has been dismissed on the merits. Where the claim is withdrawn, not more than half the full fees can be awarded. **Nanhilal Agrari v. Secretary of State for India**, 11 C.L.J. 217 = 5 Ind. Cas. 770.

MOOKERJEE and TEUNON, JJ.

(4) *Contribution—Costs incurred in bona fide litigation—Right to recover.*

Costs ordered to be paid in *bona fide* litigation are recoverable by a suit for contribution, except when it is shown that there was misconduct in the plaintiffs in impleading the defendants whose costs they were made to pay. **Shreevararayan alias Anujan Kunhunni Raja v. Palthia Kovilakath Veerarayan alias Unni Anujan Raja**, 7 M.L.T. 194 = 5 Ind. Cas. 937.

BENSON and KRISHNASAMI IYER, JJ.

References:—**Merry Weather v. Nixon**, doubted, 26 M. 373 (375), F.

(5) *Relief given to plaintiff not being that which he claimed—Practice.* See **AWARD**, No. 1, 6 N.L.R. 1.

Costs—(Continued).

(6) Suit for injunction dismissed—Defendant's death pending appeal—Abatement—Representative's right to costs. See CIV. PRO. CODE (1882), No. 173, 7 M.L.T. 195.

(7) Costs in course of execution proceedings—Separate application for realisation—Application for execution against both judgment-debtors—Application in accordance with law. See EXECUTION OF DECREE, No. 8, 5 Ind. Cas. 480.

(8) Son's obligation to pay costs awarded against father in litigation. See HINDU LAW (DEBTS), No. 6, 14 C.W.N. 659.

(9) Order rejecting appeal for failure to furnish security for—, Effect. See CIV. PRO. CODE (1908), No. 58, 13 O.C. 59.

(10) Litigation rendered necessary by act of testator—Recovery of—. See RES JUDICATA, No. 7, 11 C.L.J. 461.

(11)—of administration suit. See ADMINISTRATION SUIT, No. 1, 7 M.L.T. 400.

(12) Full costs when may be allowed. See INTEREST, No. 2, 56 P.W.R. 1910.

(13) Amount of damages reduced on appeal—Order as to costs of appeal. See LIBEL, No. 1, 14 C.W.N. 713.

(14) Appeal dismissed for default—Memorandum of objections—Costs. See CIV. PRO. CODE (1882), No. 208, 6 Ind. Cas. 309.

(15)—in partition suit—Principle of assessment. See PARTITION, No. 9, 6 Ind. Cas. 109.

(16) Decree for—Suit for contribution when lies. See CONTRIBUTION, No. 5, 7 A.L.J. 720.

(17) Remedy against vexatious conduct. See CIV. PRO. CODE (1882), No. 63, 14 C.W.N. 924.

(18) Decree in pre-emption suit—Costs. See CIV. PRO. CODE (1908), No. 117, 56 P.R. 1910.

(19) Costs—Payment after suit—Award of costs—Propriety. See CAUSE OF ACTION, No. 1, 8 M.L.T. 188.

(20)—if part of decree—Interest on. See MORTGAGE (GENERAL), No. 35, 14 C.W.N. 1093.

(21)—difficulty in appeal arising from confusion in the plaint—Liability of appellant to pay. See PLEADINGS, No. 5, 8 M.L.T. 202.

(22) Mortgagee's right to. See CIV. PRO. CODE (MYSORE), No. 8, 15 M.C.C.R. 155.

Costs—(Concluded).

(23)—Execution of decree by creditor having notice of his debt being included in the insolvent's schedule—Liability of creditor for costs of insolvent. See INSOLVENCY ACT (1848), No. 1, 8 M.L.T. 202.

(24) Defendant in probate case adopting most offensive attitude towards plaintiff and making unfounded charges against plaintiff—Liability to pay costs of plaintiff. See WILL, No. 15, 7 Ind. Cas. 301.

(25) *Bona fide* parties—Recovery of—Suit for contribution. See CONTRIBUTION, No. 6, 7 Ind. Cas. 268.

(26) Dismissal for default—Costs. See CIV. PRO. CODE (1882), No. 193, 99 P.L.R. 1910.

(27) Mortgagor not appearing—Scale of. See MORTGAGE (GENERAL), Nos. 57 and 58, 37 C. 907.

Court.

(1) *Transfer of presiding officer of Court—Question determined by him cannot ordinarily be re-opened by his successor.*

When the presiding officer of a Court has decided a question involved in a case, and he is succeeded by another officer, the latter cannot re-open the same question again, excepting on the ground of some palpable mistake having been made by the former. **Harnama v. Attar Singh**, 204 P.L.R. 1910.

JOHNSTONE, J.

(2) Decree set aside for fraud—Order of Court of concurrent jurisdiction, if effective to restore suit. See SUIT, No. 1, 14 C.W.N. 558.

(3) Inherent powers of Court to correct its own proceedings. See COMPROMISE, No. 2, 12 Bom. L.R. 223.

(4)—to correct its own mistakes *suo motu*. See STAMP ACT, No. 7, 12 Bom. L.R. 466.

(5) Inherent power of—Order made by misrepresentation and mistake—Power to cancel. See CIV. PRO. CODE (1882), No. 98, 6 Ind. Cas. 208.

(6) Minor—Capacity to bind himself by contract—Parental authority—Delegation—When revocable—Court's power to revoke. See MINOR, No. 1, 8 M.L.T. 47.

(7) Power of Court in cases not falling within letter of law. See PROBATE, No. 3, 12 C.L.J. 91.

(8) Power of, to deal with minor's property. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 13, 7 Ind. Cas. 46.

Court—(Concluded).

(9) Jurisdiction of Civil Courts—Inherent powers of—. See CIV. PRO. CODE (MYSORE), No. 1, 15 M.C.C.R. 202.

(10) Collector when makes award, if Court. See ACT, I OF 1894 (LAND ACQUISITION), No. 6 12 C.L.J. 505.

Court fee. •

(1) *Court-fees—Suit for possession—Decree for possession conditional on payment of a sum disputed in appeal.*

Where a plaintiff sues for possession of land claiming an unconditional decree or admitting his liability to pay a certain sum, and the Court requires him to pay a sum which he disputes, and he appeals on the ground that he is not liable to pay that sum, *held*, that he must pay Court-fee on the amount in question. **Basudeo Ban v. Sri Krishna Gir**, 13 O.C. 62 = 5 Ind. Cas. 941.

CHAMIER and EVANS, O.J.CS.

References:—12 O.C. 130; 9 O.C. 153; 31 A. 265; 1 Legal Remembrancer, 162; 2nd C.A. 296 of 1908, R.

(2) Execution conditional on payment of—Application for execution without payment—whether in accordance with law. See LIMITATION ACT (1877), No. 109, 12 Bom. L. R. 13.

(3) First suit deciding on merits, but failing on account of non-payment of deficiency in—Second suit for trial on the same merits. See RES JUDICATA, No. 19, 12 Bom. L. R. 766.

(4) Power to make up deficiency of—Enlargement of time by Court—Power of Registrar of Small Cause Court. See CIV. PRO. CODE (1908), No. 78, 7 Ind. Cas. 578.

Court Fees Act.

(1) *S. 5—Decision of Taxing Officer final as to category.*

The decision of the Taxing Officer, as to the category within which a suit falls for the purpose of assessing the proper amount of Court-fees payable on a memorandum of appeal, as also his decision as to the amount of fee, is final and binding upon the Court under S. 5, Court Fees Act. **Kuar Karan Singh v. Gopal Rai**, 6 A.L.J. 972 = 32 A. 59 = 4 Ind. Cas. 123.

TUDBALL, J.

(1-a) *S. 5, Art. 17 (6)—Appeal—Amount decreed not disputed—Liability of certain properties objected to—Valuation—Court Fees Act, Sch. II, Art. 17, cl. 6—Applicability—Registration of appeal by Deputy*

Court Fees Act—(Continued).

Registrar—Insufficiency of Court Fees not raised—Absence of decision by taxing officer, under S. 5, Court Fees Act—Objection raised at hearing—Propriety.

Where, in an appeal against a mortgage decree, the amount decreed is not disputed, but only a question as to the liability of certain properties to satisfy the mortgage debt is raised,

held, that cl. 6, Art. 17, Court Fees Act, did not apply and that the appeal ought to be stamped according to the value of those properties (a).

Where the order for registering an appeal was signed by the Deputy Registrar who was not the taxing officer, and the question as to the insufficiency of Court-fees never came before the Registrar at all, and consequently there was no decision under S. 5, Court Fees Act;

Held that the objection as to insufficiency of Court Fees could be raised at the hearing of the appeal (b). **Jugal Pershad Singh v. Parbu Narain Jha**, 37 C. 914.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 30 M. 96; 13 C.W.N. 815; 21 M. 269, R.

(1-b) *S. 7, Sch. I—Sch. I, supplementary to S. 7 Scope of S. 7—Mortgage suit—Foreclosure decree—Appeal against—Proper stamp—Value of relief, same in all stages of lis—Proper stamp duty for appeal.*

Where an appeal is made against a foreclosure decree not merely in dispute of the amount found payable for redemption but against the whole decree, that is to say, where such appeal is the converse of an appeal for foreclosure by a mortgagee who has been refused foreclosure, *held*, that such appeal ought to be stamped *ad valorem*, such value being the principal sum secured by the mortgage sued on.

Sch. I of the Court Fees Act, does not stand by itself but as a supplement to S. 7 and other sections of the Act. S. 7 states the various processes by which values in different suits are arrived at, and the schedule then applies the proper Court fees to those values payable either upon the plaint or memorandum of appeal.

The value of a particular relief, once correctly found for the purpose of stamping the plaint in a suit, remains unchanged in all subsequent stages of the suit.

The value of a particular relief in appeal remains the same, whether the appeal be

Court Fees Act—(Continued).

preferred against its grant or its refusal. **Dhiraaj Singh v. Rajaram**, 6 N.L.R. 164.

STANYON, A.J.C.

Reference :—5 N.L.R. 130, *Disc.*

(2) *S. 7—Sch. II, cls. 3, 4—Suit for dissolution of partnership—Preliminary decree—Appeal against—Ad valorem fee—Change in Civil Procedure Code—Effect of.*

In an appeal from a decree passed in a suit for the dissolution of partnership, whether the appeal be from the preliminary or the final decree, the amount of fee payable is to be computed according to the amount at which the relief sought is valued in the memorandum of appeal.

The change in the present Civil Procedure Code, making an appeal against a preliminary decree compulsory, does not in any way affect the matter of Court-fees. *In the matter of Bhola Nath*, 7 A.L.J. 516.

TUDBALL, J.

(3) *S. 7—Suit for sale partly decreed—Certain share exempted—Objections by mortgagee asking for sale of exempted share—Ad valorem fee—Reference of question of Court Fee—Jurisdiction—Division Bench.*

Held, by Knox and Karamat Hussain, JJ., that a Division Bench had no jurisdiction to hear a stamp reference, even when it is referred to him by the taxing Judge.

A suit was brought for recovery of money by sale of 11½ shares of a mortgagor's rights. The Court passed a decree for sale of only 7½ shares. The defendant appealed, and the plaintiff, accepting the correctness of the amount found due, preferred objections and asked for a declaration that the remaining 3½ shares were also liable. He valued the appeal at Rs. 800, the value of the property. *Held*, that there was a consequential relief in his demand, viz., a prayer for sale of property, and the plaintiff was liable to pay *ad valorem* fee on the amount at which he valued the property. **Khachera v. Kharag Singh**, 7 A.L.J. 842=7 Ind. Cas. 315.

TUDBALL, J.

Reference :—30 Mad. 96, *F.*

(3-a) *S. 7, Cl. IV (b) and cl. V, and Sch. I, Arts. 1 and 17 (VI)—Suit for partition by a co-parcener in joint possession—Court-fee—Ad valorem fee.*

Held, by White, C.J., and Krishnasawami Ayar, J. (Aiyling, J., *diss.*), that, in a suit for

Court Fees Act—(Continued).

partition of joint family property, where the plaintiff is in joint possession with the other co-parceners, the Court-fee is to be fixed under Art. 1 of Sch. I of the Court Fees Act and not under Art. 17 (VI) of Sch. II of the Act (a).

Quere :—Whether a suit for joint possession by a co-parcener, excluded from possession, would fall under S. 7, cl. IV (b) or S. 7, cl. (V) of the Court Fees Act. **Boganadan Rangiah Chetty v. Boganadan Subramania Chetty**, 8 Ind. Cas. 512.

References :—(a) 33 B. 658; 10 Bom. T.R. 1074; 4 Ind. Cas. 242; 6 C.L.J. 651; 12 C.W.N. 37; 8 C. 757; 20 C. 762, *dissented from*; 20 M. 289, *F.*

(4) *S. 7 (4) (c)—Record-of-rights and settlement of fair rent—Suit for amendment. Court-fees—Valuation of suit—Court-fees in declaratory suit—Ad valorem fees.*

The Court-fees payable on a plaint for amendment of a record-of-rights and for settlement of fair rents must be determined under S. 7 (4) (c) of the Court Fees Act, by the amount at which the reliefs sought are valued, and not at the sum of ten rupees required for a declaratory decree. **Sreenath Chandra Pramanic v. The Secretary of State for India in Council**, 11 C.L.J. 158—5 Ind. Cas. 141.

BRETT and SHARFUDDIN, JJ.

(5) *S. 7 (1) (c)—Declaratory suit—Levy of duty—Test.*

The question whether S. 7, para. IV, cl. (c) of the Court Fees Act, applies or not, must depend on the substance of the claim, and not on the mere words which a plaintiff may choose to introduce into his plaint with reference to it. **Malikka Meladathil Keluttammal v. Malikka Meladathil Karnavan Kunji Achammal**, 7 M.L.T. 177 = 5 Ind. Cas. 927.

MUNRO and ABDUR RAHIM, JJ.

Reference :—30 M. 18, *R.*

(5-a) *S. 7 (iv) (c)—See No. 19, supra.*

(6) *S. 7, para 6—Suit for pre-emption on sale of equity of redemption—Property in possession of usufructuary mortgagee—Possession not claimed.*

The plaintiff sued to pre-empt a sale of the equity of redemption in certain property in the possession of mortgagees with whom the property was usufructuarly mortgaged for

Court Fees Act—(Continued).

Rs. 79,000. The plaintiff alleged that the consideration for the sale he sought to pre-empt was Rs. 5,000 and he paid *ad valorem* fees on such amount. The first Court asked the plaintiff to make good the deficiency of Rs. 975 in the Court-fees which was paid by the plaintiff, but the first Court dismissed the suit on the authority of 15 A. 65, as there was not a properly stamped plaint presented within the period of limitation. The plaintiff appealed to the District Judge and again paid *ad valorem* Court-fees on Rs. 5,000. He was again asked to make good the deficiency, but as he did not, his appeal was dismissed. The plaintiff preferred a second appeal on the ground that, as the subject matter of sale was only the equity of redemption, the plaintiff was right in paying an *ad valorem* fee with reference to the value he put upon it.

Held, by the Full Bench, the Court-fees should be paid upon the value of the land computed in accordance with S. 7, para. 5, of the Act VII of 1870. **Daryao Singh v. Bharat Singh**, 6 A.L.J. 905 (F.B.) = 6 M.L.T. 311 = 3 Ind. Cas. 562 = 32 A. 19.

KNOX, RICHARDS and ALSTON, JJ.

Reference:—15 A. 69, R.

(7) S. 7, Sub-S. (4), cls. (c) and (d).—See ACT II OF 1864 (ADEN), No. 1, 12 Bom. L. R. 149.

(8) S. 7, cl. IX, and Sch. X, Art. I—*Suit to redeem a kanom—Decree for redemption—Appeal against—Denial of right to redeem and plea that a larger amount should be paid—Court fee, amount of, on appeal memo.*

In a suit to redeem a *kanom*, a decree for redemption was given. The defendants appealed against the decree, and in the grounds of second appeal, they questioned the plaintiff's right to redeem and also contended that, if the plaintiff was held entitled to redeem, he (the plaintiff) could do so only on payment of a larger sum for improvements than that fixed by the Sub-Judge. The extra amount claimed was not stated in the memorandum, and Court-fee was paid on the *kanom* amount only. The plaintiffs took a preliminary objection that the extra amount should be stated and that Court-fees should be paid on that also.

Held, that the memorandum of appeal comes under Art. 1, Sch. I, and S. 7, Cl. IX of the Act, and the Court-fee is payable on the principal money expressed to be secured by the instrument of mortgage and that the Court-fee payable was the same as that paid on the plaint.

Court Fees Act—(Continued).

In a case where the only question is as to the amount payable, the subject matter in dispute is a definite amount, and a memorandum of appeal in such a case comes under Art. 1, Sch. I, of the Act (a), and the amount of Court-fee is computed on the amount in dispute. In a redemption suit, the subject matter of the suit is the existence of the right to redeem, and any question as to the amount payable as the condition of redemption is only incidental to that right. **Sekharan Nair v. Eacharan Nair**, 6 M.L.T. 245 = 20 M.L.J. 120 = 3 Ind. Cas. 459.

MUNRO and ABDUR RAHIM, JJ.

Reference:—(a) 29 M. 367 = 16 M.L.J. 287, R.

(9) Ss. 7, 11—See MESNE PROFITS, No. 2, 7 Ind. Cas. 778.

(10) S. 7 (c), Art. 17 (3)—Suit under S. 106, Act VIII of 1885—Court-fee. See ACT VIII OF 1885, (BENGAL TENANCY), No. 42, 7 Ind. Cas. 627.

(11) S. 9, XI (c)—Valuation of suit by landlord against tenant for possession of the holding. See LANDLORD AND TENANT, No. 8, 27 P.R. 1910.

(12) S. 11—*Future mesne profits from date of plaint—Court-fee.*

This section only applies to a claim for mesne profits for which an amount can be and has been claimed by the plaintiff, and in respect of which some Court-fee has been paid. So no Court fee is payable on future mesne profits decreed from the date of plaint till delivery. **Saminatha v. Muthusami**, 20 M.L.J. 98 = 5 Ind. Cas. 880.

MUNRO and ABDUR RAHIM, JJ.

Reference:—15 B. 416.

(13) S. 11—Valuation of suit—Execution of decree—Deficiency made good—Appeal—Jurisdiction. See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM), No. 2, 7 A.L.J. 203.

(13-a) S. 11—See No. 9, *supra*.

(14) S. 12—*Decision of trying Court as to valuation of suit, if open to question in appeal against decree dismissing suit for non-payment of additional Court-fee on day fixed—Civil Procedure Code (Act XIV of 1882), S. 2—Valuation by plaintiff if determines forum of appeal.*

Where the Court in which a suit was instituted held that it had been undervalued, and directed the plaintiff to pay additional Court-fees by a certain date, but, the plaintiff having failed to do so, the suit was dismissed:

Court Fees Act—(Continued).

Held, that an appeal lay against the decree dismissing the suit, and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned, S. 12 of the Court Fees Act notwithstanding (a).

Held, further that an appeal lay to the Court of the Judicial Commissioner, although the Subordinate Judge valued the suit at over Rs. 5,000, inasmuch as the plaintiff throughout contended that the value was below Rs. 5,000 as stated in the plaint. **Prokash Chandra Sarkar v. Bishambhar Nath Sahi**, 14 C.W.N. 343 5 Ind. Cas. 18.

BRETT and SHARFUDDIN, JJ.

References:—12 C.L.R. 148; 28 C. 334, relied on.

(15) S. 17—Object of. See VALUATION OF SUIT, No. 1, 41 P.R. 1910.

(15-a) S. 19 (1) (1)—Court-fee not paid—Application for grant of probate or letters of administration can be heard. See **WILL**, No. 15-a, 8 Ind. Cas. 695.

(16) *As amended by Act IX of 1899, S. 19, Sch. III Annexure B—Probate and Administration Act (V of 1881), Ss. 3, 4, 23 and 77—Letters of Administration for ancestral property by the son—Court fees payable thereon, amount of.*

A applied for letters of administration in respect of property standing in the name of his deceased father, but forming the joint ancestral property of the undivided Hindu family of which A and his father were the only members.

Held, that, before letters could be granted, he ought to pay stamp duty on the value of his father's share in the property, because it cannot be said that the father held his share "as trust property, not beneficially or with general power to confer a beneficial interest in it," within the meaning of Annexure B to Sch. III of the Court Fees Act (a).

Held, also, that the property was not covered by the words, "other property not liable to duty" in the same annexure (b).

Per Miller, J.—The applicant is a person to whom letters may be granted under S. 23 of the Probate and Administration Act. Ancestral joint family property passing to the applicant is property of the deceased within the meaning of S. 4 of the Act, and therefore included in the "property and credit" in S. 77, and in the "estate" in the definition of "administrator" in S. 3. Inasmuch as this property does not

Court Fees Act—(Continued).

in the present case "pass by survivorship" to any other than the applicant, there seems to be no doubt that the applicant is entitled to letters which will vest it in him. *In re, Dasu Manavala Chetty*, 6 M.L.T. 286 (F.B.)=19 M. L.J. 591=4 Ind. Cas. 1064=33 M. 93.

BENSON, O.C.J., MILLER and SANKARAN NAIR, JJ.

References:—(a) 23 C. 980; 29 B. 161; 19 W. R. 230. *In re T. Swaminatha Iyer (unreported)*, R. (b) 11 B.L.R. App. 39; 20 C. 575, F.

(17) S. 28—*Plaint—Insufficient stamp—Extension of time—Further extension after expiry of time originally granted—Power of Court to extend time ex post facto—Civil Procedure Code (Act V of 1908), S. 148.*

The Court can extend the time *ex post facto*, that is, it is competent to the Court to extend the time to put in the insufficient Court-fee on a plaint even after the expiry of the time originally granted. **Dewan Amir Husain Khan v. Nanhak Chand**, 6 Ind. Cas. 424 14 C.W.N. 882=12 C.L.J. 62.

CHATTERJEE and VINCENT, JJ.

References:—16 B. 263; 17 C. 1, R.; 34 C. 20 (F.B.); 1 C.L.J. 421; 11 C.W.N. 38; 1 M. L.T. 355; 20 C. 41; 27 C. 376; 9 C.W.N. 844; 2 C.L.J. 70, D.

(18) *Sch. II, Art. 11—Court-fees—Application for execution—Restitution—Civil Procedure Code (Act XIV of 1882), S. 533—Mesne profits—Limitation—Date of accrual—Cause of action—Limitation Act (XV of 1877), Sch. II, Art. 109.*

An application for mesne profits, made not by the plaintiffs, but by the defendants against whom the suit had been dismissed, by way of restitution under S. 533, Civil Procedure Code, is one under S. 244 (c) of the Code. Such application would be chargeable with Court-fees under Art. 11 Sch. II of the Act and not *ad valorem*. The cause of action for mesne profits arises on the day the rightful owner is restored to possession. **Gangadhar Marwari v. Lachman Singh**, 11 C.L.J. 541 6 Ind. Cas. 125.

BRETT and SHARFUDDIN, JJ.

(18-a) Art. 17 (3)—See No. 10, *supra*.

(19) Art. 17, cl. (iii) and cl. (vi), S. 7 (iv), (c)—Suit for partition—Prayer that previous solenamah and decree may be declared invalid—Consequential relief. See PARTITION, No. 6, 5 Ind. Cas. 582.

Court Fees Act—(Concluded).

(20) Art. 17 (vi)—Suit under S. 92, C.P.C.—Court-fee—Order to pay wrong Court-fee—Revision. See CIV. PRO. CODE (1908), No. 44, 14 C.W.N. 932.

Court of Wards.

Debt due by ward—Acknowledgment of liability by—Effect. See LIMITATION ACT (1877), No. 24, 6 Ind. Cas. 407.

Court of Wards Act.

- (1) See ACT I OF 1902 (MADRAS).
- (2) See ACT II OF 1903 (PUNJAB).

Courts Act.

See ACT XVIII OF 1884 (PUNJAB).

Covenant.

- (1) *Covenant, imposing burden—Covenant running with land—(Grant, construction of—Easement, grant of—Building grant.*

A covenant, which imposes a burden, does not ordinarily pass with the land so as to bind a subsequent owner; but the position is otherwise where there is privity of estate and the covenant is connected with or concerns the land or estate conveyed. If these conditions are fulfilled, the covenant will run with the land as readily as one conferring a benefit. When it is said that, in this class of cases, there must be a privity of estate between the covenantor and covenantee, it only means that the covenant must impose such a burden on the land of the covenantor, as to be in substance, or to carry with it, a grant of an easement or quasi-easement, or to be in aid of such a grant.

A restrictive covenant runs with the land if created for the benefit of the land conveyed or of that of which the grantor remains the owner, and is intended to be annexed to such land; in other words, when by the construction of a grant it appears that it was the intention of the parties to create or reserve a right in the nature of servitude in the land granted for the benefit of the other land owned by the grantor, no matter, in what form the intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden, thus created and imposed, will pass with the land to all subsequent grantees. The converse proposition also holds, because a grant may impose restrictions for the benefit of the land already sold as of that remaining in

Covenant—(Concluded).

his hands which he proposes to sell. The position is stronger when there are mutual covenants. **Doyal Chandra Das v. Chunilal Addy**, 12 C.L.J. 259.

MUKERJEE and CARNDUFF, JJ.

- (2) Stranger benefited by, if may enforce it. See ACT VII OF 1885 (BENGAL TENANCY), No. 13, 14 C.W.N. 470.

- (3) Covenant for quiet enjoyment—Breach—Limitation for suit. See LIMITATION ACT (1908), No. 13, 7 M.L.T. 229.

- (4)—running with land—what is—Covenant in putni lease—Effect. See LEASE, No. 20, 7 Ind. Cas. 346.

Creditor.

- (1)—having security for advance made by him—Right to sue for the original consideration. See HINDU LAW (DEBTS), No. 5, 7 A.L.J. 459.

- (2) Appointment of Receiver, if bars suit by. See RECEIVER, No. 4, 14 C.W.N. 653.

- (3) Attachment, interim order of—Prior to vesting order, and final order subsequent thereto—Title of the Official Assignee as against the attaching creditor. See INSOLVENT, No. 3, 7 M.L.T. 258.

- (4) Alienation—Fraud—Creditor. See ALIENATION, No. 2, 15 M.C.C.R. 104.

- (5) Preference of—Alienation by debtor to defeat execution—Legality. See EXECUTION OF DECREE, No. 19, 15 M.C.C.R. 108.

- (6)—having control of security—Right of. See MASTER AND SERVANT, No. 1, 12 Bom. L.R. 780.

Cremation.

Claim to officiate as priest at the cremation ceremony—License to employ cremation priest if can be granted—Agreement with Municipality to officiate as priest—Specific performance. See CIV. PRO. CODE (1908), No. 10, 12 C.L.J. 74.

Crim. Pro. Code.

- (1) Ss. 154, 146—Rights of receiver appointed under S. 146. See ACCRETION, No. 1, 14 C.W.N. 681.

Criminal Proceedings.

Pendency of civil suit—Stay of. See CIVIL SUIT, No. 1, 6 Ind. Cas. 191.

Cross-objections.

(1) Memo of—Right to urge—as against correspondents who have not appealed. See CIV. PRO. CODE (1908), No. 154, 6 N.L.R. 51.

(2)—or cross appeal when cannot be entertained. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

Crown.

(1) *Islands in the sea—Waste lands—Title of the—Presumption as to title—Suit for possession of land—Proof of possession for 20 years by claimant—Onus on the Crown to prove subsisting title—Adverse possession, proof of— if necessary.*

The rule of English Law that islands arising out of the sea belong *prima facie* to the crown would also apply in British India, in the absence of local usage or statutory enactment to the contrary (a).

Waste land, which is not the property of an individual or a community, belongs to the Government, and the title of the Crown may be regarded as similar to the title by escheat (b).

In a suit for possession of land, it was held, though the title was originally in the Crown, still, if the possession of the claimants for 20 years is proved, then the burden is on the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation. It is not necessary for the claimant to prove adverse possession for sixty years (c). **Ram Rau v. The Secretary of State for India**, 7 M.L.T. 128.

BENSON, O.C.J., and MUNRO, J.

References:—(a) Law of waters, Coulson and Forbes, 2nd Ed., p. 31; 13 M. 369, F. (b) *Reg. v. Keyn, considered*; 12 M. 369 (376) and 8 M.I. A. 500 (525), R. (c) 9 M. 175; 15 M. 315 and 19 M. 165, F.

(2) Prerogative of the—, over infants, lunatics and charity. See MAHOMEDAN LAW (WAKF), No. 5, 6 Ind. Cas. 219.

Cultivable land.

Building by tenant on—Injunction—Effect of not cultivating for thirty years. See LANDLORD AND TENANT, No. 15, 7 M.L.T. 223.

Currency Notes.

(1) *Appropriation of debt—Payment of half notes—Whether operates as a virtual transfer of property in the notes—Intention of parties—Trust—Contract Act (IX of 1872), S. 92.*

Currency Notes—(Concluded).

A and Co., Bankers, sent to the appellant their customer, who had lodged some money with them in fixed deposit, at his request, halves of currency notes, promising to send the other halves on acknowledgment, by the appellant, of the prior halves. Before they could send the other halves, A and Co., became insolvent. The appellant sued them for the amount.

Held, (agreeing with White, C.J., and differing from Miller, J.)...that, by sending the first halves of the currency notes, the senders, did not become bailees or trustees for the creditor, so as to entitle the latter to hold the first halves of the notes as a kind of a security for payment of the other halves, and that the creditor was not entitled to insist on the other halves of the currency notes being sent to him (a).

Per Abdur Rahim, J.—S. 92, Contract Act, does not apply to the present case, as that section occurs in the Chapter relating to sale of goods, and does not apply to money or currency notes, which are made legal tender by statute and are governed by different considerations (b). **Koti Venkatramiah v. The Official Assignee of Madras**, 5 Ind. Cas. 202—33 M. 196.

MUNRO, ABDUR RAHIM and BAKEWELL, JJ.

References:—(a) 29 L.J.Q.B. 172; 3 El. and El. 22; 6 Jur. (N. S.) 977; 2 L.T. 373; 8 W. R. 561; 5 Ch. D. 786; 46 L.J. Ch. 832; 36 L. T. 529, R. (b) 1 Bom. L.R. 339 at p. 341; 7 M.H.C.R. 233; 25 B. 702, R.

Custom.

1.—GENERAL.

2.—PUNJAB.

—1—General.

(1) *Usage—Local custom—Customary law—Nature of usage—Proof of usage—Nature of proof required—Bengal Tenancy Act (VIII of 1885), S. 23—Occupancy raiyat—Use of land of holding—Impairing value or rendering unfit—Bandh—Digging tank—Making bricks.*

A usage or local custom or customary right is not the same thing as customary law.

A usage or local custom, under which occupancy rights are transferable, need not be of ancient origin; it may have been established within recent times and within a limited number of years; it may even be in course of growth, and require evidence in each case to

Custom—(Continued).**—1.—General—(Continued).**

support it; but it must be proved by satisfactory and conclusive evidence; it must have been acted upon in practice so long and invariably as to show that by common consent it has been accepted as a governing rule, and it must be so well known and acquiesced in as to be considered an ingredient imported into all contracts entered into by persons affected by it (a).

In order to establish the existence of such a custom, the person alleging it must prove that holdings in the locality have been generally sold for a series of years with the knowledge of the landlord and without his consent. But while such usage is in process of establishment, it is open to the landlord to retard its growth by refusing to acknowledge the validity of transfers.

A mere finding that there have been many sales in the locality is not, of itself, sufficient to prove the existence of the custom. And where a custom has been proved that payment of a *nazar* to the landlord is necessary to validate a transfer, this implies that the consent of the landlord to the transfer is necessary. At the same time, it is not open to a landlord to allow transfers to be made without objection, and then to come forward and demand *nazar* for registering the name of the transferee; that is, where the custom of the transferability has been proved otherwise to exist, the refusal of the landlord to effect a mutation of names until the tenant pays a *salami* would not be sufficient to prove that the usage did not exist.

Where an occupancy *raiya* constructed a *bandh* with the permission of the executive authorities, which protected the land from the influx of salt water, and had dug a tank on one *bigha* out of 63 *bighas* of the holding, and in a few *cottahs* he had dug out clay and made bricks for building a set of masonry steps to the tank.

Held, that the occupancy *raiya* had not improperly used the land under S. 23 of the Bengal Tenancy Act (b). **Raja Sati Prasad Garga v. Manmatha Nath Kar**, 6 Ind. Cas. 291

BRETT and SHARFUDDIN, JJ.

References:—(a) 7 M.I.A. 263; 4 W.R. 8 (P.C.); 20 W.R. 154; 3 M.H.C.R. 75; 3 C.W.N. 23, R. (b) 34 C. 718 (P.C.); 2 M.L.T. 399; 11 C.W.N. 794; 6 C.L.J. 19; 9 Bom.L.R. 750; 17 M.L.J. 361 (P.C.), R.

Custom—(Continued).**—1.—General—(Concluded).**

(2) Special family custom contrary to *Milnat-shara*—Proof—Value of entries in *wajib-ul-arz* as evidence of custom. See HINDU LAW (SUCCESSION), No. 10, 14 C.W.N. 770.

(3) Setting up special custom—Burden of proof. See GOLDEN TEMPLE, AMRITSAR, No. 1, 100 P.W.R. 1909.

(4) Jains—Adoption—Law applicable—Effect of—Evidence limited to small number of instances—Effect. See JAINS, No. 1, 14 C.W.N. 545.

(5) Essentials of valid custom. See CIV. PRO. CODE, (1908), No. 10, 12 C.L.J. 74.

(6) Transfer of right of residence on the site by tenant—Custom—Evidence of custom. See LANDLORD AND TENANT, No. 26, 6 Ind. Cas. 580.

(7) Punjab (Custom)—Value of precedents where custom is admitted. See PRE-EMPTION No. 47-a, 96 P.R. 1910.

(8) Who are governed by custom. See CUSTOMS (PUNJAB—ALIENATION), No. 29, 90 P.R. 1910.

(9) Proof of—Evidentiary value of statements in District Manuals. See LANDLORD AND TENANT, No. 53, 8 Ind. Cas. 330.

—2.—Punjab.

1.—ADOPTION.

2.—ALIENATION.

3.—INHERITANCE AND SUCCESSION.

4.—MARRIAGE.

5.—PRE-EMPTION.

6.—UNCHASTITY.

7.—WILL.

—1.—Adoption.

(1) Appointment of an heir, effect of—Right of adopted son and his son to succeed in the natural family—Exception in Eastern Punjab.

In Punjab the ordinary rule under the customary law is that, if an adoption (or rather the ordinary customary appointment of an heir) takes place, the adopted son does not lose the right of succeeding in his natural family, except in the Eastern Punjab (e.g., in Delhi and Karnal districts) (a), where the appointment of an heir approaches more nearly to the adoption of the Hindu Law, and the rule applies *a fortiori* in the case of the son of the adopted

Custom—(Continued).**—2.—Punjab—(Continued).****——1.—Adoption—(Continued).**

son (b). **Jhanda Singh v. Kesar Singh**, 37 P. R. 1910=62 P.W.R. 1910=6 Ind. Cas. 712.

RATTIGAN, J.

References:—Para 48, Digest of Civil Law for Punjab and 6 B.P.R. 1898, R.; 45 P.R. 1884; 42 P.R. 1886; 9 P.R. 1880, R. & F.; 51 P.R. 1906 and 100 P.R. 1906, R.

(2)—Hindu Jats of Hoshiarpur Tehsil—Adoption of brother's daughter's son invalid.

Found, there is no custom prevailing among Hindu Jat Agriculturists of the Hoshiarpur Tehsil in the Hoshiarpur District, according to which adoption of brother's daughter's son is valid without the consent of the reversioners of the adopter. **Mohan Singh v. Desa Singh**, 69 P.W.R. 1910.

REID, C.J.

References:—C. 64 P.R. 1880; C. 86 P.R. 1885; C. 43 P.R. 1886; C. 50 P.R. 1893 (F.B.); C. 34 P.R. 1899 (F.B.); C. 79 P.R. 1901; C. 116 P.R. 1901; C. 86 P.R. 1904; C. 24 P.R. 1905; C. 81 P.R. (1907)=115 P.W.R. 1907; C. 134 P.R. (1907)=85 P.W.R. 1907; C. 79 P.R. 1901; C. 116 P.R. 1901, D.

(3) Jains of Delhi—Adoption—Sonless widow's power to adopt—Nature and extent—Necessity of husband's authority—Necessity for ceremonies—Restrictions as to age of adopted boy—Adoption of husband's brother—Validity—Applicability of Hindu Law.

Held, that, according to the custom prevailing among the Jains of Delhi, (1) Adoption is a purely secular transaction designed, *inter alia* to perpetuate the name and family of the adopter without any religious meaning.

(2) No special ceremonies or rules are necessary to give legal effect to an adoption (a).

Though certain ceremonies or rules are observed in certain localities as a matter of habit, all that is actually required is that there shall be due publication of the adoption by some recognised means among the brotherhood, as for instance, by public distribution of *ladus* in token of adoption having taken place, as is done among the Jains of Delhi.

(3) There is no limit as to the age of the adopted son. It cannot be maintained that the adopted son must be younger than the adoptive mother.

Custom—(Continued).**—2.—Punjab—(Continued).****——1.—Adoption—(Concluded).**

(4) A sonless widow may adopt without the authorisation of her husband or of anybody.

(5) A married man (even with children) may be adopted (c).

(6) The adoption of the husband's brother is legal.

If no special custom is proved to obtain as regards any matter among the Jains, Hindu Law prevails as the rule of decision (d). **Manak Chand v. Munna Lal**, 95 P.R. 1909=212 P.L.R. 1910.

REID, C.J. and ROBERTSON, J.

References:—(a) 8 A. 319; 29 A. 495; 30 A. 197, R. (b) & (c) 29 A. 495; 30 A. 197, R. (d) 1 A. 688 (P.C.); 4 C. 744; 6 I.A. 15; 3 A. 55, R.

——2.—Alienation.

(1) Custom—Alienation—Mortgage of ancestral property—Evidence—Relevancy of judgment not inter partes—Former suit by mortgagee to enforce his rights—Subsequent suit by his sons and reversioners to protect their interests—Diametrically opposite findings in two cases illegal—Necessity—Just debt—Alienee antecedent creditor.

Held, that, where two suits relate to the same subject-matter between the parties, technically different, but practically the same, the finding in the previous suit on any one of the issues, common to both, which has become final, is not only relevant, but is also a very valuable piece of evidence, and though not conclusive and amounting to *res judicata*, is nevertheless not liable to be disturbed in the subsequent suit, except under very peculiar circumstances, particularly when the materials on both the records are nearly of equal weight and the subsequent suit has been instituted apparently in collusion with the defeated party in order to have the same questions tried again (a).

Held, also, that, in the absence of any proof of wanton waste and reckless extravagance, the money actually borrowed in the ordinary course of dealings whether from the alienor or from a third person is a "just debt." The mere fact that it seems to have swollen in a short time does not make any difference.

The word "just" has reference to the nature of the debt and not to the person who has advanced the money (b).

Custom—(Continued).**—2.—Punjab—(Continued).****——2.—Alienation—(Continued).**

To arrive at diametrically opposite conclusions upon the same materials in two cases relating to the same subject-matter, though disposed of at different times, reflects the greatest discredit on the trying Judge; and he is guilty of gross carelessness if he decides the subsequent case without any reference to the former proceedings. **Runganath Das v. Ismail**, 189 P.W.R. 1909.

KENSINGTON and CHITTY, JJ.

References :—(a) XXIV Bom. 591, F. (b) 11 P.R. 1899, F.

- (2) *Alienation—Custom—Mortgage—Suit by reversioners for possession—Uncertainty of widow's death—Competency of Court to pass declaratory decree—Specific Relief Act (I of 1887), S. 42.*

Held, that, where the reversioners of a deceased childless proprietor sue for possession of his property in the hands of alienees, alleging want of consideration and necessity, and it cannot be shown whether his widow is dead or living, the Court is justified in passing a decree declaring what is the valid charge against the property, on payment of which they can get its possession after her death. **Sahib Dyal v. Achhru**, 1 P.W.R. 1910 = 5 Ind. Cas. 587.

ROBERTSON and SHAH DIN, JJ.

- (3) *Alienation—Custom—Abandonment of claim to ancestral property in litigation—Incompetency of heirs to object.*

Held, that, in case of a dispute relating to ancestral immoveable property, if a litigant abandons his claim thereto or relinquishes any interest therein, his act cannot be treated such an alienation as would give his heirs or reversioners the customary right of contesting its validity for want of necessity or consideration (a). **Miran Baksh v. Gamun**, 3 P.W.R. 1910 = 5 Ind. Cas. 539.

SHAH DIN, J.

References :—(a) 15 P.R. 1903; 97 P.R. 1906; 37 P.R. = 156 P.W.R. 1907, R.

- (1) *Alienation—Custom—Acquiescence—Effect of—Necessity—Proof—Antecedent creditor—Concurrent finding—Lekha Bahi—Benefit of doubt.*

Held, that :

(1) A reversioner by recognizing an alienee's right is stopped from disputing validity of the alienation.

Custom—(Continued).**—2.—Punjab—(Continued).****——2.—Alienation—(Continued).**

Realizing revenue in the capacity of a *Tam-bardar* or consenting to partition of the land are acts of acquiescence.

The share of the reversioner who has acquiesced in the alienation goes to the alienee.

(2) Strict proof is not required of the passing of consideration or of the necessity, where the alienation is more than twenty years old. But where the antecedent creditor is the alienee himself and is in a position to prove necessity, lapse of long time is not very much material.

(3) A finding is not concurrent where the appellate Court does not expressly deal with the question of fact decided by first Court and fails to give its own independent opinion thereon.

(4) Benefit of doubt is to be given to defendant ordinarily.

(5) *Lekha Bahi* alone is not of much value to prove either consideration or necessity. **Sewa Singh v. Ganeshi Lal**, 8 P.W.R. 1910 = 5 Ind. Cas. 592.

RATTIGAN and SHAH DIN, JJ.

- (5) *Alienation—Gift by a Chhimba occupancy tenant of Mauzia Bahman Kalan, Lahore District, of his ancestral holding to his daughter's son's—Suit by reversioners to contest the alienation maintainable even after it has been successfully challenged by the landlords—Punjab Tenancy Act (XVI of 1887), Ss. 59, 60, &c.—Presumption of custom that the tenant is incompetent to alienate—Onus probandi.*

Held, that where the reversioners of an occupancy tenant are entitled to succeed to his holding under the Punjab Tenancy Act (XVI of 1887), in the case of his dying sonless, they can maintain a suit to declare that by custom he is incompetent to alienate his holding and that its alienation by him shall not affect their reversionary rights, if any, notwithstanding that the alienation has successfully been challenged by the landlords according to provisions of the said Act.

Held, also, on the analogy of 17 P.R. 1885, 30 P.R. 1896, 51 P.R. 1901, 6 P.R. 1902, 96 P.R. 1905 and 39 P.R. 1906, that, as agriculture has formed the sole occupation of the family of the *Chhimba* parties, in this case, for several generations, and as they appear to have

Custom—(Continued).**—2.—Punjab—(Continued).****———2.—Alienation—(Continued).**

settled in the village with the Jat proprietary body, their landlords, the presumption is that they have adopted the custom of Jats as regards inheritance; and that the donees have to prove that the donor (B) is competent to gift his ancestral occupancy holding to them, and as they have failed to show, either that by custom B is competent to do so, or that a Jat sonless proprietor of the village can gift his ancestral holding to his daughter's son, the gift in dispute is invalid and shall not affect the reversionary rights of S and others.

Obiter.

Held, further, that in such a case the said right of the reversioners is not enforceable where the tenant's alienation, allowed by the Punjab Tenancy Act (XVI of 1887), is in favour of the landlord (a). **Bhag Singh v. Sharam Singh**, 60 P.W.R. 1907=38 P.R. 1909.

RATTIGAN and LAL CHAND, JJ.

References :—(a) 83 P.R. 1895; 89 P.R. 1898 (F.B.); 49 P.R. 1889; 69 P.R. 1900; 12 P.R. 1904; 21 P.R. 1905, F.; 31 P.R. 1896 (F.B.); 115 P.R. 1901; 5, 12 and 58 P.R. 1906, D.

(6) *Pathans of Gurdaspur District—Gift of ancestral land in favour of daughter's son—Presence of near collaterals—Validity.*

A sonless *Pathan* proprietor of the Gurdaspur District has by custom power to make a gift of his ancestral land in favour of his daughter's son, and such gift is valid in spite of the existence of his near collaterals. **Ismail v. Ismail and Dost Muhammad**, 21 P.R. 1910=31 P.W.R. 1910=5 Ind. Cas. 901.

REID, C.J. and ROBERTSON, J.

(7) *Sale by a childless male managing member for the benefit of the family—Inaction for 9 years—Acquiescence—Necessity—Zati zururat—Revision—S. 70 of Punjab Act, XVIII of 1884.*

Held, that, a sale of ancestral holding effected by the managing members of the family, in the absence of another member who did not repudiate it for nine years, whereby previous mortgages by the common ancestor were wiped out and more than half of it was brought back unencumbered to them, is not such an alienation in which the Chief Court should interfere on the revision side, inasmuch as it is for the benefit of the family, and inaction of

Custom—(Continued).**—2.—Punjab—(Continued).****———2.—Alienation—(Continued).**

the objecting member for nine years amounts to acquiescence on his part.

The amount mentioned in the deed as paid in cash before the Sub-Registrar for *zati zururat* was also allowed. **Deva Singh v. Haku**, 39 P.W.R. 1910=5 Ind. Cas. 997.

RATTIGAN, J.

(8) *Customary law—Kakuts of Thirpal in the Chakwal tahsil, Jhelum—Gift by father to married daughter whose husband is Khanadamad, valid against collaterals.*

Among *Kakuts* of Thirpal in the Chakwal tahsil, Jhelum, a gift by a father to his married daughter, who has never left her father's house and whose husband is Khanadamad, is valid against collaterals of the father. **Muhammad Hussain v. Muhammad and Mussamat Bholi**, 31 P.R. 1910=48 P.W.R. 1910=6 Ind. Cas. 653.

REID, C.J.

Reference :—72 P.R. 1900.

(9) *Custom—Alienation by sonless proprietor—Gift to daughter's sons—Reversion on death of one of them—Right of collaterals of donor.*

A sonless proprietor made a gift of ancestral land in favour of his two daughter's sons. On death of one of them, the land was mutated in the name of his widow. She married her husband's surviving brother, and with her consent, the land was mutated in his name. The collaterals of the proprietor sued for a declaration that the latter transfer effected by the widow would not affect their reversionary rights.

Held, that the suit did not lie, for the transfer was made in favour of the surviving donee who was grandson of the original donor; the plaintiffs, not having contested the previous gift, were not competent to challenge the later one. **Mangal Singh v. Hakim Singh**, 138 P.L.R. 1909=13 P.L.R. 1910.

JOHNSTONE and SCOTT-SMITH, JJ.

(10) *Dower—Unreasonable amount of dower or expenses on marriage of a life tenant—Deed of dower (Kabin-nama) creating a charge of Rs. 100 or more on immoveable property requires registration—Section 17 of Act III of 1877—Expenses incurred on his illness—Punjab Courts Act, XVIII of 1884, sections 40 and 70 (a).*

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

Held that :

(1) A *Kabin-nama* or deed of dower, hypothecating immoveable property of the value of Rs. 100 or more for its satisfaction, is compulsorily registrable under section 17 of Act III of 1877.

(2) In settling a dower on a wife as well as in incurring marriage expenses, a tenant for life is bound to keep within reasonable limits and to spend in accordance with his rank and social position. Anything in excess should be disallowed as not being for necessity and constituting a charge on the ancestral land which might go to the reversioners.

(3) Unreasonable expenses incurred on his illness by his wife or her family members is not such a necessity so as to be binding on the reversioners.

(4) An appeal is not competent in such a suit falling below Rs. 250 even where the Courts below differ. **Murad v. Ghulam Fatima**, 71 P.W.R. 1910 = 6 Ind. Cas. 931.

ANDERSON, J.

(11) *Sale by limited owner—No necessity for one-sixth of consideration—Collusive suit by son—Sale not set aside—Vendee not to see to application of money.*

Held, that, a sale by a limited owner of his ancestral land cannot be set aside on the collusive usual declaratory suit of his son, even if one-sixth of the consideration is not proved for necessity or appears fictitious, specially where it is not shown that the vendee is a debauchee or spend thrift and has mismanaged his affairs.

Held, also, that a vendee is not bound to see to the application of the money to its ostensible purpose. **All Gauhar v. Mahandra**, 64 P.W.R. 1910.

REID, C.J. and CHEVIS, J.

References :—8 P.R. 1908 = 33 P.W.R. 1908, Civil Appeal No. 265 of 1909, Civil Appeal No. 1189 of 1907, F.; 27 P.R. 1909 = 33 P.W.R. 1909, D.; 97 P.R. 1901, R.

(12) *Succession—Sale by widow—Barbers of Shahabad now in Karnal, formerly in Ambala District—Reversioners can object—Necessity a question of fact—Non-interference with finding of fact in revision under S. 70 (b) of Act XVIII of 1884—Alienee not to see to application of money.*

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

Found that, in matters of alienation and succession (*nais*) barbers of Shahabad, now in the Karnal but formerly in the Ambala District (who sometimes own land but are not mainly dependent on agriculture for their support), are not governed by Muhammadan Law, but by ordinary agricultural custom; consequently, in the absence of legal necessity, a widow is incompetent to alienate her husband's immoveable property without the consent of his reversioners.

In cases of persons of certain class of semi-agriculturists who are converts from Hinduism, living in a part of the country largely inhabited by Hindu cultivators, the presumption of their adopting the customs of agriculturists of another religion is not so much as of their falling into line with the customs of persons following the religion which those persons themselves originally professed.

The fact that the widows are found to succeed to the whole estate of their husbands, while the daughters are excluded, further points to the applicability to them of ordinary agricultural custom.

Held, that :

(1) The question of necessity is a pure matter of fact, and the lower appellate Court's finding thereon cannot be interfered within revision even under S. 70 (b) of Act XVIII of 1884.

(2) When a vendee has satisfied himself that his vendor has necessity to raise the money, it is no part of the former's duty to see that the latter has duly applied the money. **Karm Bakhsh v. Nabl Baksh**, 67 P.W.R. 1910.

CHEVIS, J.

References :—25 P.R. 1890; 5 P.R. 1906; 101 P.R. 1906; 115 P.R. 1907 = 207 P.W.R. 1907; 59 P.R. 1908 = 121 P.W.R. 1908; 17 P.R. 1909 = P.W.R. 1908; 58 P.R. 1909 = 97 P.W.R. 1909, D.

(13) *Alienation—Custom—Hindu Law—Suit by son to contest alienation of ancestral property by his father—Definition of ancestral property—Onus of proving ancestral property on son—Ancestral property mixed up with self-acquired.*

Held, that the onus of proving that certain property is ancestral lies on the son who contests its alienation by his father on the ground of its being ancestral.

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

Held, also, that, unless the son proves that the property has come to his father by descent from a lenial male ancestor in the male line through whom the son also in the like manner claims, it is not to be deemed ancestral in Hindu law.

Held, further, that when the ancestral property is so mixed up with the self-acquired that it is impossible to differentiate between the two, the whole of it is to be regarded as self-acquired. **Attar Singh v. Thakar Singh**, 128 P.W.R. 1908 (P.C.) = 42 P.R. 1910 = 6 Ind. Cas. 721 = 12 C.W.N. 1049 = 35 C. 1039 = 8 C.L.J. 359 = 18 M.L.J. 379.

LORDS ROBERTSON, ATKINSON, COLLINS,
SIR ANDREW SCOBLE, and SIR
ARTHUR WILSON.

- (14) *Gift by a sonless male proprietor in favour of sons of daughter who has married a near collateral—Validity—Mirali Sials of Kabirwala tahsil, Multan District.*

Among *Mirali Sials* of Kabirwala tahsil, a gift of ancestral land made by a sonless male proprietor in favour of the sons of a daughter, who has married a near collateral of the donor, is valid. **Shahamad v. Naurang**, 53 P.R. 1910.

SHAH DIN and CHEVIS, JJ.

Reference:—Rattigan's Digest of Customary Law, Art. 23, Proviso R.

- (15) *Jats — Alienation of ancestral land—Presence of agnates—Necessity for sale, exception to general rule—Sahu Jats of Mauza Dudah Sahu, District Montgomery.*

Among Jats generally, ancestral land is inalienable, in presence of agnates, except for "necessity," but this general rule is not applicable to Sahu Jats of Mauza Dudah Sahu, District Montgomery, where the common village bond has been broken by the introduction into the proprietary body of persons of different independent tribes whose lands all intermix, or where many uncontested alienations have taken place in the presence of agnatic relatives of the alienors. **Fazil v. Sadan**, 51 P. R. 1910 = 6 Ind. Cas. 986.

JOHNSTONE, J.

- (16) *Ghirths of Mauza Baldhar, Khangra tahsil—Alienation by widow—Right of sisters of last male owner to contest alienation in the absence of collaterals.*

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

Among Ghirths of Mauza Baldhar, a sister of the last male owner is, in the absence of reversioners, entitled to contest that an alienation by the widow was not for necessity, and to obtain a declaration that the alienation does not affect her rights on the death of the widow. **Missammatt Kokhan v. Mussamut Lakhoo**, 60 P.R. 1910 = 92 P.W.R. 1910 = 7 Ind. Cas. 470.

REID, C.J. and RYVES, J.

References:—80 P.R. 1885; 11 P.R. 1888; 47 P.R. 1890; 59 P.R. 1892; 24 P.R. 1894; 5 P.R. 1895; P.R. 1898; 117 P.R. 1901; 28 P.R. 1904; 94 P.R. 1905; 95 P.R. 1905; 19 P.R. 1906; 72 P.R. 1906; 72 P.R. 1907; 44 P.R. 1909, *R.*

- (17) *Brahmins of Ajnala, District, Amritsar—Alienation of ancestral property—Presumption in favour of custom when arises.*

Held that the Brahmins of Ajnala follow agricultural custom and not Hindu Law, as their family for the most part lives, and has lived in past generations, by agriculture, has given up priestly functions, and its members do not wear their heir as Brahmins do; and they can therefore contest a transaction, which in effect was an unauthorised and unlawful alienation of ancestral property.

Ordinarily one most important test is, whether the Brahmins in question are a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of custom. **Bishen Das v. Ram Dhan**, 63 P.R. 1910 = 100 P.W.R. 1910 = 7 Ind. Cas. 483.

JOHNSTONE, J.

References:—58 P.R. 1906; 3 P.R. 1908; 87 P.R. 1909; 103 P.R. 1902, *R.*

- (18) *Childless proprietor borrowing money for marriage and for enlistment in cavalry regiment—Duty of lender.*

Where a childless proprietor mortgages ancestral land and borrows money for his intended marriage and for his project of enlisting in a cavalry regiment; but neither purpose was effected though the preliminary steps were taken towards carrying out each, such a mortgage is for "necessity" and his binding on reversioners. The lender, in such cases, is not bound to see what the borrower actually did

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

with the money, provided the lender, after due enquiry, had reason to believe that the borrower really intended to carry out the objects in view. **Pal Singh v. Bur Singh**, 65 P.R. 1910 = 111 P.W.R. 1910 = 7 Ind. Cas. 480.

JOHNSTONE, J.

Reference :—65 P.R. 1900, F.

(19) *Dhamrayas of Shahpur District—Gift of ancestral land by childless proprietor to his sisters—Rights of reversioners.*

Among Dhamrayas, a small endogamous agricultural tribe, of the Shahpur District, the collateral reversioners of a childless proprietor are entitled to a declaration that a gift of the whole of his ancestral land to his sisters shall not affect their reversionary rights. Held that the burden of proving the validity of the alienation, against the collaterals, was on the sisters, who failed to discharge it. **Mussammat Bhagan v. Jahana**, 67 P.R. 1910 = 7 Ind. Cas. 486.

REID, C.J., and RYVES, J.

(20) *Kahuts of tahsil Chakwal, Jhelum District—Bequest by a childless proprietor to sister's sons.*

Among Kahuts of tahsil Chakwal, a bequest of ancestral land by a childless proprietor, with the consent of his brother, to his sister's sons, who were agnatically related to him in the fifth degree and have also rendered him services, is valid. **Khuda Baksh v. Shamas**, 68 P.R. 1910 = 7 Ind. Cas. 489.

JOHNSTONE, J.

References :—72 P.R. 1900; 84 P.R. 1900, R.

(21) *Sale of a house owned by a non-proprietor in Mouzia Talwandi Kalan, Tehsil Jagraon District Ludhiana—Competency of the proprietary body to object—Right of alienee—Construction of wajib-ul-arz—Effect of attesting the deed of sale.*

Found, following the provisions of the *wajib-ul-arz*, against three instances of sale and two of mortgages, that custom exists in *Mouzia Talwandi Kalan*, in *Tehsil Jagraon* in *Ludhiana District*, whereby non-proprietors have restricted power of alienating their houses.

Held, also, that, when the custom of a village does not empower non-proprietors to sell the site, but allows them to sell the materials of

Custom—(Continued).**—2.—Punjab—(Continued).****—2.—Alienation—(Continued).**

their houses, the vendee does not acquire the right of residence therein, but can remove the materials; and that, if he fails to do so within reasonable time, the proprietary body have a right to demolish the building and take possession of the site, leaving the vendee to take away the materials whenever he likes.

Held, further, that a member of the proprietary body is estopped from contesting the alienation of the house, either by attesting the sale-deed of non-proprietor of his house or by appearing as a witness before the Sub-Registrar at the time of registration. **Mallal alias Mal Singh v. Munshi Ram**, 96 P.W.R. 1910 = 69 P.R. 1910 = 7 Ind. Cas. 711. 125 P.L.R. 1910.

SHAH DIN, J.

(22) *Sayads of mouza Tal Khalsa, Rawalpindi District—Alienation of self-acquired property by mother and widow of last male owner—Collateral's right to contest—Legal necessity.*

Among Sayads of mauza Tal Khalsa, collaterals of the last male owner residing in another village are entitled to contest an alienation of self-acquired land made by the mother and widow of the deceased without necessity (a). **Channan Shah v. Amar Das**, 71 P.R. 1910 = 113 P.W.R. 1910 = 142 P.L.R. 1910.

SHAH DIN, J.

References :—(a) 110 P.R. 1906, F.; 64 P.R. 1893; 18 P.R. 1896, R.

(23) *Necessity—Ancestral property defined—Alienation to obtain money, etc., for recovering ancestral property—Unconscionable bargain—Incompetency of reversioners to contest it when property is not ancestral.*

1. (a) Immoveable property left by an ancestor, who is the common ancestor of the alienor and the reversioners, is ancestral for the purposes of the Punjab Agricultural custom relating to alienation.

(b) In case of a village originally founded by the common ancestor, the land in the hands of a co-sharer which has been left by other co-sharers who absconded or absented themselves in straightened circumstances, is included in the category of ancestral property (a).

2. However monstrous and unfair the conditions, etc., of an alienation of immoveable property may be, a reversioner under the Punjab

Custom—(Continued).**—2.—Punjab—(Continued).****———2.—Alienation—(Continued).**

Agricultural Customary Law has no *locus standi* to successfully contest that alienation, if the property is not ancestral.

3. A contract by a litigant to give, to certain persons including a pleader who agreed to help him with money and legal aid required to carry on litigation, property worth many times the expenses required for the said litigation, out of the property in dispute, is absolutely unconscionable and not enforceable by a Court of Justice, irrespective of the misconduct of the pleader which is to be dealt with separately according to the Legal Practitioners Act, XVIII of 1879.

4. A reasonable amount required to pay a pleader engaged to recover property is a legal necessity. **Thakar Singh, through Hukm Kaur v. Khark Singh**, 109 P.W.R. 1910.

ROBERTSON and ANDERSON, JJ.

References :—(a) (C. 31 P.R. 1894), *F.*; and (C. 81 P.R. 1901), *D.*

(24) *Alienation—Burden of proof—Consideration and necessity—Suit by alienee for possession.*

The *onus* of proving that an alienation is for consideration and necessity is always, in the first instance, upon the alienee, whether he is suing for possession against the reversioners of the alienor, or the reversioners are suing for cancellation of the alienation. **Hira Singh v. Ruldu Singh**, 7 Ind. Cas. 49.

SCOTT-SMITH, C.J.

(25) *Gift—Donee dying without children.*

Held that the plaintiff, having failed to prove that he was a collateral of the donor, was not entitled to claim the gifted land on the ground that it reverted to him on the death of the donee or his descendants. **Viru v. Imam Din**, 79 P.L.R. 1910.

SHAH DIN, J.

(26) *Custom—Alienation by sonless male proprietor—Suit by reversioner—Delay in suing—Necessity—Burden of proof.*

Where a suit to set aside an alienation by a sonless male proprietor is filed with great delay a strict proof of payment of consideration or of necessity is not to be required from the alienee. **Alla Dia v. Sandha**, 78 P.L.R. 1910.

JOHNSTONE, J.

(27) *Alienation by sonless male proprietor—Ancestral property—Property acquired by*

Custom—(Continued).**—2.—Punjab—(Continued).****———2.—Alienation—(Continued).**

gift from maternal uncle is self-acquired property in the hands of donee—Consideration—Onus probandi.

Property acquired by a person from his maternal uncle by gift is self-acquired property in the hands of the donee, and his power to alienate the property is not restricted.

In a suit in which the power of the alienor to sell was questioned and the passing of consideration was denied, it was found that the sale was by a registered deed, that the plaintiff got possession of part at least of the land in suit, and that at the time of mutation the defendant verified the sale on his behalf and on behalf of his brothers.

Held that all these circumstances gave rise to a strong presumption in favour of the passing of consideration under the sale-deed, and it was, therefore, for the defendant to show that no consideration passed. **Meda v. Mohan Lal**, 93 P.L.R. 1910.

SHAH DIN, J.

(28) *Succession—Alienation by sonless proprietor—Widow, alienation by—Partial surrender of estate in favour of reversioners—Suit for possession by reversioner—Locus standi of reversioner to contest alienation by sonless proprietor in the life-time of his widow—Amendment of plaint—Conversion of suit for possession into suit for declaration that alienation was without necessity.*

After the death of a sonless proprietor, his reversioners sued for possession of land mortgaged by him with the defendants. They contended, *inter alia*, that, the proprietor having left a widow, the reversioners had no right to sue.

It appeared that, soon after the death of the proprietor, a woman, who had lived within for nearly 16 years and bore him a daughter who was married in the brotherhood, claimed mutation in respect of his estate, and the claim was supported by the *lambardar* and *patwari* of the village. During the course of mutation proceedings, she executed an agreement, whereby she agreed to accept maintenance in lieu of the lands left by her husband, but did not stick to the agreement and pressed her claim to mutation. The reversioners prevailed upon her

Custom—(Continued).**—2.—Punjab—(Continued).****——2.—Alienation—(Continued).**

to allow mutation in their favour of the land mortgaged, keeping with her only a small portion of the remaining land.

The reversioners urged that the woman was not the widow of the deceased, and, even if she was, they were entitled to sue for possession, for she had surrendered the land to them, and that in any case they were competent to challenge the mortgage as one made without necessity.

Held, that, although evidence on record was meagre, the fact of the woman being the widow of the deceased was established.

(2) That the plaintiffs were not competent to sue for possession, as they had no right to possession during the life-time of the widow, and a partial surrender by a widow of her life-estate was not valid, and no right was validly conferred on the reversioners by the mutation in their favour.

(3) That the claim to possession on the allegation of the woman not being widow of the proprietor being inconsistent with the claim for a declaration admitting her status of a widow, amendment of the plaint could not be allowed on appeal. **Buta Singh v. Sarkar Khushal Singh**, 151 P.L.R. 1910.

RYVES and SCOTT-SMITH, JJ.

(29) *Khokars of Gujrat town—Governed by Muhammadan Law—Custom—Who are governed by.*

The *Khokars*, who live in the town of Gujrat and do not live by agriculture, are not governed by custom but by Muhammadan Law.

Where the parties are not agriculturists or members of a village community, but live in a city and earn their livelihood by service, they are not governed by custom (a). **Balj Nath v. Gulab Din**, 90 P.R. 1910 (Civ.).

SCOTT-SMITH, J.

References :—(a) 107 P.R. 1887, F.; 55 P.R. 1908, 124 P.R. 1908, R.

(29-a) *Mukurridari rights, creation of—Whether amounts to permanent alienation.*

The creation of *Mukurridari* rights is equivalent to permanent alienation. **Musammatt Begam Jan v. Qadar Khan**, 85 P.R. 1910 (Civ.).

RYVES, J.

Reference :—10 P.R. 1896 (Rev.), followed.

Custom—(Continued).**——2.—Punjab—(Continued).****——2.—Alienation—(Concluded).**

(29-b) *Alienation by last male owner—Suit for possession by collaterals after death of his widow, but more than 12 years after the alienation—Limitation.* See ACT I OF 1900 (PUNJAB LIMITATION), No. 1, 62 P.R. 1910.

(30) *Bunjahi Khatriis of Nara—Law applicable—Burden of proof as to agricultural custom.* See HINDU LAW (ALIENATION), No. 12, 85 P.W.R. 1910.

(31) *Sunni Sayads of Mauzia Chama—Gift by widow to daughter—Incompetency of reversioners to contest.* See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 15, 81 P.W.R. 1910.

——3.—Inheritance and Succession.

(1) *Succession—Pujari of Akal Bungi Shrine—Its income—1859—Dastur-ul-Aml of Golden Temple (Darbar Sahib)—Incompetency of sister's son to succeed.*

Held, that the 1859, Dastur-ul-Aml prepared originally for the Golden Temple, Amritsar (Darbar Sahib) applies also to Akal Bunga shrine as regards succession to the share in its income. According to it the only persons entitled to succeed to share in the income of the shrine are the holder's male lineal descendants. A sonless holder may subject to certain restrictions laid down therein, alienate his share by deed to a daughter's son or a disciple, but the right of a sister's son is neither recognized by it nor by the custom of the institution. **Sardar Arjan Singh v. Kishna Singh**, 101 P.W.R. 1909.

STODDON and RIVAZ, JJ.

(2) *Succession—Gift by a widow of a Sayed of Kharkunda in Rohtak District in favour of her husband's maternal relation—Objection by her husband's father.*

Held, that, if a Sayed of Karkanda, in Rohtak District, dies without leaving any male or female lineal descendant or other near kindred, the property inherited by him through his mother reverts, according to custom, to his maternal heirs; and in their presence, the paternal relations have no right of succession. Consequently a gift of that property by his widow in favour of one of her deceased husband's maternal relatives cannot be challenged

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

by his father (a). **Jawad Ali v. Mussammat Emna Begam**, 121 P.W.R. 1909.

KENSINGTON and SHAH DIN, JJ.

References.—12 P.R. 1892 (F.B.); 32 P.R. 1895 (F.B.); 144 P.R. 1893 (365), F.; 46 P.R. 1890, *disapproved and not followed*, C.A. No. 994 of 1890; C.A. No. 538 of 1897, D.

(3) *Custom—Muhammadan Law—Succession—Daughter—Sayeds of Kharkanda in Roh-tak District—Distant kindred—Female with full ownership—Effect of confiscation and re-grant of property by Government—Person in possession—Inquiry by Revenue officer at mutation—Value of instance not in point—Effect of mutation—Indian Evidence Act, I of 1872, section 110 and section 44 of Act XVII of 1887.*

Held, that, among Sayeds of Kharkanda in Rohtak District, a daughter having no brother takes the whole estate of her parents just like a son, and, in some instances, she has also succeeded collaterally; and that, when a female succeeds, she becomes full owner of the property she inherits; and that, in case of her leaving no near kindred, the right of succession to her estate, of her father's father's brother's son's daughter or grand-daughter is, both according to custom and Muhammadan Law, not inferior, but rather superior, to that of her father's sister's son's son, where the competition is between these two sets of heirs.

Both of them are, according to Muhammadan Law, distant kindred, being neither "sharers" nor "residuary" but former's right is better than the latter's as she is the daughter, of a residuary of a fourth class (a).

Held, also, that the property originally belonging to a male proprietor, but confiscated by the Government for disloyalty in 1857 and afterwards regranted to his widows with full ownership, entirely vests in them as their acquired property and ceases to form a part of their husband's estate.

Obiter :—**Held**, further, that :—

(a) A person, seeking to oust another out of the possession of the landed property, to which the latter has already succeeded and in whose favour mutation of names has also been effected, after regular enquiry by a Revenue officer, is bound in the first instance, to prove that his

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

right is superior to that of his adversary—(S. 110, Evidence Act, and S. 44 of Act XVII of 1887) (b).

(b) A regular enquiry made by a Revenue officer in the matter of succession, at the time of effecting mutation of names, is relevant. **Mussammat Nasib-ul-Nissa v. Mansur Ali**, 120 P.W.R. 1909.

KENSINGTON and JOHNSTONE, JJ.

References :—(a) C.A. 538 of 1897, R.; 82 P.R. 1887; 71 P.R. 1892, D.; 134 P.R. = 49 P.W.R. 1907 (F.B.), *doubted*; 110 P.R. 1906; 59 P.W.R. 1907, R. (b) 141 P.R. 1893, F.

(4) *Reversionary right of nephew in respect of property in foreign village preferred to that of the proprietary body of the village—Exclusive right of village-proprietors—Onus of proof—Escheat.*

Held that the nephew, who resides in a foreign village, is entitled to succeed to property left by the deceased uncle in his own village in which the nephew was not a proprietor, in preference to the proprietary body of the village where the property is situate (d).

Generally speaking, the initial *onus* would be on the proprietary body to show that they had a right to exclude the agnatic relation of the deceased owner from inheritance :

Held that a right of escheat to the proprietary body must be affirmatively proved to inhere in the proprietary body in each particular case (b). **Dasounda Singh v. Mangal and others**, 18 P.R. 1910 = 26 P.W.R. 1910 = 5 Ind. Cas. 817.

RATTIGAN and SHAH DIN, JJ.

References :—(a) 110 P.R. 1906 (F.B.), *discussed*. (b) 61 P.R. 1898; 68 P.R. 1898; 78 P.R. 1898; 75 P.R. 1902; 28 P.R. 1904; 102 P.R. 1906 and 137 P.R. 1908, R.

(5) *Hindu law—Succession—Daughters—Collaterals—Brahmins of Manakiala village, Gujjar Khan Tahsil, Rawalpindi District—Burden of proof.*

The plaintiff, daughter of a deceased Brahmin of Manakiala village, sued to inherit the land left by her deceased father and alleged that the family was governed by Hindu law. The defendants pleaded that the family was governed by agricultural custom and not by Hindu law. It appeared that the members of

Custom—(Continued).**—2.—Punjab—(Continued).****——3.—Inheritance and Succn.—(Ctd.).**

the family had been in possession of land for some generations, cultivated land through servants, followed other pursuits besides agriculture, and did not form a compact village community.

Held, that the burden of proving that the family was governed by agricultural custom lay on defendants, and that they had failed to discharge it. **Mussamat Maya v. Gurdit Singh**, 145 P.L.R. 1909=1 P.R. 1910.

JOHNSTONE, J.

References:—21 P.R. 1890; 58 P.R. 1906; 33 P.R. 1907; 9 L.R. 1908; 115 P.R. 1907; 110 P.R. 1906 (F.B.); 31 P.L.R. 1907; 59 P.R. 1908; 125 P.R. 1908; S.C. 10 P.L.R. 1909; C.A. 1098 of 1906; S.C. 129 P.L.R. 1909, R.

(6) *Inheritance and succession—Gujars of Ludhiana District—Ancestral property—Will—Appointment of future Khanadanad—Validity.*

Held that land pre-empted with money raised by mortgage of ancestral property is not ancestral, and the reversioners' remedy is not to follow the purchased land as if it were ancestral, but to sue for a declaration that the mortgage was not for necessity and so not binding on them.

There is no proof of any custom that, among the Gujars of the Ludhiana District, a sonless proprietor has power by will to alter the ordinary rule of succession, in the sense that he can will ancestral land in absolute ownership to a daughter in the presence of near collaterals.

Khanadanad is a man who marries the daughter of a sonless proprietor and, instead of taking the girl away to his own house, lives on with her in her father's house, performing services for him, helping to manage his property and generally taking up the position of a son.

Held also that this institution cannot be extended so as to cover the case of a future possible husband of the daughter.

Held further, that, among the Gujars, an unmarried daughter holds her father's estate until death or marriage. **Nabia v. Mussammat Fatto and Rahman**, 2 P.R. 1910=4 P.W.R. 1910=5 Ind. Cas. 232.

ROBERTSON, O.C.J., and JOHNSTONE, J.

Custom—(Continued).**—2.—Punjab—(Continued).****——3.—Inheritance and Succn.—(Ctd.).**

(7) *Janjiana Sials of Kharanwala in the Jhang District—Haqi Dastar—Eldes son entitled to an extra share—Succession.*

Held that, among the Janjiana Sials of Kharanwala in the Jhang District, there is a custom that the eldest son is entitled, upon final partition, to receive more land than his share by way of *Haqi Dastar* or *Haqi Pagri*. **Mian Kassim v. Samail and others**, 4 P.R. 1910=2 P.W.R. 1910=5 Ind. Cas. 241.

JOHNSTONE and SCOTT-SMITH, JJ.

(8) *Inheritance and succession—Muhammadan Rajputs of Hoshiarpur—Daughters and daughter's children exclude collaterals.*

Held that, among the Muhammadan Rajputs of Hoshiarpur District (an endogamous tribe), when a daughter has been allowed to succeed as heir to her father's estate, there was no authority for saying that her daughter again could not succeed to her, in the absence of direct male heirs.

Held also that, when one daughter, who has enjoyed a life-estate, dies, her sisters and sister's sons would exclude the collaterals. **Mussamat Budhi v. Mussamat Mihran**, 5 P.R. 1910.

ROBERTSON, O.C.J., and WILLIAMS, J.

(9) *Inheritance—Custom of Hindu Law—Tarkhans of Amritsar city—Grand-nephew.*

Held, that, in matters of succession, Tarkhans of Amritsar city are governed by Hindu Law, which presumably governs non-agriculturists residing in a city. Consequently, neither a great grand-nephew, who is a *sakulya*, nor the widow of a grand-nephew who has pre-deceased the widow of the last male-owner whose estate she wants to inherit, is entitled to succeed in the presence of a grand-nephew who is a *sapinda*. **Sardul Singh v. Karm Singh**, 27 P.W.R. 1910=30 P.R. 1910=5 Ind. Cas. 990.

SIR ARTHUR REID, C.J.

References:—C. 19 P.R. 1874; C. 123 P.R. 1879; C. 144 P.R. 1884; C. 130 P.R. 1888; C. 148 P.R. 1890; C. 110 P.R. 1906=59 P.W.R. 1907; C. 140 P.R. 1908=68 P.W.R. 1907, D.

(10) *Jats of Mouza Chuhar Chak, tahsil Moga, Ferozepur district—Succession—Adopted son of same got—Right to collateral succession in adoptive father's family.*

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

Among Sikh Jats of Mouza Chuhar Chak, an adopted son, who is of the same *got* as the adoptive father, is entitled, by custom to succeed collaterally in the family of his adoptive father. **Dial Singh v. Sewa Singh**, 108 P.R. 1909=15 P.W.R. 1910.

JOHNSTONE and SHAH DIN, JJ.

Reference:—72 P.R. 1893, R.

(11) *Jats of Rohtak district—Succession—Right of adopted son to succeed collaterally in adoptive father's family.*

Among the Jats of the Rohtak district, an adopted son or his heirs can succeed collaterally to property to which the adoptive father would have succeeded if alive. **Mansa v. Surta**, 99 P.R. 1909=16 P.L.R. 1910.

REID, C.J., and WILLIAMS, J.

Reference:—4 P.R. 1893, R.

(12) *Occupancy tenant—Effect of an entry in Wajib-ul-arz allowing a Bhai or Karabat to succeed to the holding—Onus to prove occupation by the common ancestor—Punjab Tenancy Act (XVI of 1887), S. 59 (c).*

Held, that an entry in a *Wajib-ul-arz* providing that, in case of an occupancy tenant dying sonless, his holding should go to his Bhai or Karabat, does not deprive the landlord of his right to recover the land, whether the entry be regarded as an agreement or a statement of custom. In the former case it cannot reasonably be supposed that the landlord agreed to give the land to the person not entitled to succeed to it under the Tenancy Law, and in the latter case the custom cannot be used to override or extend the scope of S. 59 (c) of Act XVI of 1887.

Held, also, that, in order to succeed to the occupancy holding, the claimant should prove that his common ancestor once occupied the land. **Allah Ditt and others v. Achhru Mal**, 60 P.W.R. 1910.

JOHNSTONE, J.

Reference:—C.A. No. 1277 of 1906, R.

(13) *Barren widow—Right to claim a definite share in her husband's estate for maintenance, along with his son by another wife—Mughals of Tahsil Rawalpindi.*

Under the *Riwaj-i-am* of Rawalpindi District, which, in the absence of evidence throwing doubt on its correctness, should be followed, (a),

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

it has been *held*, that, among the Mughals of Tahsil Rawalpindi, a barren widow is entitled to a definite portion of her husband's estate for life by way of maintenance, in the presence of his son by another wife (b). **Amir v. Mussammat Sharf Nur**, 49 P.R. 1910=6 Ind. Cas. 929=87 P.W.R. 1910.

ARTHUR REID, C.J.

References:—(a) 68 P.R. 1893; 116 P.R. 1901; 117 P.R. 1901, R.; 24 P.R. 1904 (F.B.) and 73 P.R. 1895 (F.B.), R. (b) 30 P.R. 1905, F.; 116 P.R. 1906, R.

(14) *Hindu Sikh Jats of Ferozepore District—Widow marrying her husband's brother—Succession to her late husband's estate—Custom.*

Among Hindu Sikh Jats of Ferozepore District, a widow, who marries her first husband's brother, no longer remains widow of her first husband, and cannot, therefore, after the death of her first husband's son without issue, succeed to a life-interest in her late husband's estate in preference to his brothers. **Hardam Singh v. Mussammat Mahan Kaur**, 64 P.R. 1910=91 P.W.R. 1910=7 Ind. Cas. 484.

JOHNSTONE and WILLIAMS, JJ.

References:—117 P.R. 1888; 46 P.R. 1891 (F.B.), F.; 88 P.R. 1900; 115 P.R. 1900, D.; 87 P.R. 1870; 107 P.R. 1888; 11 P.R. 1870, R.

(15) *Estate of sonless male proprietor—Collaterals—Sunni Sayads of Mauzia Chuma, tehsil and District Gurgaon—Gift by widow to daughter—Incompetency of reversioners to contest—Riwaj-i-am.*

Found, that, by custom prevailing among Sunni Sayads of Mauzia Chuma, tehsil and District Gurgaon, a widow succeeds to the whole estate of her sonless husband for her life, and, in the absence of the widow and her death, his property is inherited by his daughter in preference to his collaterals in any degree whatever.

Held, that an alienation made by a widow in favour of the next heir to her husband cannot be challenged by his reversioners; consequently, the verbal gift in this case, followed by mutation of names, made, by the widow, of her husband's ancestral land, to his daughter, cannot be questioned by his collaterals in the fourth degree of agnatic relationship (a).

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

Approved Rivaj-i-am of Gurgaon District as regards succession of daughters. Muzaffar Ali v. Zainab, 81 P.W.R. 1910.

SHAH DIN and CHEVIS, JJ.

Reference :—(a) 194 P.W.R. 1908, R.

(16) *Gift—Succession—Donee dying without sons—Daughter—Collaterals—Jats of Chhajawal village, Jagraon Tahsil, Ludhiana District.*

G died leaving two widows D and C and a daughter M by C. After his death the land was mutated in favour of D only, C having predeceased. D made a gift, but the collaterals of G obtained a decree declaring that the gift would not operate against their reversionary interests. M, daughter of G by C, was no party to that suit. On the death of D the collaterals of G and his daughter M claimed to succeed to the estate. B and others also claimed to inherit on the ground that the land originally belonged to their ancestor G S who had gifted of it to G and that on G dying sonless, the same reverted to them. It was found that the land was not ancestral but was self-acquired land of G.

Held that B and others had no right, for no gift by their ancestor G S was proved.

Held, also, that the collaterals of G had failed to prove a custom according to which they inherited self-acquired land of the deceased to the exclusion of M, daughter of the deceased. The fact that they had obtained a declaratory decree against D did not operate as *res judicata* against M who was no party to the suit and did not claim in the present suit through D. *Bhola Singh v. Mano Bhola Singh v. Mussammat Mano*, 100 P.L.R. 1910.

RYVES, J.

References :—2 P.R. 1909; 11 P.R. 1908; S.C., 92 P.L.R. 1908; 30 P.R. 1908; 65 P.R. 1908; 90 P.L.R. 1908; 86 P.R. 1908, referred to.

(17) *Succession—Daughters—Collaterals—Naru Rajputs of Hoshiarpur District.*

Held, that, according to custom among *Naru Rajputs* of Hoshiarpur district, daughters excluded from inheritance all collaterals other than descendants of a common great-grand-father.

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

To a suit for redemption of a mortgage by the collaterals of the mortgagor after the latter's death, his daughter claiming to succeed by right of inheritance is entitled to be made a party and contest the collaterals' right to sue. *Fatfeh Din v. Ram Rakha*, 32 P.L.R. 1910.

KENSINGTON and ROBERTSON, JJ.

(18) *Succession—Husband—Father's sister's son.*

Held that, on the death of a female, the land to which she had succeeded on her father's death would not go according to custom to her husband, if she left surviving her a son of his father's sister. *Ahmad Hussan v. Mehdi Hussan*, 135 P.L.R. 1910.

SCOTT-SMITH, J.

(19) *Succession—Khanadamad—Daughter—Collaterals—Adverse possession—Possession of widow of sonless proprietor is not necessarily adverse to next heir.*

A sonless proprietor gifted land in equal shares to his four daughters. The reversioners sued for a declaration that the gift, being invalid by custom, would not affect their reversionary rights. The gift was upheld as regards two daughters whose husbands were held to be *khanadamad*. After the death of the donor, the half of the land was mutated in the names of the reversioners, but on his widow's claim, her name alone was entered. The land remained in the actual possession of the *khanadamads* and their wives, the daughters, the gift in favour of whom was recognised. After the death of the widow, the *khanadamads* and their wives sued for a declaration that they were entitled to hold the land as next heirs. The land was mutated in the names of the reversioners after the death of the widow. It was pleaded that the suit was barred by *res judicata*, limitation and acquiescence of the plaintiffs.

Held, that the pleas had no force. The cause of action arose on the death of the widow, whose possession could not be held adverse to the plaintiffs. *Fazal Ahmad v. Dittu*, 216 P.L.R. 1910.

SHAH DIN and CHEVIS, JJ.

(20) *Inheritance—Custom—Daughter—Sayads of Khanpur in tehsil Hoshiarpur—Revision—Limitation—S. 70 (a) and (b) of Act XVIII of 1884.*

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

Found, that, among Sayads of Khanpur in tehsil Meshiarpur, there exists no custom entitling a daughter to more than a life-interest in her sonless father's ancestral holding, and that, on her death, the property reverts to her father's reversioners, and they can recover it within 12 years from her death.

Held, that a point of limitation involving questions of Law and custom is a good ground for revision under S. 70 (b) of Act XVIII of 1884. **Fazal Muhammad v. Fazal Muhammad**, 141 P.W.R. 1910.

REID, C.J., and JOHNSTONE, J.

References:—16 P.R. 1906 ; 64 P.R. 1906 ; C. 5 P.R. = 10 P.W.R. 1910, D.

(21) *Inheritance—Custom—Sayads of Khar-kanda in the district of Rohtak—Widow's status—Right of her husband's collaterals to succeed and question alienation by her—Widow represents her husband, and daughter her father, when succession opens—Reversioner cannot sue for another reversioner's share.*

Held, that:—

1. In matters of succession *Sayads* of Khar-kanda in the Rohtak District follow custom and not Muhammadan Law; and that a widow has only a life-interest in her husband's property, even if he has inherited it from his mother or his mother's family, and widow's husband's reversioner can successfully contest its alienation made by her without legal necessity.

2. On widow's death her husband's brothers, whether of whole or half blood, succeed, and, in their absence, their male descendants.

3. The widow of a male descendant represents her husband and a daughter represents her father in the absence of male lineal heir. But sons and daughters do not succeed together.

In the present case, on widow's death, one nephew's widow and a daughter of another nephew were found to succeed equally to the deceased's property.

4. A reversioner can get possession only for his own share, but is incompetent to sue for whole of the property, leaving the other reversioners, who have not come forward, to take their share from him if so inclined. **Falr-Ud-Din v. Amam Ali**, 143 P.W.R. 1910.

ANDERSON and ROBERTSON, JJ.

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Ctd.).**

(21-a) *Muhammadan Rajput dying leaving a minor son and widows—Widows succeed in equal shares on son's death.*

A Muhammadan Rajput died leaving a minor son and three widows, one of whom was the mother of the minor; *held*, on the death of the son without issue, that, on the general principles of succession under custom, all the widows were entitled to life-interest in equal shares, which they would have inherited on the death of their husband but for the intervention of the son.

The Full Bench ruling *Hamira v. Ram Singh* (a) does not lay down a general principle that, in matters of succession, descent should not be traced upwards in order to determine the immediate heir. **Ato v. Miro**, 8 Ind. Cas. 499.

KENSINGTON and SHAH DIN, JJ.

Reference:—(a) 194 P.R. 1907 = 85 P.W.R. 1907, Expl.

(21-b) *Shiah Sayads of Palwal, District Gurgaon—Custom—Daughter's right—Succession to daughter—Trace of descent of property—Daughter's father's sister's claim as sister—Claim as paternal aunt of daughter—Collaterals—Claim as sister may be preferential to collaterals but not so as paternal aunt.*

By the customary law obtaining in the tribe of Shiah Sayads of Palwal, Gurgaon District, daughters succeed to their father's property in the absence of direct male lineal descendants.

Where the daughters of a male proprietor of the said tribe succeeded to the property of their father, and on their death their father's sister claimed as such to succeed in preference to her brother's collaterals descended from the common ancestor:

Held, that, as the daughters had succeeded to the property on the death of their father, descent of the property must be traced from them and not from their father, and that, therefore, the sister's claim must be regarded not as that of a sister, but as that of a paternal aunt (a).

Held, further, that, as paternal aunt, her right was not preferential to that of the collaterals.

Quere.—A sister of the last proprietor may, in this tribe, have a right of succession preferential to that of collaterals descended from

Custom—(Continued).**—2.—Punjab—(Continued).****—3.—Inheritance and Succn.—(Cld.).**

the common ancestor. **Zahid Hussain v. Karam Ali**, 8 Ind. Cas. 667.

KENSINGTON and RATTIGAN, JJ.

References:—(a) 110 P.R. 1906 (F.B.); 59 P.W.R. 1907; 31 P.L.R. 1907; 134 P.R. 1907 (F.B.); 85 P.W.R. 1907; Further Appeal No. 110 of 1908, *followed*.

(21-c) *Jullundur District, Nakodar tahsil, Muhmmadan jats—Succession—Widow's right to collateral succession.*

Among Muhammadan Jats of tahsil Nakodar, a widow succeeds collaterally to the property to which her husband would have succeeded, if alive. **Fatta v. Jiwan**, 98 P.R. 1910 (Civ.).

SHAH DIN, J.

(22) *Sadh Sanyasi—Inheritance—Custom.* See **MAHANT**, No. 1, 41 P.W.R. 1910.

(23) Appointment of an heir, effect of—Right of adopted son and his son to succeed in the natural family—Exception in Eastern Punjab. See **CUSTOMS (PUNJAB—ADOPTION)**, No. 1, 37 P.R. 1910.

(24) Custom among Quarishis of Ferozpoore allowing widowed daughter-in-law to succeed in presence of near collaterals, not proved. See **MUHAMMADAN LAW (SUCCESSION)**, No. 1, 50 P.R. 1910.

—4.—Marriage.

Status of Jats and Kolis—Karewa marriage between a Jat and Koli woman—Legality—Succession.

Kolis are not Chamars by profession, though they may be a sub-division of that tribe. The Jats are not members of twice-born classes themselves, and are by no means particular as to the woman with whom they contract Karewa unions. They are Sudras and there is no reason for holding that the marriage of a Jat with a Koli would be invalid by custom. Such widow is entitled to succeed to her late husband's property for life. **Mussammat Askaur v. Sawan Singh**, 79 P.R. 1910=115 P.W.R. 1910=97 P.L.R. 1910.

RYVES and SCOTT-SMITH, JJ.

—5.—Pre-emption.

(1) Pre-emption in the new abadi of Garhi Awan. See **PRE-EMPTION**, No. 37, 102 P.W.R. 1910.

(2) See **PUNJAB ACT II OF 1905 (PRE-EMPTION)**.

Custom—(Concluded).**—2.—Punjab—(Concluded).****—6.—Unchastity.**

Widow—No effect of her unchastity after succession among Somal Jats, Phillour Tehsil in Jullundur District—Burden of proof.

Found, no custom among Somal Jats of the Phillour Tehsil in the Jullundur District, whereby unchastity of a widow subsequent to taking possession of the husband's estate effects forfeiture thereof.

Held, the onus of establishing a custom involving forfeiture in case of unchastity of a widow after succeeding to the husband's estate is on those who allege its existence (a). **Malan v. Rura**, 106 P.W.R. 1910=74 P.R. 1910=96 P.L.R. 1910=7 Ind. Cas. 719.

ARTHUR REID, C.J. and SCOTT-SMITH, J.

References:—(a) (C. 2 P.R. 1889); (C. 25 P.R. 1888); (C. 107 P.R. 1888); (C. 25 P.R. 1891); (C. 40 P.R. 1889); and (C. 76 P.R. 1901), *D*.

—7.—Will.

Gujars of Gujrat—Wills in favour of daughter and son-in-law, when valid—“Khanadamad.”

According to the customary law of the Gujarat District, among *Gujars*, wills in favour of daughter and son-in-law are valid, only if made in favour of duly appointed and regularly and continuously recognized *Khanadamad*. **Muhammad v. Lakhan**, 25 P.R. 1910=34 P.W.R. 1910=5 Ind. Cas. 908.

REID, C.J., and JOHNSTONE, J.

Customary right.

Landlord and tenant—Customary right—Custom, growth of—Putni incumbance—Custom originated during putni, whether binding on zemindar after extinction of putni—Trees, right to cut and appropriate.

A customary right owes its origin generally to common consent, and, when fully developed, may be treated as incorporated into a contract by implication (a).

When such a customary right becomes annexed to an agricultural contract by implication, its legal operation and effect are no higher than that of an express term of the contract. When, therefore, during the continuance of a putni, a customary right grows up by which the riyats become entitled to cut and appropriate trees on their holdings, and subsequently the zemindar purchases the putni at a sale

Customary right—(Concluded).

under Reg. VIII of 1819, the customary right can be claimed against him by the raiyats, only if the right, if expressly granted by the putnidar, was of such a nature as to be binding on the zemindar.

A customary right to cut and appropriate trees may amount to an incumbrance on the property (b).

Such a customary right, however, when claimed by hereditary and resident cultivators may stand on the same footing as a *bona fide* engagement with them, and is, therefore, not liable to be ignored by a purchaser at the putni sale. **Maharaja Sir Prodyot Coomar Tagore v. Gopi Krishna Mandal**, 11 C.L.J. 209 = 14 C. W.N. 487 = 5 Ind. Cas. 243.

MOOKERJEE and TEUNON, JJ.

References :—(a) 7 M.I.A. 263 ; 1 M. and W. 466, Appl. (b) 5 Barr. 317, applied.

Cutchi Memons.

Cutchi Memons—Inheritance and succession—Applicability of Hindu Law obtaining in Gujarat—Power of widow of Cutchi Memon over moveables inherited from husband—Capacity to will away—Injunction restraining disposal during her life—Whether can be granted.

The Cutchi Memons are governed in matters of succession and inheritance by Hindu Law obtaining in the Gujarat Division of the Bombay Presidency (a).

The widow of a Cutchi Memon has an absolute estate in the moveable property inherited from her husband (b), exclusive only of the power of willing it away at her death (c), and an injunction cannot be issued restraining her in the disposal of that property during her life (d). **Hallman, wife of Sulleman v. Asibal, widow of Haji Ibrahim Haji Ahmed**, 4 S.L.R. 77.

HAYWARD, J.C.

References :—(a) 10 B. 1 ; 14 B. 189 (193) and 20 B. 53 (57) ; 2 S.L.R. 59 (63), R. (b) 32 B. 59, not foll. ; 1 Bom. H.C.R. 130 ; 1 Bom. H.C.R. 56 ; 4 Bom. H.C.R. 163 ; 8 Bom. H.C.R. 156 ; 5 B. 670 ; 26 B. 220 ; 28 B. 457 ; 12 Bom. L.R. 224, R. (c) 17 B. 708 (711), P. ; 11 M.I.A. 175 ; 11 M.I.A. 511, R.

Damage.

Possible obstruction to procession—No special damage. See TORT, No. 1, 20 M.L.J. 367.

Damages.

(1) *Suit for damages—Illegal search and seizure by the Police—Police Act (V of 1861), S. 42—Limitation Act, Art. 29, Sch. II.*

The special period of limitation of six months prescribed by S. 42 of the Police Act of 1861 does not apply to a suit for damages for the illegal search and seizure of moveables by the police, as search is not one of the matters provided for in the said Act.

Nor does Art. 29 of the Limitation Act, Sch. II, prescribing a period of one year, apply to such a suit, inasmuch as the requisition of a police officer under S. 166 (1) of the Code of Criminal Procedure cannot be said to be a 'legal process' within the meaning of the said article. **Munisubbayya v. Raghotama Rao**, 15 M.C.C.R. 47.

NANJUNDAYYA and SETLUR, JJ.

(2) *Breach of contract—Measure of—Contract Act, S. 74.*

In cases in which, *ex-necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract, Courts of Equity do not interfere with the contract of the parties who, in anticipation of the breach, have stipulated that a fixed sum should be regarded as the measure of compensation to be paid by the person violating the contract.

In such cases the Courts will not exercise the power, conferred by S. 74 of the Contract Act, of reducing the contract damages. **Mir Hazar Khan v. Sawan Ali**, 81 P.R. 1910 = 148 P.L. R. 1910 = 127 P.W.R. 1910.

REID, C.J.

References :—5 A. 238 ; L.R. 11 A.C.H. of L. 346, P.

(3) *Damages, suit for—Land given in lieu of service Rent—Suit, if cognisable in Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8.*

A service rendered by a tenant to his landlord is in the nature of rent, and a suit for damages for non-performance of such service is not cognisable in the Court of Small Causes under Art. 8, Sch. II of the Provincial Small Cause Courts Act. **Panohu Chakar Behara v. Nagendra Nath Pal Chowdhury**, 12 C.L.J. 480.

MOOKERJI and SHARFUDDIN, JJ.

(4) *Damages, suit for—Suit for compensation for loss resulting from an injunction—Malice, whether necessary or not—Damages, consequent on legal proceedings—Damages resulting from a civil suit.*

Damages—(Concluded).

Held, that, in a suit for compensation for loss resulting from an injunction wrongfully obtained, the plaintiff need not prove malice.

Held further, that the bringing of an ordinary civil suit does not furnish ground for a suit for damages by the defendant, although the suit may have been instituted maliciously and without reasonable and probable cause. But some legal proceedings and some incidental proceedings in civil suits involve damage to the reputation of person or property of the defendant, and a suit for damages may be maintained with respect to them. **Manohar Lal v. Gobardhan Prasad**, 13 O.C. 357.

CHAMIER and LINDSAY, J.CS.

(5) Breach of contract of sale—Measure of. See **SALE**, No. 1, 5 L.B.R. 144.

(6) Suit for—Cause of action when arises—Amount of. See **UNCERTIFIED PAYMENT**, No. 1, 7 M.L.T. 351.

(7) Seller's failure to make delivery—Rate varying during the course of the day—Measure of. See **CONTRACT**, No. 3, 2 P.L.R. 1910.

(8) Actual extent less than the extent granted—Lessee if entitled to damages. See **GRANT**, No. 1, 7 M.L.T. 390.

(9) Circumstances mitigating—Decision as to amount of—Review on appeal. See **LIVEL**, No. 1, 14 C.W.N. 713.

(10) Suit for, for cutting away crops—Question of title tried incidentally—Second appeal. See **CIV. PRO. CODE (1908)**, No. 48, 6 Ind. Cas. 415.

(11) Damages—Voluntary offerings—Refusal of right to participate in. See **CIV. PRO. CODE (1908)**, No. 9, 20 M.L.J. 513.

(12) Want of notice—Damages—Burden of proof. See **ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS)**, No. 9, 7 A.L.J. 815.

(13) Employing shroff to pass Babachi coins—Shroff passing Shikkai coins—Loss to Government—Measure of—Nominal damages when allowed. See **MAXIM**, No. 1, 12 Bom. L.R. 769.

(14) Decree directing cutting of bund by defendant—Omission of defendant—Suit for damages. See **CAUSE OF ACTION**, No. 2, 7 Ind. Cas. 248.

(15) Breach of contract—When damages will be proper remedy. See **SPECIFIC RELIEF ACT**, No. 35, 8 M.L.T. 149.

Damdupat.

(1)—*Inheritance—Rule of damdupat, Scope of—*

The rule of *Damdupat* does not divest rights which have accrued; it merely limits accruing rights (a). **Krishnappa v. K. Raghavendrachar**, 15 M.C.C.R. 195 (F.B.).

STANLEY ISMAY, C.J., KRISHNA RAO and SETLUR, JJ.

Reference :—(a) (1895) 20 Bom. 611, F.

(2)—Rule of, when applies to mortgage transaction. See **MORTGAGE (GENERAL)**, No. 41, 15 M.C.C.R. 227.

(3) Applicability of rule of—. See **MORTGAGE (GENERAL)**, No. 45, 12 Bom. L.R. 992.

Dancing girl.

Adoption of—Immoral practices—Custom. See **HINDU LAW (SUCCESSION)**, No. 9, 6 Ind. Cas. 310.

Day.

'Days'—Meaning of—Computation—Fractions of days. See **ACT IX OF 1899 (ARBITRATION)**, No. 7, 3 S.L.R. 237.

Dead man.

Decree against—Execution of decree. See **DECREE**, No. 5, 5 Ind. Cas. 523.

Death.

Presumption as to—English and Indian Law. See **EVIDENCE ACT**, No. 31, 11 C.L.J. 133.

Debt.

Transfer of liability for—Limitation. See **ACT I OF 1904 (PUNJAB LOANS LIMITATION)**, No. 1, 59 P.R. 1910.

Debtor and creditor.

(1) *Limitation—Balance—New contract to revive barred items—Balance struck by one of the joint debtors when binding on the other.*

Held, that a balance struck by a debtor in the creditor's book, with a statement of future interest to be paid, (e.g., Lena Baki raha biaz 1-4-0) is a promise in writing to pay within the meaning of S. 25 (3) of Act IX of 1872, and is enforceable, regardless of all questions of limitation in connection with previous items or balances.

Held also, that a balance struck by one of the joint Hindu brothers of their joint debt, which originally began against their father, is

Debtor and creditor—(Concluded).

also binding upon the other brothers. **Tirkha v. Rizak Ram**, 138 P.W.R. 1910.

REID, C.J. and JOHNSTONE, J.

References:—35 P.R. 1903, *F.*; 72 P.R. 1879; 25 Bom. 378, *R.*; 119 P.R. = 206 P.W.R. 1908, *Disappr.* and *D.*

(2) See APPROPRIATION OF PAYMENTS, No. 1, 7 M.L.T. 199.

(3) Nature of relationship of banker and customer. See BANKER and CUSTOMER, No. 2, 7 M.L.T. 214.

(4) Demands made by creditor—Non-compliance, whether amounts to repudiation of claim. See MAINTENANCE, No. 3, 7 M.L.T. 278.

(5) Duty of debtor. See JURISDICTION (GENERAL), No. 3, 6 Ind. Cas. 111.

Debutter property.

(1) *Hindu Law*—Debutter property—Nature of proof—Regulation II of 1819—Resumption proceedings—Question whether lands are endowed or not—Adjudication not final nor foreign to enquiry—Shebait, extinction of family of—Reversion to family of grantor—Description of debutter property in documents, effect of—Unlawful diversion of profits of debutter property not to destroy its character.

In order to prove that particular lands form the subject of a valid public endowment, it must be established that an absolute grant was, in the first place, made with the intention that the profits should be applied for the services of an idol, that the profits have since been so applied, and that the members of the family of the founder have not treated the property as one, the profits of which were mainly intended to be applied for their benefit (a).

In proceedings under Regulation II of 1819, there can be no final adjudication of the question whether lands had been so dedicated as to constitute a public charitable endowment, but the question is not foreign to the enquiry by the Revenue officer in resumption proceedings (b).

When the family of a shebait dies out, the shebaitship will, in the natural course, revert to a member of the family of the original grantor (c).

Although the description of a property as *debutter* in documents may not amount to proof of the character of the endowment, it still can be accepted as showing that the property was all along regarded as endowed property.

Debutter property—(Continued).

The unlawful diversion of the profits of an endowed property will not be sufficient to destroy the original grant, or to convert the property from the state of endowed property of the idol to that of secular property. **Madhab Chandra Bara v. Rani Sarat Kumari Dehl**, 6 Ind. Cas. 26.

BRETT and SHARFUDDIN, JJ.^o

References:—(a) 2 Hay 557; 3 W.R. 142; 18 W.R. 399; 8 M.I.A. 66; 5 C. 438; 5 C.L.R. 296; 6 I.A. 182, *R.* (b) 2 C.L.J. 431 (444), *dissented from.* (c) 3 Ind. Cas. 408; 11 C.L.J. 2, *R.*

(2) *Representation in suit by person acting under the authority of shebait*—Res judicata—Identity of subject-matter not essential—Judgment in previous suit—Admissibility—Evidence Act (I of 1872), S. 13.

A decision obtained in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the debutter estate under an *arpannama* from the shebait, and who, in fact, did represent the debutter estate, is binding on a succeeding shebait, on the principle of the case **M. 2 I.A. 145 (a)**. **Raja Ranjit Sinha Bahadur v. Basunta Kumar Ghose**, 12 C.W.N. 739—9 C.L.J. 597.

STEPHEN and MOOKERJEE, JJ.

References:—(a) 11 C.W.N. 489=6 C.L.J. 404; 12 M. 235 and 9 B. 198=2 I.A. 145, *R.*

(3) Debutter property—Proof of endowment—Grant, ambiguous, terms of—Proceeds of land used for the support of an idol—Power of the Mohunt to alienate debutter property—His power to grant mokarree pottah or permanent lease—Operation of such a lease when granted—Construction of statutes of limitation—Limitation Act (XV of 1877). Sch. II, Art. 134 and S. 10—“Purchased for a valuable consideration,” meaning of—Whether lessee of a mokarree pottah on a permanent lease is a purchaser under Art. 134—Purchaser under Art. 134, who is.

The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, but it is a fact that may well be taken into consideration when the intention of the founder has to be gathered from an ancient document expressed in ambiguous terms (a).

Debutter property—(Continued),

A grant of *mouzah* was made "by way of *lakheraj debutter*" to a Mohunt in 1787, and it was perfectly clear from the evidence in the case that the donee received the gift as a gift for the service for the particular idol whose *shebait* he was, and that the income of the *mouzah* had ever since been entirely appropriated to that service. In 1860, the then Mohunt, describing himself as "*Brittobhogi* holder of *debutter*" granted a *mokarari pottah*, or permanent lease of the *mouzah*, which was therein described as "my longstanding ancestral *lakheraj debutter* property endowed for the service of the deity."

Held, that the *mouzah* was *debutter* property in the sense of having been dedicated to the worship of the idols represented by the grantee Mohunt.

The power of the Mohunt of the endowment for the time being to alienate *debutter* property is, like the power of the manager of an infant heir, limited to cases of unavoidable necessity, and, apart from such necessity, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the Mohunt (*b*).

A *mokarari pottah* or permanent lease granted by the Mohunt of the endowment for the time being, on the most favourable construction, endures only for the life-time of the grantor.

Statutes of limitation, like all others, ought to receive such construction as the language, in its plain meaning, imports (*c*).

The operation of Art. 134 of Sch. II of the Indian Limitation Act (XV of 1877) is controlled by S. 10 of the Act.

The words "purchased for a valuable consideration," in Art. 134, Limitation Act, mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser, in consideration of a price paid or secured by the purchaser to the vendor.

The lessee of a *mokarari pottah* or permanent lease is not a purchaser under Art. 134, Limitation Act, under which the purchaser must be the purchaser of an absolute title (*d*). **Abhram Goswami Mohant v. Shyam Charan Nandi**, 10 C.L.J. 294 (P.C.) = 6 A.L.J. 857 = 11 Bom. L.R. 294 = 19 M.L.J. 530.

LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

Debutter property—(Concluded).

References:—(a) 8 W.R. 43, R. (b) 2 I.A. 145; 13 M.I.A. 270 (275), F.; 4 I.A. 52 = 2 C. 341, R. (c) 13 B.L.R. (P.C.), 177 (182), F. (d) 24 C. 440 (447), Appr.; 33 C. 511 = 3 C.L.J. 306, reversed.

(4) *Two maths belonging to idol—Ekrarnama between two chelas of deceased mahant giving subordinate math and properties to junior chela—Possession under ekrarnama adverse to idol—Limitation.*

The Mahant of an idol died in possession of two *maths*, and the properties annexed to them (which he held as representative and manager of the idol), and leaving two *chelas* who settled their dispute as to the right of succession, by an *ekrarnama* executed in 1874 by the senior *chela* in favour of the junior, by which the parent *math* was allotted in perpetuity to the elder *chela* and his successors, while the subordinate *math* with the properties annexed to it were allotted to the younger *chela* and his successors for the purposes connected therewith, subject to an annual payment of Rs. 15 towards the expenses of the parent *math*.

Held—That, from the date of the *ekrarnama*, the possession of the junior *chela*, by virtue of the terms of that *ekrarnama*, became adverse to the right of the idol and of the senior *chela* as representing that idol, and, therefore, a suit brought by the successor of the elder *chela*, after his death and more than twelve years after the date of the *ekrarnama*, for recovery of possession of the subordinate *math*, and the properties attached to it, was barred by limitation. **Mahant Damodar Das v. Adhikari Lajhan Das**, 14 C.W.N. 889 (P.C.) = 7 A.L.J. 791 = 12 Bom. L.R. 632 = 12 C.L.J. 110 = 8 M.L.T. 145 = 20 M.L.J. 624.

LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

Decisions.

(1) *Decisions—Old and unchallenged—Overruling of—Bengal Tenancy Act (VIII of 1885), S. 29—Enhancement of rent—Bona fide dispute, settlement of.*

The Court must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property.

Decisions—(Concluded).

Acting on this principle, the Court in this case refused to dissent from 18 C. 333 and 28 C. 90.

Held, the limitation as to enhancement of rent provided in S. 29 of the Bengal Tenancy Act does not apply in the case of a contract by which the rent is adjusted or settled in a case of *bona fide* dispute whether as to the rate of rent or as to the area of the land comprised in the tenancy. **Kedar Nath Hazra v. Maharaja Manindra Chandra Nandi**, 11 C.L.J. 106 = 5 Ind. Cas. 309.

MOOKERJEE and TEUNON, JJ.

References:—4 Macqueen 314 (345), F.; 18 C. 333; 28 C. 90, R.

(2) When, said to be passed. See ACT IV OF 1897 (MADRAS SURVEY AND BOUNDARIES), No. 1, 8 M.L.T. 310.

(3) Case must be decided according to allegation and proof. See HINDU LAW (ADOPTION), No. 8-a, 8 Ind. Cas. 713.

Declaratory decree.

(1) Landlord's title in jeopardy—Controversy between two sets of tenants—Right to—. See LANDLORD and TENANT, No. 51, 8 Ind. Cas. 47.

Declaratory suit.

(1) *Suit for declaration of title—Proof of long possession—Presumption of ownership—Evidence Act, S. 110—Title—Burden of proof—Classification of land as village site in Settlement—Register—Legal effect—Adverse possession, whether proof necessary to establish.*

In a suit brought by A against the Secretary of State for India in Council, for declaration of his title as to two items of land, he proved possession in himself of item 1, for thirty years, and of item 2 for forty years, and the defendant failed to establish his title to the land or any possession within sixty years before suit.

Held, the possession of A throws upon the defendant the burden of proving that he has a subsisting title (a), and that the mere classification by Government of the land as village site (*natham poramboke*) has no legal effect whatever, except in so far as it may be regarded as an assertion of title (b); that such length of possession is sufficient to make out a title against any one including the Secretary of State, the latter having failed to prove a title or possession within sixty years (c); that A is not

Declaratory suit—(Continued).

bound to prove sixty years' adverse possession in order to establish his title against the Secretary of State (d). **M. Krishna Iyer v. The Secretary of State for India in Council**, 6 M.L.T. 306 = 5 Ind. Cas. 121.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 19 M. 165; 22 M. 100; 20 B. 798 and 25 B. 287, F. (b) 13 M.L.J. 269, Expl. (c) 20 B. 798; 25 B. 287; 20 C. 834 (P.C.), Expl. and D. (d) 19 M. 165 and 36 C. 1, R.

(1-a) *Declaratory suit—Declaration that 'plaintiffs are entitled to the keys of the temple'—Executability.*

A decree, granting a declaration and stating that the 'plaintiffs are entitled to the keys of the temple,' can be executed. Under the decree, the plaintiffs or his representatives are entitled to recover possession of the keys. **Ramasami Iyengar v. Srilangachariar**, 7 M. L.T. 307.

MUNRO and ABDUR RAHIM, JJ.

(2) *Declaratory suit—Limitation—Six years—Specific Relief Act, S. 42.*

Suit by some of the sharers to declare that a decree passed on a hypothecation is not binding on their shares.

Held, that the suit was not barred by limitation, as the decree was passed within six years before the institution of the suit. Nor was the suit barred by S. 42 of the Specific Relief Act—The fact that the other sharers were impleaded does not make it obligatory upon the plaintiff to sue for a general partition (a). **Velammal v. Yavammal**, 7 M.L.T. 155.

MILLER and KRISHNASWAMI IYER, JJ.

Reference:—(a) 25 M. 504, R.

(3) *Decl. atory suit—No consequential relief—Maintainability—Partition suit.*

Held that a suit for a mere declaration of title, without any consequential relief, is bad, where the plaintiff was entitled to the further relief, viz., for partition and recovery of his share (a). **Ganapathy Venkatrayudu v. Butchu Venkatrayudu**, 7 M.L.T. 164.

MUNRO and ABDUR RAHIM, JJ.

Reference:—19 M. 267, F.

(4) *Declaration, suit for, by dismissed trustee—Prayer for injunction and mere declaration—No prayer for possession—Maintainability whether person out of possession can sue for injunction—S. 42, Specific Relief Act.*

Declaratory suit—(Continued).

A suit by a dismissed trustee, for a declaration of the invalidity of his dismissal and an injunction restraining the co-trustees and the temple committee from interference with his exercise of the right of a trustee, is not maintainable, when there is no prayer for at least joint possession with the other trustees (a).

Injunction cannot be claimed by a plaintiff out of possession, when he does not ask for possession against the defendant who is actually in possession, and the circumstance that the plaintiff happens to be trustee is no answer to the objection that possession should have been sued for and not mere declaration (b). **Rathnasabapathy Pillai v. G. Kamasami Iyer**, 7 M.L.T. 311=20 M.L.J. 306=5 Ind. Cas. 630.

SANKARAN NAIR and KRISHNASWAMI IYER, JJ.

References:—(a) 28 B. 667, *not F.*; 28 M. 238; 15 M. 15; 15 M. 255, *Cons.*; 25 M. 504; 25 M. 587; 14 M.L.J. 290; 33 L.J. Ch. 451 (454); 9 Ch. 116; 33 Sol. Journ. 183, *R.* (b) 32 C. 129 (P.C.), *R.*

(5) *Maintainability of suit—Declaration that certain legal steps, if taken, would be unjustifiable—Cause of action.*

No suit would lie for a declaration that, if the defendant takes certain legal steps, those steps will not be justified in law. Whether such steps are justified or not must, when they are taken, be determined by the Court before which the application is made, and not in anticipation by the same or some other Court. **Bajjnath Goenka v. Rani Sashirama Kumri**, 12 C.L.J. 183.

WOODROFFE and RICHARDSON, JJ.

(6)—*Suit for a declaration that plaintiff belonged to the Mughal tribe—Maintainability.*

Held that the plaintiffs' claim for a declaration that they belonged to the Mughal tribe and not to the Miana tribe, as shown in the Revenue Records, was maintainable, and the plaintiffs were entitled to the declaration, for, in the *Shajranasab* of 1860, their ancestor was shown as *Miana Mughal* and the entry was not rebutted by any evidence. **Muhammad Azim v. The Secretary of State for India in Council**, 89 P.L.R. 1910.

SHAH DIN, J.

(7) *Declaratory suit—Plaint, rejection of.*

The Court is not competent to reject a plaint, in which the plaintiffs sue for a declaration of

Declaratory suit—(Continued).

their right to the land in suit, without going into the question of possession of the plaintiffs and other merits of the cause. **Maluk Singh v. Dasaundha Singh**, 129 P.L.R. 1910.

RYVES, J.

(7-a) *Declaratory suit—Decree declaring defendant's right not proper.*

Where a plaintiff sues for a declaration of his right, it is not proper to declare the right of the defendant. The inquiry into defendant's right is only necessary to ascertain the rights of the plaintiff. **Katala Kelath Munikoth Rairu Nambiar v. Katala Karoth Thani-cheri Appa alias Ryrappan Nambiar**, 8 Ind. Cas. 567.

MUNRO and SANKARAN NAIR, JJ.

(8) Decree not in accordance with judgment—Dismissal of application to bring decree into conformity with judgment—Suit for declaration of the mistake—*Res judicata*. See CIV. PRO. CODE (1882), No. 20, 5 Ind. Cas. 119.

(9) Suit for declaration that defendant's rent was higher than what appeared on record of rights—Cause of action, when arises—Limitation. See LIMITATION ACT, 1877, No. 34, 5 Ind. Cas. 115.

(10) Mortgage of occupancy holding—Relinquishment by mortgagor's representative—Right of mortgagee to—. See MORTGAGE (GENERAL), No. 13, 7 A.L.J. 291.

(11) Dismissal of suit for declaration, whether bars subsequent suit for possession. See CIV. PRO. CODE (1882), No. 45, 6 N.L.R. 81.

(12)—by adopted son in respect of alienation by adoptive mother—Limitation. See LIMITATION ACT (1877), No. 81, 6 Ind. Cas. 443.

(13)—does not bar suit for possession. See CIV. PRO. CODE (1882), No. 12, 6 Ind. Cas. 696.

(14) Suit for declaration that a certain person is not plaintiff's son—Maintainability—Powers of Courts to make declarations. See SPECIFIC RELIEF ACT, No. 23, 12 Bom. L. R. 697.

(15) Suit to recover assessment under S. 59 of Madras Revenue Recovery Act—Reliefs by way of declaration and injunction prayed for in the same suit—Limitation. See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 6, 8 M.L.T. 201.

(16) Maintainability of suit for declaration of an abstract right. See SPECIFIC RELIEF ACT, No. 24, 7 Ind. Cas. 318.

Declaratory suit—(Concluded).

(17) Discretion of Court in granting declaratory decree—Interference with discretion—. See CIV. PRO. CODE (1882), No. 130-b, 8 Ind. Cas. 608.

Decree.

- (1) *Decree, amendment of—High Court, power of—Division Bench—Same Judges—Leave to appeal to His Majesty in Council—Amendment after grant of leave—Decree of lower Court—Confirmation in appeal—Civ. Pro. Code (Act V of 1908), S. 152, O. XLV, R. 13.*

An application for amendment of a decree need not be made to a Court composed of the same Judges who heard the appeal. The settled practice of the High Court is to allow applications of this character to be made to the Division Bench in charge of the group to which the case belongs.

O. XLV, r. 13 of the Code, does not restrict the operation of S. 152. The High Court may amend a decree, even after leave has been granted to appeal to His Majesty in Council, more so where the transcript record has not been sent to England.

It is settled law that, after a decree has been confirmed, reversed or varied in appeal, the decree of the appellate Court is the ultimate and only decree in the case. If an amendment is to be made, the application must be to the appellate Court, and not to the Court below. **Aghora Kumar Ganguli v. Mahomed Musa**, 11 C.L.J. 155 = 5 Ind. Cas. 723.

MOOKERJEE and TEUNON, JJ.

References :—11 A. 267 ; 18 B. 542, *F.*

- (2) *Decree, amendment of, by first Court, after being affirmed on appeal and after dismissal of second appeal under S. 551, C.P.C.—Civ. Pro. Code (Act V of 1908), S. 152.*

A Court of first instance has no jurisdiction to amend a decree, on the ground that it does not accord with the judgment, when such decree has been affirmed on appeal by the Subordinate Judge, and an appeal against the appellate decree has been dismissed by the High Court under S. 551 of the Code of 1882. The only Court competent to amend the decree is the High Court. S. 152 of the Code of 1908 has not in this respect altered the law. **Abbas Khan v. Nibarani Dass**, 11 C.L.J. 159 = 5 Ind. Cas. 261.

MOOKERJEE and TEUNON, JJ.

References :—24 C. 759 ; 11 C.L.J. 155, *F.* ; 21 B. 548, *not F.*

Decree—(Continued).

- (3) *Decree, affirmed on appeal, if may be amended by first Court.*

An amendment, by the Court of first instance of its decree, after it has been affirmed by the appellate Court, is made without jurisdiction.

Where the High Court, in exercise of its revisional jurisdiction, refused to interfere with an order of amendment so made, the Judicial Committee on appeal reversed the decision of the High Court, and set aside the order of amendment. **Lala Brij Narain v. Kunwar Tejbal Bikram Bahadur**, 14 C.W.N. 667 (P.C.) = 7 A.L.J. 507 = 11 C.L.J. 560 = 12 Bom. L.R. 444 = 8 M.L.T. 57 = 6 Ind. Cas. 669 = 20 M.L.J. 587 = 32 A. 295.

LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

- (4) *Decree—Sale certificate—Construction, rule of—Court's duty—Presumption.*

The Court is bound to interpret a decree and a sale certificate according to the language to be found in those documents. It is not justified in ignoring the terms of the decree and assuming that the parties have made a mistake. Where there is no ambiguity in the terms of a decree, the Court is bound to interpret it according to the plain meaning which its language would bear. **Sita Ram v. Ram Sarup**, 6 Ind. Cas. 75.

STANLEY, C.J. and GRIFFIN, J.

- (5) *Execution of decree—Sale—Decree passed against dead person—Nullity—No execution of such decree maintainable.*

If a decree was passed against a person who, at that time was not in existence, it was a bad decree, though passed as a result of a *bona fide* mistake, and could be successfully impugned by any person against whom it was actually passed, and on such a decree, of course, no execution could be legally had ; such a decree would be a nullity and might be disregarded without any proceeding to set them aside. **Rajani Kant Bhowmik v. Karamat Ali**, 5 Ind. Cas. 523.

CASPERSEZ and DOSS, JJ.

References :—32 I.A. 23 ; 2 A.L.J. 71 ; 1 C.L.J. 584 ; 7 Bom. L.R. 1 ; 9 C.W.N. 201 ; 32 C. 296, *F.*

- (6) *Legal representative—Decree against sons for debt due by father—Personal decree—Finding that sons not possessed of sufficient assets of the father.*

Decree—(Continued).

Where a decree is passed against sons for a debt due by their father, the proper form of the decree is that it should be enforceable as against the assets of the father in the hands of the sons.

In the absence of a specific finding that sufficient assets have come into the hands of the sons, no personal decree should be passed against them. **Nalupurakkal Tarwad Karanavan Syyali v. Kagki Mutaliar**, 6 Ind. Cas. 397.

BENSON and KRISHNASWAMI IYER, J.J.

Reference :—20 M. 446, R.

- (7) *Representation—Estate of deceased—Decree when estate not properly represented—Will left by deceased—Executor not made party to suit—Effect of decree.*

If the estate of a deceased person be not properly represented in a suit, his property cannot be affected by a sale held in execution of the decree obtained in that suit (a).

In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented (b).

Where, in the course of a suit, the defendant dies, and a person appears in that suit and applies to be substituted as the representative of the deceased defendant by reason of the fact that he is the executor appointed under the will of the deceased, the Court should either add him as the representative of the deceased or stay its hands in order to give him an opportunity of proving his title. If the plaintiff in that suit presses for the substitution of the legal representatives of the deceased, the result will be that he will obtain a decree against the estate of the deceased, in a suit in which that estate is not properly represented, and consequently the decree will be bad. **Harish Chunder Biswas v. Puri Das Das**, 6 Ind. Cas. 627 = 14 C.W.N. 1041.

BRETT and RICHARDSON, J.J.

References :—(a) 9 B. 86 ; 32 I.A. 23 ; 2 A.L.J. 71 ; 1 C.L.J. 584 ; 7 Bom. L.R. 1 ; 9 C.W.N. 201 ; 32 C. 296, *relied on*. (b) 22 C. 90, 3, F. ; 4 C. 342 ; 3 C.L.R. 154, D.

- (8) *Suit to set aside a decree—False evidence.*

A suit to set aside a decree upon the ground that it was obtained by means of false evidence

Decree—(Continued).

is not maintainable. **Balasangappa v. Venkata Rao**, 15 M.C.C.R. 286.

ISMAY, C.J. and CHANDRASEKHARA AIYAR, OFFG. J.

Reference :—29 M. 179, Diss.

- (9) *Suit to set aside decree—Decree obtained on false allegation and supported by perjury—Whether suit maintainable.*

A decree cannot be declared a nullity and set aside merely on the ground that the suit was brought on a false allegation and supported by false evidence. **Mohendra Narain Chuckerbuddy v. Shashi Bhushan Chatterjee**, 7 Ind. Cas. 764.

CHATTERJEE, J.

Reference :—21 C. 612, F.

- (9-a) *Right to sue—Judgment in personam—Who can set aside on the ground of fraud.*

A person, who is not a party to a suit, cannot sue to have the decree set aside on the ground of fraud or otherwise. **Komerappa Chetty v. Beindu**, 8 Ind. Cas. 614.

PARLETT, J.

References :—3 Bur.L.R. F. ; 17 M. 389 ; 10 B. 659 ; 12 C. 156 ; 16 M. 198 ; 6 B. 703, R.

- (9-b) *Joint decree against two defendants—Setting aside of entire decree at the instance of one defendant—Fraud, setting aside of decree on ground of.*

A suit for possession on alleged unlawful dispossession was brought against two persons and a joint decree against both defendants was passed. It was not stated that each of the defendants was in possession of a particular share.

Subsequently one of the defendants brought a suit for cancellation of the decree on the ground that it had been obtained by fraud. She was successful in proving that the decree was obtained by fraud and also in showing that the other defendant was a party to the fraud.

Held that the entire decree must be set aside (a). **Padarath Pathak v. Mussammat Maharaji**, 13 O.C. 388.

LINDSAY, J.C.

Reference :—24 A. 383, R.

- (10) *Common property belonging to community—Decree appointing receiver till proper trustee is appointed by community—Validity.* See **RECEIVER**, No. 2, 19 M.L.J. 669.

Decree—(Concluded).

(11) Decree—Vagueness in description—Effect. See MORTGAGE (REDEMPTION), No. 6, 7 M.L.T. 191.

(12) Suit to set aside, on ground of non-service of summons. See SUMMONS, No. 1, 11 C.L.J. 250.

(13)—lost or destroyed—Power to reconstruct. See EXECUTION OF DECREE, No. 7, 11 C.L.J. 243.

(14)—Set aside for fraud—Order of Court of concurrent jurisdiction, if effective to restore suit. See SUIT, No. 1, 14 C.W.N. 558.

(15)—Whether fraudulent—Point of law—Second appeal. See CIV. PRO. CODE (1908), No. 46, 5 Ind. Cas. 398.

(16)—Setting aside, in part—Legality. See CIV. PRO. CODE (1882), No. 66, 5 Ind. Cas. 284.

(17)—Modification of, if can be made by first Court after appeal preferred. See CIV. PRO. CODE (1908), No. 75, 14 C.W.N. 584.

(18) Interlocutory order for examination of account of Receiver is not a decree—Appeal. See MORTGAGE (GENERAL), No. 24, 6 Ind. Cas. 323.

(19) Partition suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Decree validated from date of decree. See PARTITION, No. 13, 7 Ind. Cas. 94.

(20) Evidence of subsequent oral agreement rescinding or modifying—Admissibility. See EVIDENCE ACT, No. 19, 6 N.J.R. 123.

(21) Order under Land Acquisition Act not a—. See ACT I OF 1894 (LAND ACQUISITION), No. 3, 12 Bom. L.R. 839.

(22) Order striking off certain defendants—Effect—Appeal. See CIV. PRO. CODE (1908), No. 1-c, 8 Ind. Cas. 409.

(23) Order directing distribution of sale proceeds between several mortgagees—Whether a—Appeal. See MORTGAGE (GENERAL), No. 52, 8 Ind. Cas. 4.

Dedication.

(1) Unrestricted dedication—Dedication by trustees, presumption as to—Burden of proof. See HIGHWAY, No. 1, 8 Ind. Cas. 175.

Defamation.

(1) Defamatory words, ambiguous—Plaint alleging an innuendo—Plaintiff's right to prove—Excommunication from caste, rules regarding.

Defamation—(Continued).

Where, in a suit for damages for defamation, the plaintiff alleges in his plaint that the defendant libelled him by using certain words, which are capable of being understood as implying that the plaintiff is an outcaste.

Held, it is open to the plaintiff to prove that the words were intended to convey that imputation, having regard to the time and place and manner of utterance and all other relevant facts which may be duly proved (a).

Prayaschitam by itself may not indicate any kind of excommunication. But *prayaschitam* for a caste offence, as a condition for re-admission into religious or social communion, certainly implies provisional excommunication, which is removed when *prayaschitam* is performed.

Words, which are intended to bring about disastrous consequences resulting from the loss of caste, such as deprivation of religious and social communion, by imputing unworthiness to any person to continue a member of his caste, are *prima facie* defamatory and give rise to a cause of action.

A man may be excommunicated or otherwise punished for a caste offence; but that jurisdiction must be exercised only by the caste "with due care and in conformity with the usage of the caste" (b). **Cooposwami Chetti v. A. T. Duraiswami Chetti**, 6 M.L.T. 290 = 33 M. 67 = 19 M.L.J. 714 = 3 Ind. Cas. 955.

SIR R. S. BENSON, O.C.J. and SANKARAN NAIR, J.

References:—(a) L.R. 7 App. cases, p. 777. (b) 10 M. 133; 15 M. 217; 12 M. 495; 17 M. 222; 6 M. 384 and 19 M. 64, *It*.

(2) Defamatory statement in affidavit—Privileged—*Sit* for damages—Maintainability.

There is no difference between evidence given in the box and the evidence on affidavit, in that they are both absolutely privileged, and no suit for damages will lie in respect of evidence given therein. **Adapala Adivaramma v. Rabala Ramachandra Reddy**, 6 Ind. Cas. 309.

WALLIS, J.

References:—11 B.L.R. 318 (328); 17 W.R. 283, (1875) [L.R. 7 H.L. 744; 45 L.J. Q.B. 8; 33 L.T. 196; 23 W.R. 931; L.R. 1 C.D. 540 (545), *F.*; 11 M. 477; Weir's Cri. Rul., Vol. 1, p. 561, *R.*

(3) Defamation—Written statement—Judicial proceeding—Absolute privilege.

Defamation—(Concluded).

A written statement of a party in a judicial proceeding, which contains defamatory matter, is not absolutely privileged. **H. P. Sandyal v. Bhaba Sundari Debi**, 7 Ind. Cas. 808.

HOLMWOOD and CHATTERJEE, JJ.

References :—23 C. 967 ; 5 C.W.N. 293 ; 29 A. 685 ; A.W.N. (1907), 235 ; 4 A.L.J. 605 ; 6 Cr. L.J. 197, *F*.

(4) Defamatory statement in affidavit—Privilege—Suit for damages—Maintainability. See **EVIDENCE**, No. 2, 6 Ind. Cas. 309.

Default.

Dismissal for—Costs. See **CIV. PRO. CODE** (1882), No. 193, 99 P.L.R. 1910.

Defence.

(1) Inconsistent defences—When may be pleaded. See **PLEADINGS**, No. 6, 7 Ind. Cas. 166.

(2) Power of Court to strike out defence of defendant of its own motion. See **CIV. PRO. CODE** (1908), No. 111, 84 P.L.R. 1910.

Dekkhan Agri. Relief Act.

See **ACT XVII of 1879 (BOMBAY)**.

Delay.

(1) Delay, excusing of—Discretion of Court—Interference of High Court. See **REVIEW**, No. 1, 7 M.L.T. 387.

(2) Long delay in suing—Effect. See **REVISION**, No. 5, 97 P.W.R. 1910.

(3)—in suing—Burden of proof of necessity or consideration. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 26, 78 P.L.R. 1910.

(4)—in suit—Effect on burden of proof. See **MORTGAGE (USUFRUCTUARY)**, No. 6, 7 Ind. Cas. 646.

Delivery.

Railway receipt in name of vendee as consignor, effect of.

The mere fact that the receipt is made out in the name of the vendee both as consignor and consignee, to secure the vendee for the advances made by him, is not tantamount to delivery of the goods which completes the contract of sale and transfers the ownership of goods, but amounts only to constructive possession of the goods as the pawnee thereof (Ss. 172, 173, Contract Act.) **Sanday, Patrick & Co. v. Mayam-al Bishendas**, 4 S.L.R. 10 = 7 Ind. Cas. 588.

CROUCH, J.

Delivery—(Concluded).

(2) Goods shipped from one place to another—Delivery of goods to consignee, what constitutes. See **INSURANCE**, No. 1, 3 S.L.R. 191.

Deposit.

(1)—when may be forfeited—Discretion of Court. See **CIV. PRO. CODE** (1908), No. 125, 7 A.L.J. 325.

(2) Test whether there was a—. See **ACT I OF 1904 (PUNJAB LOANS LIMITATION)**, No. 1, 59 P.R. 1910.

(3) Nature of—Right to refund of, when arises. See **VENDOR and PURCHASER**, No. 5, 7 A.L.J. 1019.

(4) of policy as security for debt—Subsequent assignment of policy to another creditor—Priority. See **INSURANCE**, No. 3, 12 Bom. L. R. 717.

Deposition.

(1) Nature of a—Opportunity of cross-examination—Deposition in suit against widow—Value of, in subsequent suit against reversioner. See **WITHDRAWAL OF SUIT**, No. 2, 7 Ind. Cas. 892.

Dirhams.

Dower—Dirhams—Money value. See **MAHOMEDAN LAW (DOWER)**, No. 1, 7 A.L.J. 116.

Dismissal of suit.

Case to be decided on issues—Where plaintiff's title was assumed, case not to be dismissed. See **ISSUES**, No. 1, 6 Ind. Cas. 446.

Dispossession.

Rent-decree obtained by defendant against plaintiff's tenants, if amounts to. See **SPECIFIC RELIEF ACT**, No. 19, 14 C.W.N. 576.

District Municipalities Act.

(1) See **ACT III OF 1901 (BOMBAY)**.

(2) See **ACT IV OF 1894 (MADRAS)**.

Distraint.

English and Indian Law of. See **ACT VIII OF 1865 (RENT RECOVERY)**, No. 2, 7 Ind. Cas. 210.

Division Bench.

Power of, on case referred to it. See **CIV. PRO. CODE** (1908), No. 20, 12 P.W.R. 1910.

Divorce.

(1) *Divorce proceedings—Attachment before judgment—O. XXXVIII, rr. 5, 6, C.P.C. (1908)—Ss. 7, 45, Act IV of 1869 (Divorce).*

Divorce—(Concluded).

An order for attachment before judgment cannot be made in divorce proceedings. There is much in the Code of Civil Procedure which deals with substantive law and not procedure; and O. XXXVIII, rr. 5 and 6, have no application in divorce proceedings. Attachment before judgment is a matter of relief and not of procedure. **Phillips v. Phillips**, 37 C. 613.

PUGH, J.

Divorce Act.

See ACT IV OF 1869.

Documents.

(1) Interpolation in—Admitted by executants before—Registrar—Effect. See MORTGAGE (GENERAL), No. 18, 5 Ind. Cas. 654.

(2) Effect of not objecting to admissibility of, before lower Court. See LAND SUIT, No. 1, 73 P.W.R. 1910.

(3)—between Hindus and Mahomedans regarding sacrifice of cows—*Nudum factum*—Validity. See SPECIFIC RELIEF ACT, No. 24, 7 Ind. Cas. 318.

(4) Material alteration of deeds—Effect. See AWARD, No. 1, 6 N.L.R. 1.

(5) Suit for declaration that deed is inoperative—Cause of action—Limitation. See LIMITATION ACT (1877), No. 59, 5 Ind. Cas. 497.

Dower.

(1) Marriage contract entered at Lucknow—Suit for dower filed in Meerut—Powers of Court. See ACT XVIII OF 1876 (ODDH LAWS), No. 1, 7 A.L.J. 388.

(2) Unreasonable amount of—Legality—Registration of deed of. See CUSTOMS (PUNJAB—ALIENATION), No. 10, 71 P.W.R. 1910.

Drain.

—Whether a continuous easement. See ACT V OF 1882 (EASEMENTS), No. 2, 8 M.L. T. 292.

Dustoori.

(1) Dustoori or commission—Agreement to pay, on purchases—Opposed to public policy.

A claim for *dustoori* or commission on purchase of mortar, based on custom, is immoral and opposed to public policy. *Obiter*, such a claim, even if based on agreement, is illegal. **Madho Ram v. Badar-ud-din**, 91 P.R. 1910 (Civ.)

SCOTT-SMITH, J.

Earthquake.

Subject of lease damaged by—Effect. See TRANSFER OF PROPERTY ACT, No. 85, 7 Ind. Cas. 201.

Easement.

(1) *Easement, suit relating to—Servient owners, if all must be parties.*

A decree based on an easement cannot be passed, when all the servient owners are not parties. **Madan Mohan Chattopadhyaya v. Akshoy Kumar Baruri**, 14 C.W.N. 15=5 Ind. Cas. 23.

JENKINS, C.J., and MOOKERJEE, J.

(2) *Right of way—Maintainability of suit—Amendment of plaint.*

Where A, a resident of a village, has the right to use the path over the land of B, and claims it as an easement, and it is not alleged in the plaint that the path over B's land is a public right of way, *held*, the suit is maintainable by A on his own behalf, and he may be allowed to amend the plaint to limit the claim to that easement. **Iswara Gowd v. Komati Siddappa**, 7 M.L.T. 222.

BENSON and ABDUR RAHIM, JJ.

References:—9 M. 463 and 14 M. 177, D.

(3) *Easement—Branches of a tree—Existence for over 12 years—Prescriptive right—Whether exists.*

A claim of prescriptive right to the branches of a tree, on the ground that the branches have been in existence for more than 12 years, cannot be held admissible. **Boppa Poparayudu**, 7 M.L.T. 247=6 Ind. Cas. 600.

BENSON and ABDUR RAHIM, JJ.

References:—19 B. 420, F.; 29 M. 511, D.

(4)—*of necessity—Right of way—Other means of access—Mortgage deed reserving right of way—Transference—from mortgagee—Right to object.*

If A has a means of access to his property without going over B's land, then A would have no right of way through B's land as an easement of necessity (a).

Where a mortgage deed reserves a right of way over a lane forming part of the mortgaged property, if the mortgagee transfers his right as mortgagee to a third person, then, it is open to the transferee-mortgagee to raise the contention that there was no easement of a right

Easement—(Continued).

of way. **Thannir Yenkatarama Chetty v. Madagutisami Chetty**, 7 M.L.T. 288 = 6 Ind. Cas. 605.

BENSON and KRISHNASWAMI IYER, JJ.

Reference :—(a) 28 M. 495.

(5) *Ownership of Kosalai attached to one house but overhanging the ground of adjoining house—Whether Kosalai belongs to the house over the ground of which it overhangs—Space above and beneath Kosalai, to whom belongs—Owner of house over the ground of which Kosalai overhangs, whether can build on Kosalai—Trespass.*

Where two adjoining houses belong to a certain person and there is a *kosalai* attached to one house and overhanging the ground of the adjoining house, held, if the two houses are sold to different persons, the *kosalai* passes to the purchaser of the house to which it is attached, but not to the owner of the ground over which it overhangs (a).

Held also, that the space above and beneath the *kosalai* does not belong to the owner of the *kosalai* (b).

Held further, that the owner of the ground over which the *kosalai* overhangs will not be entitled to raise a construction upon the *kosalai*, even though the space above it does not belong to the owner of the *kosalai*. Building upon the *kosalai* will therefore constitute a trespass. **Saminada Sastrigal v. Pathma Bibi Ammal**, 8 M.L.T. 122 = 7 Ind. Cas. 175.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) (1992) 2 Ch. 53. (b) (1871) L.R. 9 Eq. 671, R. .

(6) *Easement—Non-user—Abandonment—Intention—Limitation Act (XV of 1877). S. 26—Extent to which easement to be used Watering mulberry land—Right to irrigate other crops.*

An easement once acquired is not necessarily lost by mere non-user; and the question of abandonment is one of intention to be decided on the facts of each particular case.

The plaintiff obtained a decree which established his right to take water from a certain tank, belonging to the defendant, for the purpose of "irrigating plaintiff's 9 cottah mulberry land.

Held that the right declared and established by the decree was not restricted to that kind of cultivation, but that the decree gave the plaintiff the right to a reasonable use of the water

Easement—(Concluded).

of the defendant's tank to the extent to which the same was used prior to the date of the decree, no matter what crop the plaintiff chose to grow (a). **Poran Ghosh v. Netal Sundar Roy**, 7 Ind. Cas. 813.

TEUNON, J.

References :—(a) 4 Rep. 86 a; 11 A. and E. 759; 3 P. and E. 581; 9 L.J.Q.B. 258; (1902) 2 Ch. 759; 71 L.J.Ch. 835; 87 L.T. 405; 51 W.R. 312; L.R. 6 Ch. App. 166; 40 L.J. Ch. 126; 24 L.T. 209; 19 W.R. 833, Rel. on.

(6-a) *Easements Act (V of 1882), S. 15—Claim for a right of way as an easement—Proof of enjoyment as an easement—False plea of ownership of the way—Whether destroys acquisition of right of easement.*

In an action to establish an easement of a right of way over a lane, the plaintiff should prove enjoyment of the way as an easement for the period of prescription.

The fact that, in a previous suit, plaintiff falsely set up his ownership of the way, will not preclude the acquisition of the right of easement, which has to be proved by independent evidence (a). **Yenkata Yarahia Dikshitar v. Subbaroya Pillai**, 8 Ind. Cas. 502.

BENSON and KRISHNASWAMI IYER, JJ.

Reference :—(a) 16 B. 592, R.

(6-b) *Easement overriding S. 168, District Municipalities Act, whether possible. See ACT IV OF 1884 (DISTRICT MUNICIPALITIES), No. 2, 7 M.L.T. 154.*

(7) See NATURAL RIGHTS, No. 1, 7 M.L.T. 164.

(8) *Suit for partition—Prayer in the nature of an, whether can be granted in second appeal. See APPEAL (SECOND APPEAL), No. 3, 6 Ind. Cas. 423.*

(9) *Grant of. See COVENANT, No. 1, 12 C. L.J. 259.*

(10) *Enjoyment and possession of buttress for more than twelve years—Effect. See ADVERSE POSSESSION, No. 7, 8 M.L.T. 282.*

(11) See ACT V OF 1882 (EASEMENTS).

Easements Act.

See ACT V OF 1882.

Ejectment.

(1) *Inam lands in or outside a zemindari—Right of Inamdars to eject.*

In the absence of any evidence of right to eject, the Inamdars will not be entitled to eject persons, who and whose predecessors have been in possession for about 50 years.

Ejectment—(Continued).

If the inam is in a zamindari, the Inamdar cannot be in a better position, as regards the right to eject, than the zemindar who created the inam. But if the inam is situated outside a zamindari and is granted by Government, there would be no presumption in favour of the inamdar that he would be entitled to eject. **Maddu Yerrayya v. Yadulla Kangati Naidu**, 7 M.L.T. 365.

BENSON and KRISHNASWAMI IYER, JJ.

References :—14 M. 269 and 23 M. 318 (321), R.

(2) *Ryoti land—Zamindar's right to eject the ryot and recover possession of land.*

A zamindar will not be entitled to eject a ryot from a ryoti land and recover possession thereof. **Narayanasami Naidu Garu v. Karaturli Venkayya**, 7 M.L.T. 366.

BENSON and KRISHNASWAMI IYER, JJ.

(3) *Right to eject the tenant in Berar on non-payment of rent—Denial of landlord's title in the pleadings whether gives cause of action for.*

A tenant of land in Berar is liable to eviction, if he persists in not paying the amount found due from him (whether as rent or revenue) in respect of land held by him, but before he is ejected, he should be given a reasonable opportunity of paying the amount found due from him.

The denial by the tenant of his landlord's title in the pleadings will not give the landlord a cause of action for ejectment, which he had not when he filed the suit. **Rajaram v. Yithal**, 6 N.L.R. 83 = 6 Ind. Cas. 927.

SKINNER, A.J.C.

References :—(a) (1896) 2 Berar L.J. 137, F; 13 B. 323; 15 M. 125, R. (b) 15 B. 407; 13 C. 96; 28 C. 135; 31 M. 261, F; and 8 B. 228, Not F.

(4) *Ejectment suit—Defendant in possession—Admission of title in plaintiff—Defendant setting up title by transfer from plaintiff—Onus of proof—What plaintiff ought to prove.*

Where it is admitted, or has been proved, in an ejectment suit, that, within the statutory period (of 12 years), plaintiff was in possession, under title, of the land in suit, the defendant, who pleads his own title by transfer from the plaintiff, cannot rely upon his possession as raising a presumption in favour of that title, but must prove the transfer which he alleges.

Ejectment—(Concluded).

In an ejectment suit, the plaintiff must prove a title to possession subsisting at the date of suit. **Baliram v. Sitla**, 6 N.L.R. 160.

STANYON, A.J.C.

(4-a) *Distinction between injunction and—English and Indian Law—Duty of Courts in India.* See CO-SHARERS, No. 4, 11 C.L.J. 189.

(5) *Suit in—Defendant's right to put plaintiff to proof of his title.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 1, 5 Ind. Cas. 291.

(6) —, meaning of. See ACT IX OF 1883 (CENTRAL PROVINCES TENANCY), No. 5, 6 N.L.R. 95.

(6-a)—of one not a party to suit—Revision. See CIV. PRO. CODE (1882), No. 169-c, 8 Ind. Cas. 613.

(7) *Plaintiffs owning separate parcels of land—Trespass—Suit in—Misjoinder.* See MIS-JOINDER, No. 3, 6 Ind. Cas. 15.

(8) *Action in—Invalidity of notice—Objection taken in second appeal.* See TRUST, No. 3-b, 8 M.L.T. 435.

Ejusdem Generis.

Application of principle of. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

Election.

See ACT II OF 1882 (TRUSTS), No. 3, 6 N.L.R. 12.

Emblements.

No Law of, in India. See ACT VIII OF 1885 (BENGAL TENANCY), No. 48, 11 C.L.J. 87.

Encroachment.

(1) *Plans approved by Municipality and buildings erected—Burden of proving encroachment—Enjoyment for long periods.*

Where the plaintiff has had buildings erected on the disputed sites for about nine and four years respectively, and notice was given to the Municipality before building and plans were submitted and no objection was taken, held, that under the circumstances, the burden of proving the encroachment lay upon the Municipality. **Tippabhotla Lakshmi Narasamma v. The Municipal Council of Masulipatam**, 8 M.L.T. 290.

BENSON and KRISHNASWAMI IYER, JJ.

English Law.

(1) *Application of principles of English Law in construction of Wills.* See WILL, No. 6, 3 S.L.R. 185.

English Law—(Concluded).

(2) English Common law, if to be applied in India. See **MAHOMEDAN LAW (GENERAL)**, No. 1, 14 C.W.N. 865.

Equity.

(1) Court's power to introduce equities modifying statute law. See **TRANSFER OF PROPERTY ACT**, No. 32-a, 8 Ind. Cas. 364.

Escheat.

Proof of right of. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 4, 18 P.R. 1910.

Estates Act.

See **ACT I OF 1869 (ODH)**.

Estates Land Act.

See **ACT I OF 1908 (MADRAS)**.

Estates Partition Act.

See **ACT V OF 1897 (BENGAL)**.

Estoppel.

- (1) *Estoppel—Signature on document as a witness—Knowledge of contents—Denial of lessor's right—Transfer of the witness's right.*

The plaintiff's suit was for possession of certain property, on the ground that the plaintiff was its absolute owner. The defendant alleged that the plaintiff's husband had relinquished the land in his favour, and that he was the absolute owner of that land. The defendant produced a lease purporting to have been executed by himself in respect to the property in dispute, in which it was recited that the plaintiff had no title to the property but that the defendant was its owner. To this lease the plaintiff was a marginal witness. The Courts below found that she was aware of the contents of the lease. *Held* that the plaintiff's title was not transferred by a mere recital in the lease, to the person in whose favour the recital was made.

Held further that the plaintiff was estopped from denying the defendant's right as against the lessees, but she was competent to deny the defendant's right as against herself. **Baldeo Sahai v. Sunder Kuar**, 7 A.L.J. 664 = 7 Ind. Cas. 264.

STANLEY, C.J., and GRIFFIN, J.

- (2) *Father maintaining suit in his individual capacity or in his representative capacity—Circumstances raising presumption—Whether sons can raise the same plea as father raised in the former suit.*

Estoppel—(Continued).

A suit was brought on a mortgage executed by the father of the first defendant in favour of the first defendant's daughter. The first defendant had brought a suit for declaration that the mortgage has been discharged by his father before his death. The suit was dismissed on appeal.

Held, the question whether the sons of first defendant are now estopped from raising the same plea of discharge as the father raised in a former suit depends on the question whether the father in the former suit sued in his representative capacity as the manager of the family.

The circumstances that the interests of the first defendant and his sons were identical, it being as much to their interest as to his to free the family land of the encumbrance, and that the first defendant was the father of the family, raise no presumption that the former suit was on behalf of the family. **Rangasami Iyengar v. Annathurai Iyengar**, 8 M.L.T. 204 = 7 Ind. Cas. 341.

MILNER and ABDUR RAHIM, JJ.

- (3) *Estoppel—Judgment—Different position in litigation not allowed—Issue not raised.*

A judgment is an estoppel upon a party, not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognises or sustains his theory or claim, it estops him from afterwards taking a different position in litigation with the same opponent (a).

The present plaintiffs failed, in certain previous suits instituted by the present defendant, on the ground that he was prevented by plaintiffs from realising his rents from the tenants on the ground that the holdings had been transferred by purchase to other persons: *held*, that the plaintiffs could not now be allowed to set up, in support of the present suit, an absolutely inconsistent case in which they alleged that no right passed to the defendant under the sales to him; and that the mere omission in the previous proceedings to have a distinct issue framed on the point, whether an occupancy right was transferable by custom or not, was not sufficient to save the plaintiffs from being estopped in the present suit, when the defence, which they took and supported in the previous suits, was absolutely inconsistent with the existence of such a custom and when the existence of such custom, if it had been pleaded in those suits and maintained, would have been a sufficient answer to the claim then

Estoppel—(Concluded).

put forward by the present defendant. **Langat Singh v. Rai Radha Kishen Bahadur**, 7 Ind. Cas. 781.

BRETT and VINCENT, JJ.

Reference :—(a) 6 C.L.J. 621, *Rel. on.*

(4) *Evidence Act*, S. 115—*Estoppel—Compromise decree.*

A decree passed by consent or following on a compromise is as effective as an estoppel between the parties as a decree passed in a contested suit. A decree passed on a compromise may be binding on a co-defendant who was not a party to the compromise. **Nanjappa alias Appaji Gowda v. Kempanna**, 15 M.C.C.R. 293.

ISMAY, G. J., and CHANDRASEKHARA AIYAR, J.

(b) *Cestui que trust* concurring in a breach of trust—Payment by administrator with consent of next of kin—Effect. See **ADMINISTRATOR**, No. 1, 12 Bom. L.R. 53.

(6) Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel. See **SARANJAM**, No. 1, 12 Bom. L. R. 208.

(7) Transferee of a co-sharer—Application of doctrine of. See **OCCUPANCY RIGHT**, No. 2, 14 C.W.N. 779.

(8) Elements of. See **CIV. PRO. CODE** (1882), No. 10, 5 Ind. Cas. 732.

(9) Party obtaining benefit of erroneous order not to ask same to be disregarded. See **CIV. PRO. CODE** (1882), No. 113, 6 Ind. Cas. 813.

(10)—when arises. See **EVIDENCE ACT**, No. 35, 15 M.C.C.R. 122.

(11) Acceptance of order of Court and action under it—Subsequent objection to validity of order—Estoppel. See **AMENDMENT**, No. 4-a, 8 Ind. Cas. 79.

Evidence.

(1) *Supplementary Survey Records—Value to prove mortgage—Evidence Act*, S. 65 (c)—*Public documents, how proved.*

Held that Supplementary Survey Records containing an entry as to a mortgage are insufficient to prove the mortgage, in the absence of other reliable evidence (a).

The proper way and the only way to prove an entry in the Settlement Records was to obtain and put in evidence a certified copy. **Mi Se San and others v. Mi Min Ya and others**, U.B.R. (1909), 4th Qr., Evidence 19.

SHAW, J.

References :—U.B.R. (1904—06), Vol. II, Ev. 8; 2 L.B.R. 56, R.

Evidence—(Continued).

(2) *Defamation—Defamatory statement in affidavit—Privilege—Suit for damages—Maintainability.*

There is no difference between evidence given in the box and the evidence on affidavit, in that they are both absolutely privileged, and no suit for damages will lie in respect of evidence given therein. **Adapala Adiyamma v. Rabala Ramachandra Reddy**, 6 Ind. Cas. 309 = 8 M.L.T. 55.

WALLIS, J.

References :—11 B.L.R. 318 (328); 17 W.R. 283; (1875) L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 23 W.R. 931; L.R. 1 C.D. 540 (545), P: 11 M. 477; Weir's CrL. Rul. Vol. I, p. 561, R.

(3) *Practice—Procedure—Trial of suit—Absence of defendant—Plaintiff tendering only sufficient evidence to establish claim—Appeal—Right of plaintiff to be allowed to adduce all his evidence.*

Where, at the trial of a suit, the plaintiff tenders only enough evidence to establish his claim owing to the absence of the defendant, and obtains a decree, and on appeal the appellate Court reverses the first Court's decree on the ground that the plaintiff had not sufficiently proved his case, the appellate Court, before dismissing plaintiff's suit, should give him an opportunity of putting on record the additional evidence which he had filed in Court but which he abstained from tendering owing to the defendant's absence. **Vallammai Achi v. Maranen Pillai**, 7 Ind. Cas. 494.

WALLIS and KRISHNASWAMI IYER, JJ.

(4) *Deeds—Material alteration after execution and without privity of party to be affected by it—Effect—Whether it can be used in evidence—Deed, which have a continuing effect and deeds taking effect at once—Distinction.* See **AWARD**, No. 1, 6 N.L.R. 1.

(5) Jurisdiction of Court to admit evidence after decree. See **CIV. PRO. CODE** (1882), No. 232, 11 C.L.J. 26.

(6) *Usufructuary mortgage below Rs. 100—Proof of debt—Admissibility in.* See **MORTGAGE (USUFRUCTUARY)**, No. 1, 7 A.L.J. 71.

(7) *Unregistered document which is compulsorily registrable, how far admissible in.* See **MAINTENANCE**, No. 3, 7 M.L.T. 278.

(8) *Reappraisal of—, whether a ground for revision.* See **CIV. PRO. CODE** (1908), No. 59, 6 N.L.R. 49.

Evidence—(Concluded).

(9) Lease—, want of registration—Admissibility in—Specific performance. See *LEASE*, No. 13, 11 C.L.J. 548.

(10) Power of appellate Court to admit evidence in appeal. See *CIV. PRO. CODE* (1882), No. 217, 6 Ind. Cas. 196.

(11) Power to allow fresh evidence to be given in second appeal. See *HINDU LAW (REVERSIONER)*, No. 2, 5 Ind. Cas. 666.

(12) Value of Thak and Survey maps—Evidence of possession—Effect. See *ACT XV OF 1891 (MURSHIDABAD)*, No. 1, 6 Ind. Cas. 392.

(13) Misinterpretation of—Not considering loss of important document. See *REVISION*, No. 5, 97 P.W.R. 1910.

(14) Construction of will—Admissibility of extrinsic evidence. See *ACT X OF 1865 (SUCCESSION)*, No. 7, 12 Bom. L.R. 963.

(15) Private arbitration—Applicability of rules of. See *CIV. PRO. CODE* (1882), No. 206, 7 Ind. Cas. 333.

(16) Suit to set aside a decree—False evidence—Maintainability. See *DECREE*, No. 9, 15 M.C.C.R. 286.

(17) Assumption by Court against evidence on record—Revision. See *REVISION*, No. 6, 127 P.L.R. 1910.

(18) Claim against estate of the deceased—Uncorroborated evidence of plaintiff—Value. See *PROMISSORY NOTE*, No. 6, 12 C.L.J. 470.

(19) Evidentiary value of statements in District Manuals—Proof of custom. See *LANDLORD AND TENANT*, No. 53, 8 Ind. Cas. 330.

(20) Chitta—Admissibility in. See *RES JUDICATA*, No. 23-a, 8 Ind. Cas. 715.

Evidence Act.

(1) Nature and scope of. See *GUARDIAN AND MINOR*, No. 7, 86 P.W.R. 1910.

(1-a) Ss. 10, 13, 18, 21, 33, 41, 43, 45, 155, 157. See *GUARDIAN AND MINOR*, No. 7, 86 P.W.R. 1910.

(1-b) S. 13—See No. 1-a, *supra*.

(1-c) S. 13—See No. 1-a, *supra*.

(1-d) S. 21—See No. 1-a, *supra*.

(2) S. 32 (5)—Pedigree filed in settlement Court—Admissibility in evidence of such pedigree without proof—Evidence Act (I of 1872), S. 32 (5)—Admission used as evidence of facts stated therein—*Rivaj-i-am*, good evidence of custom stated therein—Second appeal, finding of fact based on

Evidence Act—(Continued).

evidence cannot be disturbed in—Adverse possession from mere mutation of names in favour of guardian.

A pedigree filed at the time of the regular settlement and accepted by the settlement Court is not admissible in evidence, unless it is proved how the pedigree was prepared, whether it was based upon the statement of a person since deceased and whether such person had special means of knowledge.

Where a finding of fact has been arrived at by the lower appellate Court on an admission previously made by one of the parties, the finding is good and valid and cannot be disturbed in second appeal.

Where a minor was entitled to a property of which the mutation of names was effected, not in his favour, but in favour of a person who was actually his guardian and not really entitled to the property on his own behalf, such person cannot be considered to be in adverse possession. *Mohammad Azim Khan v. Brijraj Singh*, 8 Ind. Cas. 728.

EVANS, J.C.

(3) Ss. 32, 34—Collection papers, admissibility of.

The fact that collection papers may be admissible under S. 34 of the Evidence Act does not prevent their also being admissible under S. 32 of the Act, if the conditions prescribed by S. 32 are established. *Bhaba Sundari Devi v. Talra Nasya*, 6 Ind. Cas. 369.

JENKINS, C.J. and DOSS, J.

References :—11 C. 407; 28 B. 294, *Expl.*

(4) S. 32 (3)—Recital as to ownership—Recital in a document relating not to suit land but to neighbouring land.

Where the question was as to who was the owner of a certain land ;

Held, that a recital in a document dealing with the neighbouring land that the land in question belonged to the plaintiff was not legal evidence. Nor was it admissible under S. 32 (2) of the Evidence Act. *In re Daddamaneni Rarayanappa*, 8 Ind. Cas. 268.

KRISHNASWAMI IYER, J.

Reference :—23 B. 63, *not Appr.*

(4-a) Ss. 32 (5), 90, 115—Statements about the birth and death of relatives—Admissibility under S. 32 (5)—Presumption in favour of old documents if applicable to copies. See *BENAMI TRANSACTIONS*, No. 1-a, 7 Ind. Cas. 218.

Evidence Act—(Continued).

- (5) *S. 33—Witness dying after examination-in-chief, but before cross-examination—Admissibility of evidence—Value.*

The plaintiff was examined-in-chief, but died before cross-examination. The question was as to the admissibility of his evidence. *Held* that, without going so far as to hold that the evidence is altogether inadmissible for any purpose, because the cross-examination was not completed (a), it is clear that the principles underlying S. 33, Evidence Act, points to the conclusion that such evidence ought not ordinarily to be acted upon (b). **Rose alias Hagl v. Yadala Pillamma**, 7 M.L.T. 41 = 11 Cr. L.J. 145 = 5 Ind. Cas. 512.

BENSON and ABDUR RAHIM, JJ.

References:—(a) Wigmore, Vol. II, p. 1742, R. (b) 5 C.W.N. cccxx, F.

(5-a) *S. 33—Deposition in suit against widow—Value of deposition in subsequent suit against reversioner. See WITHDRAWAL OF SUIT, No. 2, 7 Ind. Cas. 892.*

(5-b) *S. 33—See No. 1-a, supra.*

- (6) *S. 34—Account books, entries, how to be proved—Limitation Act (XV of 1877), Ss. 19, 20—Acknowledgment—Admission should be of distinct liability in dispute, not any liability—Payment of interest—Where debtor liable in respect of several transactions—Appropriation of interest to several debts.*

It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. They need not be written up from moment to moment, or from day to day (a).

But it is obvious that, if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, they do not possess the same claim to confidence that attaches to books entered up from day to day or from hour to hour as transactions take place (b).

The proper procedure to follow is to call the clerk, who has kept the accounts, or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate (c).

Where certain account books were produced in the original Court by the plaintiff, and all that was proved was that they were in the hand-writing of his father, and the books were

Evidence Act—(Continued).

not even examined in detail in the original Court, and the particular entries upon which the plaintiffs relied were not selected and exhibited :

Held, that the entries ought to have been pointed out and proved, and evidence should also have been given in detail as to the character of the books themselves.

An acknowledgment under S. 19 of the Limitation Act, 1877, need not be expressed and may be left to implication ; but it must be a necessary implication from the words used that the person acknowledging was referring to and admitting the distinct liability in dispute and not any liability (d).

Therefore where A, who was indebted to B in respect of eleven different transactions, wrote a letter to the effect that the money of the addressee would be paid : *Held*, that, the terms of the letter not being specific enough to indicate whether the acknowledgment related to one or more of these transactions, it was not sufficient to save the claim in respect of any of them from the bar of limitation.

S. 20 of the Limitation Act, 1877, did not expressly refer to the case of payment of a sum as interest, when more than one debt was due from debtor to the creditor.

When there are two debts and payment of interest has been made by the debtor without specification, it may save either a debt from limitation.

The amount due as interest from a debtor to a creditor in respect of eight different transactions was Rs. 307 when $\frac{1}{4}$ payment of Rs. 200 was made towards interest. The sum paid was sufficient to discharge the whole of the interest due on the last seven debts amounting to Rs. 175 and there was a balance of Rs. 25 left which might be deemed as part payment of interest on the first sum due :

Held, that the inference was perfectly legitimate that the payment might reasonably be attributed to all the debts which were thus saved from limitation.

If the plaint shows the ground of exemption from limitation, the requirement of S. 50 of the C.P.C. of 1882 is satisfied ; but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation, if he believes that the latter is the true ground, and he is entitled to urge that the suit is not barred by limitation for a reason

Evidence Act—(Continued).

different from the one assigned in the plaint. **Hingu Miya v. Heramba Chandra**, 8 Ind. Cas. 81.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 27 C. 118 (P. C.); 26 I.A. 254; 4 C.W.N. 417, *Rel.* (b) 4 B. 576, *R.* (c) 6 M.I.A. 88 (98), *F.* (d) 9 Bom. L.R. 350, *Rel.*

(6-a) S. 34—Proof and corroboration of bali account. See **ACCOUNT**, No. 3, 80 P.R. 1910.

(6-b) S. 34. See No. 3, *supra*.

(6-c) S. 35. See No. 7, *supra*.

(7) Ss. 35, 63, 90—Ordinary correspondence conducted by officials, whether comes within the meaning of S. 35—Secondary evidence—When admissible in evidence.

S. 35 does not apply to ordinary correspondence, though that correspondence might be conducted by officials, for the entries must be in something which is either "a book, register, or record," and they must be made "by public servants in the discharge of their official duties."

S. 90 cannot apply unless it is shown that the original has been lost or destroyed. **Jijoya Bai Sahiba v. Yengalakshmi Ammal**, 7 M.L. T. 117 = 5 Ind. Cas. 827.

WHITE, C.J. and MUNRO, J.

References :—(a) 5 C. 886 and 22 A. 294, *It.*

(8) S. 36—Topographical Survey map—Admissibility in evidence—Value as evidence—Presumption that entries are correct—Boundary dispute—Jungle land—Duty of Court to settle boundary, when evidence insufficient—Second appeal—Civ. Pro. Code (Act XIV of 1882), S. 584—Error of law.

When the question was in which of two adjoining villages—the boundary line between which admittedly corresponded with the boundary line between two pergunnahs—the land in dispute was included,

held, that a Topographical Survey map of 1869, in which the boundary line between the two Pergunnahs was given was admissible in Evidence under S. 36 of the Evidence Act.

When pergunnah boundaries are found entered in such map, the presumption is that they were so entered in pursuance of instructions received.

S. 36 of the Evidence Act does not require that the authority, under which a map is prepared, must be authority given by statute.

Evidence Act—(Continued).

Assuming that topographical survey maps were not prepared for revenue purposes, they are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made (a).

In cases of boundary disputes, the fact that no satisfactory evidence as to possession is obtainable, does not relieve the Court of the duty of settling the boundary line on the evidence before it (b).

Held, on second appeal, that, in the absence of better evidence, the lower appellate Court erred in law in not accepting a Topographical Survey map as evidence of possession at the time the map was made. **Gajhoo Damor Singh v. Kotwor Jagatpal Singh**, 11 C.W.N. 230 = 9 C.L.J. 415.

BRETT and GUPTA, JJ.

References :—(a) 7 C.W.N. 193 = 30 C. 291, *R.* (b) 21 C. 504, *F.*

(9) Ss. 40, 44—, Decree under S. 32, Agra Tenancy Act—Right to plead that it was passed without jurisdiction. See **RES JUDICATA**, No. 9, 6 Ind. Cas. 98.

(9-a) S. 41. See No. 1-a, *supra*.

(9-b) S. 43. See No. 1-a, *supra*.

(9-c) S. 44. See No. 9, *supra*.

(9-d) S. 45. See No. 1-a, *supra*.

(10) S. 57 (7)—Interpretation of. See **CIV. PRO. CODE** (1908), No. 72, 5 Ind. Cas. 537.

(11) Ss. 57, 58 (2)—Judicial notice of facts of public history. See **LIBEL**, No. 1, 14 C.W.N. 713.

(12) S. 58. See **JURISDICTION (GENERAL)**, No. 5, 12 Bom. L.R. 712.

(12-a) S. 58 (2). See No. 11, *supra*.

(12-b) S. 65. See No. 7, *supra*.

(13) S. 65 (e)—Public documents how proved. See **EVIDENCE**, No. 1, U.B.R. (1909), 4th Qr, Evidence 19.

(13-a) S. 68—Essentials of attestation—Position of scribe. See **ATTESTATION**, No. 4a, 6 N.L.R. 152.

(13-b) Ss. 68, 69, 70—Co-executant if may attest execution by others. See **TRANSFER OF PROPERTY ACT**, No. 38, 14 C.W.N. 1046.

Evidence Act—(Continued).

(13-c) S. 69. See No. 13-a, *supra*.

(13-d) S. 70. See No. 13-a, *supra*.

(14) S. 90—*Ancient document—Applicability to originals and copies.*

S. 90, Evidence Act, is not limited to cases in which the document is actually produced in Court, and consequently, secondary evidence of an ancient document is admissible, without proof of execution of the original, when the document is shown to have been lost and to have been last heard of in proper custody. **Sawan Singh v. Karim Baksh**, 93 P.R. 1910 (Civ.).

JOHNSTONE, J.

References:—5 C. 886, F.; 22 A. 294, R.

(14-a) S. 90. See Nos. 4a and 7, *supra*.

(15) S. 91—Deed declaring or effecting partition—Registration—Admissibility of unregistered deed. See PARTITION, No. 10, 6 Ind. Cas. 346.

(16) S. 92—*Oral evidence Collateral agreement—Mortgage deed—Variation of terms—Mode of payment.*

After the execution of a mortgage deed, the parties thereto arranged that the mortgagee would be placed in possession and authorised to receive the profits in satisfaction of his dues under the mortgage:

Held, this was not an agreement contradicting, varying, adding to or subtracting from the terms of the original contract but merely providing means for the satisfaction of the bond, and could be proved by oral evidence. S. 92 of the Evidence Act did not apply (a). **Kamala Sahai v. Babu Nundan Miran**, 11 C.L.J. 39 = 2 Ind. Cas. 13.

MOOKERJEE and RICHARDSON, JJ.

References:—9 All. 392; 11 C. 486; 18 All. 168, F.

(17) S. 92—*Sale-deed—Construction—Oral agreement to treat it as a mortgage—Agreement cannot be proved unless fraud, etc., is alleged.*

Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, etc., rendering the sale invalid.

Where one party to a contract does not agree any of its stipulations, and the other party

Evidence Act—(Continued).

induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract, by representing that the stipulation in question would be in reality treated by him as a dead letter, it cannot be enforced, because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation.

It was the result of a mis-statement of the intention of the party inducing, and such a mis-statement is one of fact and an action of deceit may be founded on it. **Sangira Malappa v. Ramappa Sangappa**, 11 Bom. L.R. 1130 = 34 B. 59.

CHANDAVARKAR and HEATON, JJ.

(18) S. 92—*Registered lease—Subsequent alteration by oral agreement—Agreement to be inferred from conduct.*

No oral agreement is admissible under section 92 of the Evidence Act to vary the rent fixed by a registered lease.

An agreement is none the less oral, because it is to be inferred from the conduct of the parties. **Lakhatullah Sheikh Bishambur Roy**, 6 Ind. Cas. 577.

JENKINS, C. J. and DOSS, J.

(19) S. 92—*Decree of Civil Court—Evidence of subsequent oral agreement rescinding or modifying—Admissibility.*

Under no circumstances is evidence admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of Civil Court, S. 92, Evidence Act, 1872, forbids the reception of such evidence, whether the decree be treated as a document embodying the terms of a disposition of property or not. **Karansingh v. Kanhailal**, 6 N.L.R. 123.

STANYON, A.J.C.

(20) S. 92—*Sale-deed—Representation that the deed would not be enforced as a sale-deed—Mortgage deed—Evidence—Indian Contract Act (IX of 1872), S. 17 (3)—Fraud—Proof.*

In a suit for a declaration that an apparent sale-deed executed by the plaintiff was a mortgage and for redemption, the lower Courts allowed the plaintiff to adduce evidence to prove that the defendant, at the time of the execution of the sale-deed, represented to the plaintiff that the sale-deed would not be enforced as such:

Evidence Act—(Continued).

Held that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted.

It was contended that the representation found proved amounted to fraud as defined in S. 17 (3), Contract Act.

Held, overruling the contention, that there was no finding that the defendant, at the time of making the representation, had no intention of performing it. He might have made the promise in good faith and changed his mind afterwards, when he found the value of the property in dispute had increased and that it was more advantageous for him to rely upon the sale evidenced by the written document than upon the mortgage which the plaintiff alleged was the real agreement between the parties. **Dagdu Sadu Nahavi v. Nama Salu**, 12 Bom. L.R. 972.

SCOTT, C.J. and BATCHELOR, J.

(21) S. 92—Deed of gift—Agreement contrary to the terms of the gift—Evidence to prove the agreement. See LIMITATION ACT (1877), No. 59, 5 Ind. Cas. 497.

(22) S. 92—Contemporaneous oral agreement—Acts and conduct of parties—Acceptance of reduced rent—Waiver.

Per Curiam.—The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by S. 92 of the Evidence Act, and in the latter case by proviso 4 to S. 92 (a).

Per Gupta, J.—The mere acceptance of a reduced rent, though it may amount to a full acquittance of rent for the particular year or years for which the rent was paid, does not operate as a binding contract between the parties without proof of the agreement which formed the basis of the reduction granted. **Radha Raman Chowdhuri v. Bhabani Prosad Bhowmik**, 12 C.L.J. 439.

RAMPINI and GUPTA, JJ.

References:—(a) 24 Cal. 20; 25 Cal. 603; 28 Cal. 256; 22 M. 261, R.

(23) S. 92, Proviso (4)—Registered *kabuliyat*—Oral agreement, if admissible to prove modification.

A subsequent oral agreement, by which the plaintiff would get the money for costs and

Evidence Act—(Continued).

wasilat and would make a deduction from the rent corresponding to the amount received, is not admissible in evidence under Proviso (4) of S. 92 of the Evidence Act to prove modification of terms of a registered *kabuliyat*. **Banku Behary Sanyal v. Shama Churn Bhattacharjee**, 12 C.L.J. 442.

O'KINEALY and GUPTA, JJ.

(23-a) S. 92—Alteration of terms of registered lease—Oral evidence—Conduct of parties—Payment of reduced rent—Evidence whether admissible. See LANDLORD AND TENANT, No. 51, 8 Ind. Cas. 47.

(24) S. 92 (1)—Pre-emptor can show that transaction is really one of sale and ostensibly a mortgage. See PRE-EMPTION, No. 1, 157 P.W.R. 1909.

(24-a) S. 92, proviso (2)—Rent kept in abeyance in *kabuliat*—Admissibility of evidence to prove reason. See LANDLORD AND TENANT, No. 39, 7 Ind. Cas. 721.

(25) Ss. 92, 99—Pre-emption, suit for—Evidence to show the real nature of a transaction—Mortgage in form but really a sale—Pre-emptor not a party to the instrument—Party to an instrument not entitled to offer evidence to contradict the terms of a document.

In a suit for pre-emption, based on a mortgage deed, on the allegation that the mortgage was really a sale but thrown in that form in order to defeat pre-emption, the contention was that oral evidence should not have been admitted to show that the parties to the deed intended a sale and not a mortgage:

Held, that, under Ss. 92 and 99 of the Evidence Act, evidence could be given by the pre-emptor to show the real nature of the transaction, he being no party to the instrument. **Chhutko v. Jugga Singh**, 8 Ind. Cas. 501.

LINDSAY, O.A.J.C.

References:—22 A. 149; 27 I.A. 58; 4 C.W.N. 153; 11 O.C. 176; C.A. No. 247 of 1904; 3 O.C. 215, R.

(26) Ss. 93 and 94—Document, construction of—Ambiguity—Oral evidence as to contents of document.

The plaintiffs owning two wells—*Naiwala* and *Shahwala* in a single *khata* No. 3, consisting of 814 *kanals*, 14 *marlas* sold land out of the *khata* which they described as half of well *Naiwala*, area 407 *kanals* 7 *marlas*, i.e., half of the whole *khata*—*khata* No. 3, *jama*

Evidence Act—(Continued).

Rs. 12-8 (i.e., the *jama* of half well Naiwala alone) and putting the price at Rs. 2,500, they sold, in addition to the land, the rights appurtenant to well Naiwala; well Shahwala was not mentioned. They claimed possessions of land of well Shahwala, on the allegation that the defendants had sued for pre-emption and got a decree for full half of the *khata*, i.e., half of both wells and of the land attached to both and executed the decree and obtained mutation without their being impleaded a party to the suit, while they had not sold any land of well Shahwala. The claim was dismissed on the ground that it amounted to a claim for rectification of a deed which could not be allowed under S. 31 of the Specific Relief Act, there being no mutual mistake about the terms of the deed, and that the amount of the price was unimportant. Market price of the half *khata* was appraised by a local commissioner appointed by Court at Rs. 4,000.

Held that the claim was not one for rectification of the deed, and that the plaintiffs were entitled to a decree. **Ghulam Murtaza v. Fateh Shah**, 130 P.L.R. 1910.

JOHNSTONE, J.

(27) *Ss. 93, 94, 95, 96—Hand note—Stipulation to pay interest—Interest whether monthly or annual, extrinsic evidence to prove.*

A hand-note contained a stipulation to pay interest at 2½ per cent., but did not mention whether that interest was to be calculated annually or monthly or otherwise.

Held—That evidence was properly admitted to show that the words meant that the interest should be calculated monthly (a). **Monmotha Nath Chaudhury v. Nabin Chandra Sanyal**, 14 C.W.N. 1100.

CARNDUFF and RICHARDSON, JJ.

Reference :—(a) W.R. (1864), 379, F.

(27-a) S. 94. See Nos. 26 and 27, *supra*.

(28) S. 95. See CONTRACT ACT, No. 32, 7 M.L.T. 392.

(28-a) S. 95. See No. 27, *supra*.

(28-b) S. 96. See No. 27, *supra*.

(28-c) S. 99. See No. 25, *supra*.

(29) S. 107—*Claim as representative of one unheard for fifteen years—Onus of proof.*

Where certain persons contended that they were the representatives of P, a person unheard of for over fifteen years who was a descendant of

Evidence Act—(Continued).

V and who, if he had survived T, the last female owner, would have been a reversioner of V, and that in consequence they were entitled to a share in V's properties, *held* that the onus of proving that P survived T lay upon them. **Thiagaraja Mudaliar v. Kandasami Mudaly.** 6 M.L.T. 153=2 Ind. Cas. 977=19 M.L.J. 502.

BENSON, OFFG. C.J. and BAKEWELL, J.

References :—23 B. 296; L.R. 5 Ch. Ap. 139, 152=22 L.T. 111=19 L.J. Ch. 316=18 W.R. 303 and 35 C. 25=11 C.W.N. 883=5 C.L.J. 649, R.

(30) S. 107—*Nature of presumption under—*See PARTITION, No. 8, 11 C.L.J. 580.

(31) S. 108—*Presumption as to death.*

The presumption of death under S. 108 of the Evidence Act is a presumption that the man was dead when the question was raised, that is, at the date of the suit, and not at any earlier period (a).

The English law is otherwise (b). **Narki v. Pheklia**, 11 C.L.J. 138=14 C.W.N. 341=37 C. 103=5 Ind. Cas. 709.

STEPHEN and CHATTERJEE, JJ.

References :—(a) 35 C. 25=11 C.W.N. 883; 33 C. 173, Doubted and F. (b) 5 Ch. App. 139, R.

(32) S. 108—*Unheard of for seven years—Presumption of death—Presumption as to the time of death—Burden of proof—Effect of admitting absentee's death.*

S. 109 of the Evidence Act raises a presumption of death at the end of a continuous absence of seven years, and not at the time when the question is raised or the suit is instituted. The party, on whom the burden of proving the life of the absentee lies, cannot get rid of that burden by admitting the absentee's death at some subsequent time. **Akbari v. Bashir Ali**, 8 Ind. Cas. 55.

KARAMAT HUSAIN, J.

References :—35 C. 25; 5 C.L.J. 649; 11 C. W.N. 883; 14 C.W.N. 341; 37 C. 103; 11 C. L.J. 138; 5 Ind. Cas. 709; 33 C. 173; 2 C.L.J. 236; 15 M.L.J. 317; 7 Bom. L.R. 892; 2 A.L. J. 798; 10 C.W.N. 33; 32 I.A. 177; 2 Ch. A. 139; 39 L.J. Ch. 316; 22 L.T. 111; 18 W.R. 303; 8 Bom. L.R. 226, R.

(33) S. 110—*Person in possession—Effect of mutation after inquiry by Revenue officer.* See CUSTOMS, (PUNJAB—INHERITANCE AND SUCCESSION), No. 3, 120 P.W.R. 1909.

Evidence Act—(Continued).

- (34) *S. 112—Legitimacy—Period of iddat—Marriage of Muhammadan woman after iddat but before delivery—Child born 280 days after divorce or death of husband but less than six months after her re-marriage—Muhammadan Law.*

Held, that the ordinary period of *iddat* for Muhammadan woman is three months from the date of her divorce or from death of her husband. But if she be in the family way at the time of happening of either of these two events, the period of *iddat* extends to the date of delivery of a fully or partly formed child, whether it takes place before or after expiry of three months. A re-marriage before expiry of *iddat* is void; but it is irregular and not void if it takes place after the *iddat* period is over but before delivery.

In the last mentioned case a child, born more than 280 days after the divorce by her first husband or his death, but less than six months after her re-marriage with the second husband, is to be considered legitimate under S. 112 of Act I of 1872 and is entitled to inherit her mother's second husband's property, particularly where he admits the child to be his (*a*). **Nurul-Hasan v. Muhammad Hasan**, 107 P.W.R. 1910. = 78 P.R. 1910 = 146 P.L.R. 1910.

ARTHUR REID, C.J., and JOHNSTONE, J.

References:—(*a*) (XI M.L.A. 94); (34 Bom. 111); and C. 6 P.R. = 25 P.W.R. 1909), *Approved and Referred to*, (C. 29 P.R. = 34 P.W.R. 1909) and 10 All. 289, *Diss. from*, (C. 79 P.R. = 133 P.W.R. 1907), *R.*

(35) *S. 115—Scope.* See TRANSFER OF PROPERTY ACT, No. 10, 12 Bom. L.R. 457.

(36) *S. 115—Effect of S. 258, C.P.C. (1882).* See CIV. PRO. CODE (1882), No. 123, 12 Bom. L.R. 686.

(37) *S. 115.* See TRANSFER OF PROPERTY ACT No. 11, 7 A.L.J. 967.

(38) *S. 115.* See No. 4-*a*, *infra*.

(39) *S. 116—Benami transactions—Tenant—Defence of benami, not available.*

A tenant cannot deny the title of the landlord from whom he has been holding, and to whom he has bound himself to pay rent, either by alleging that he is a mere *benamidar*, i.e., an agent or trustee for some one else not mentioned in the lease or rent-note, or in any other way, S. 116, Evidence Act, applies to *benami* transactions also. **Meer Jangoo v. Chote Sahib**, 6 N.L.R. 161.

SKINNER, A.J.C.

References:—24 W.R. 44, *Diss.*; 7 B.L.R. 720, 6 M.I.A. 53 (72), *R.*

Evidence Act—(Concluded).

(39-*a*) *S. 155.* See No. 1-*a*, *supra*.

(40) *S. 157.* See No. 1-*a*, *supra*.

Evidence Act (Mysore).

- (1) *Section 91—Exclusion of oral by documentary evidence—Unregistered document—Specific performance.*

Section 91 of the Evidence Act is no bar to the reception of secondary evidence in the case of a document which remains unregistered through no fault of the person in whose favour it has been executed (*a*).

An unregistered document, the registration of which is compulsory, can be admitted in evidence for the purpose of obtaining specific performance of the contract, the terms of which it embodies and for the breach of which the action is brought (*b*). **Veranna v. Kenga Boranna**, 15 M.C.C.R. 216.

STANLEY ISMAY, C.J. and KRISHNA RAO, J.

References:—(*a*) (1890) 14 Mad. 55, *F.* (*b*) (1907) 17 M.L.J. 218, *F.*

(2) *S. 92—Leave in writing—Oral evidence.*

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession. **Rudre Gowda v. Kamma**, 15 M.C.C.R. 111.

STANLEY ISMAY, C.J. and S. S. SETIUR, J.

(3) *S. 110—Burden of proof.*

Plaintiff sued for recovery of certain articles as owner, alleging that the defendant was in possession thereof by sufferance. The defendant set up his own title.

Held, that the burden of proving that the defendant was not the owner was on the plaintiff. **Lakshamma v. Sike Bore Gowda**, 15 M.C.C.R. 118.

NANJUNDAYYA and KRISHNA RAO, JJ.

(4) *S. 115—Estoppel—When arises.*

S hypothecated certain immoveable property to V's father; and for recovery of money due thereon V sued S's minor son with his mother N as guardian *ad litem* and obtained a decree. In execution of this decree, mortgaged property was brought to sale. N alleging that she inherited the property from her father and that her husband (S) had no right to hypothecate it to V's father, sued for a declaration that the said property was not liable to be attached and sold in execution of the decree. The

Evidence Act (Mysore)—(Concluded).

defence was, among other things, that N was estopped from bringing this suit, firstly because she had herself paid interest for the mortgage debt; secondly because she omitted to plead in the first suit that her husband had no right to the mortgaged property.

Held, that the question of estoppel did not arise at all inasmuch as the act or omission of the plaintiff neither caused nor permitted the first defendant (V) to act upon the strength of the representation therein made or implied, **Nan Jama v. Visweswara Gowda**, 15 M.C.C. R. 122.

NANJUNDAYIA and SETLUR, JJ.

Exchange.

Deed of—Registration, See CO-SHARERS, No. 1, 145 P.W.R. 1909.

Excise Act (Mysore).

- (1) *Rules, Part II, Rule XXI, Cl. (5). Sub-clause (12) prohibiting a licensed vendor of toddy from having interest in the sale of arrack—Partnership between toddy vendor and arrack vendor.*

K entered into an agreement of partnership with V in the business of vending toddy and arrack. In accordance with this agreement, K obtained a license for vending toddy, and V a license for vending arrack in the same locality. At the time this partnership agreement was entered into, there was a rule under the Excise Act prohibiting a licensee for sale of toddy from having any interest in the sale of arrack and *vice versa*. In a suit by K against V's heirs for the winding-up of the partnership business and for an account, *held*, that the agreement of partnership, being in violation of the Excise Law, was opposed to public policy, and, therefore, void (a), **Kale Gowda v. Hanumiah**, 15 M.C.C.R. 23.

KRISHNA RAO and SETLUR, JJ.

Reference :—(a) (1900) 24 M 401, F.

Execution of decree.

- (1) *Attachment of decree—Failure of attaching creditor to execute the attached decree—Attached decree barred by limitation—Right of decree-holder to claim damages from attaching creditor—Damages.*

A decree obtained by plaintiff against one K was attached by defendant, who held a decree against plaintiff. The defendant did not execute the decree attached and allowed it to become barred. In the suit by plaintiff for damages against defendant, the latter contended,

Execution of decree—(Continued).

inter alia that plaintiff was not entitled to damages as he could have executed the decree himself:

Held, that the attachment of plaintiff's decree by defendant did not prevent plaintiff from executing it, and that plaintiff was not entitled to recover any damages from defendant. **Arapayil Pattuthi Umma v. Thacharkavil Umi Koya**, 5 Ind. Cas. 56 = 7 M.L.T. 262.

SANKARAN NAIR, J.

References :—13 M.L.J. 265; 21 M. 417 and 24 C. 778; 1 C.W.N. 676, R.

- (2) *Execution—Order in previous proceeding not to be questioned at later stage—Res-judicata—General principles—Doctrine not applicable when previous order made without notice to judgment-debtor—Application for delivery of possession of property purchased at execution sale—Limitation.*

The doctrine that a decision at any stage of execution proceedings cannot be questioned at a later stage of the proceedings is based, not upon the ground that it is *res judicata*, but upon general principles of law, for if it were not binding, there would be no end of litigation (a).

But that principle is inapplicable to a case where the previous order was made without notice to the judgment-debtor and without knowledge on his part that execution proceedings were pending against him. In such a case, that order does not operate as a bar to the determination of the objection of limitation urged by him against the previous application for execution.

An application for delivery of possession ought to be made within three years of the confirmation of the sale (b). **Maszem Hossein Mondal v. Sarat Kumari Debi**, 5 Ind. Cas. 89.

MOOKERJEE and TEUNON, JJ.

References :—(a) 8 C. 51 (P.C.); 11 C.L.R. 113; 8 I.A. 123; 5 A. 269; 11 I.A. 37; 7 A. 102, *Rel. on.* (b) 8 B. 267, F.

- (3) *Sale—Purchase-money, right of decree-holder to take when accrues—Interest, right of decree-holder to get, up to when—Poundage fee—Expense of sale.*

Although the sale-proceeds could not be available for the satisfaction of the decree, and the mortgagee decree-holder would not be entitled to handle the cash up to the date when the sale was confirmed, yet, if, as a matter of fact, he withdrew the money before that time, then he

Execution of decree—(Continued).

was entitled to interest only up to the date when the full purchase-money was paid.

The rules of the High Court clearly contemplate that the poundage fees are to be taken as costs of the execution to be recovered from the judgment-debtor; and where a surety bound himself to make good the sum by which the sale proceeds of the property fell short of the decretal amount: *Held*, that the surety bound himself to make good any sum which the sale proceeds, after defraying the expenses of the sale including the poundage fees, fell short of the amount decreed. **Mussamat Sundari v. Hari Prosad Singh**, 5 Ind. Cas. 139.

BRETT and SHARFUDDIN, JJ.

- (4) *Limitation—Reviver—Step-in-aid of execution—Limitation Act (XV of 1877), Sch. II, Arts. 179, 180—Payment not certified to Court—Civil Procedure Code Act (XIV of 1882), Ss. 244, 258.*

To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it.

On an application for execution being made, the judgment-debtor objected that the decree was barred. This objection was overruled and it was decided that the decree was not barred by limitation:

Held, the effect of the order was to entitle a decree-holder to proceed with the execution, and to revive the decree.

Even if the decree-holder did not then choose to proceed with the execution and the case was struck off, any subsequent application for execution made by him within time would not be barred (a).

To an application to execute an order of His Majesty in Council, which confirmed a decree of the Court below, article 180 is applicable and applicable to the entire application (b).

A payment not duly certified under S. 258, Civil Procedure Code, cannot be proved under S. 244 where no application under the former section has been made within the period of limitation prescribed by article 179-A. To hold otherwise would be to render the article null and void (c). **Kamini Debi v. Aghore Nath Mukherji**, 11 C.L.J. 91=4 Ind. Cas. 402.

MOOKERJEE and TEUNON, JJ.

References:—(a) 9 C.L.J. 271, F.; 30 C. 979; 25 All. 361, D. (b) 8 C. 218, F. (c) 31 C. 480; 31 C. 437, D. and *Expl.*; 12 C.W.N. 485, D.; 20 C. 32; 15 M. 302, *relied upon*.

Execution of decree—(Continued).

- (5) *Application for—Decree for possession of land against one set of defendants, possession through tenants against another and for costs and mesne profits against all—Limitation Act (XV of 1877), Sch. II, Art. 179 (4) Limitation—“In accordance with law” meaning of—Application for execution of decree against some of several judgment-debtors, if operative and effective against all.*

The words “in accordance with law” relate to the execution of the decree and it cannot be said that a person who executes a decree with the permission of the Court, a permission which the Court is expressly empowered to give, is not doing so in accordance with law. An application to realize costs from some only of the judgment-debtors is in accordance with law.

Where a decree or order has been passed jointly against more persons than one, the application for execution of the decree, if made against any one or more of them, or against his or their representatives, shall take effect against them all. **Barada Kinkar Chowdhury v. Nabin Chandra Dutt**, 11 C.L.J. 83 4 Ind. Cas. 108.

CASPERSZ and DOSS, JJ.

References:—20 C. 388 (394); 18 C. 515 (518); 26 C. 888; 33 M. 268, R.

- (6) *Decree admitted to be fully satisfied—Application for further execution and admissible—Proper course for decree-holder in review.*

A decree-holder is not entitled to put in an application for further execution of his decree after, in execution of a previous application, the full amount stated in that application, had been paid and the decree admitted to be fully satisfied and so entered by an order of the Court.

The proper course, if there had been any mistake, would be for the decree-holder to come in for a review. **Sheikh Kapiluddin Ahmad v. Sheikh Kamruddin Ahmad**, 5 Ind. Cas. 148.

BRETT and SHARFUDDIN, JJ.

Reference:—5 C.W.N. 627, D.

- (7) *Lost record—Record burnt—Decree, execution of—Limitation Act (XV of 1877), Sch. II Art. 179, Cls. (1) & (4)—Reconstruction of lost record—Inherent power—Step-in-aid of execution.*

A Court has inherent power to re-construct its records, when they have been lost or destroyed

Execution of decree—(Continued).

An application for execution of a decree need not be accompanied by a copy of the decree. When, therefore, the decree has been lost or destroyed, it is competent to the decree-holder to apply for execution and to obtain relief upon proof of the contents of the decree by secondary evidence.

An application to a Court to re-construct a lost decree is not a step in aid of execution, as it is needless for the decree-holder to have the decree restored before he applies for execution, which must be done within three years from the date when the judgment was pronounced.

Quare :—Whether, when a record has been destroyed, the decree-holder is entitled to bring a fresh suit, or whether he must apply for execution of the lost decree and prove its contents by secondary evidence. **Raj Gir Sahaya v. Iswardhari Singh**, 11 C.L.J. 243 -5 Ind. Cas. 660.

MOOKERJEE and HOLMWOOD, JJ.

- (8) *Costs in course of execution proceedings—Separate application for realisation—Application for execution against both judgment-debtors—Application in accordance with law—Limitation Act (XV of 1887), Sch. II, Art. 179, cl. (4).*

When costs have been directed to be paid in the course of execution proceedings, separate execution may be taken out for realisation of these costs, apart from any application to realise whatever is due under the original decree (a).

Where the only defect in an application for execution was, in so far as it was one for realisation of the costs of the previous execution-proceedings, that the decree-holder prayed for realisation thereof, not from one judgment-debtor, as he should have done, but from both the judgment-debtors.

Held, that that did not vitiate the application, for it would have been competent to the Court to direct execution to issue against both the judgment-debtors for recovery of the balance of the decree, and against one judgment-debtor for realisation of the costs of the previous execution proceedings (b). **Sukha Sinhu Sanyal v. Jogeswar Bhattacharjee**, 5 Ind. Cas. 480.

MOOKERJEE and TEUNON, JJ.

References :—(a) 5 A. 236, F. (b) 12 A. 64 ; 2 A.L.J. 376 ; 27 A. 619, D.

- (9) *Order to sell properties in certain order—Subsequent application not to sell property in that order—Res judicata.*

Execution of decree—(Continued).

Where, upon an objection to an application for execution of a decree, an order was made directing that the properties affected by the decree should be sold in a certain order :

Held, that the same question could not be re-opened upon a subsequent application for execution to the same decree. **Murlidhar v. Goma**, 5 Ind. Cas. 210.

KNOX and KARAMAT HUSAIN, JJ.

References :—A W.N. (1891) 33, F. 4 A.L.J. 100 ; A.W.N. (1907) 163 ; A.W.N. (1897), 29, R.

- (10) *Execution of decree—Amount of mesne profits left undetermined—Compromise between parties as to mesne profits—Decree in accordance with compromise, executability of.*

Where the amount of mesne profits was left undetermined by the decree and the parties entered into a compromise that the decree as to mesne profits should be executed against a particular plot of land and a decree was passed in accordance with the compromise.

Held, that the decree cannot be executed in any manner other than that specified in the *razinama*, unless it is shown that the method of execution specified in the *razinama* has become impossible.

When an issue is left undetermined, it is competent for the parties to adjust that part of the suit by a lawful compromise (a). **Vythina-tha Aiyar v. Vythina-tha Aiyar**, 6 M.L.T. 187 -33 M. 78.

BENSON and MILLER, JJ.

References :—(a) 13 A. 53 (65) ; 25 A. 385 ; 14 C. 50 (53), R.

- (11) *Mortgage decree—Sale without the legal representatives of a deceased defendant being brought on the record—Validity.*

Where the legal representatives of a deceased defendant were not brought on record when they had the right to redeem a prior mortgage under the decree, a sale held in execution of the mortgage decree is bad. **Kanakasabapathy Chetty v. Venkatarama Iyer**, 7 M.L.T. 270 = 5 Ind. Cas. 339.

MUNRO and RAHIM, JJ.

References :—12 M. 211, D. ; 12 M. 90 ; 6 M. 108, R.

- (12) *Formalities to be observed preliminary to sale, non-compliance with—Effect—S. 311, C.P.C.—Error in the warrant of attachment, effect of—Application to set aside sale on the ground of irregularity—Limitation—Art. 166, Limitation Act.*

Execution of decree—(Continued).

If the formalities laid down in the Code of Civil Procedure as preliminary to a valid sale have not been complied with, the sale is not *de facto* void (a).

So, the error (*e.g.*, recording a wrong number of a plot) in the warrant of attachment constitutes merely a material irregularity, which can be the subject of objection to the sale under S. 311, and does not render the sale void *ipso facto* and thereby oust the provisions of S. 311. An application to set aside the sale on the ground of irregularity must be treated as one under S. 311, and will be barred by limitation under Art. 166, Limitation Act, if the application is not made within 30 days from the date of sale. **Madho Mal v. Jawahir Singh**, 10 P.R. 1910=63 P.W.R. 1910-6 Ind. Cas. 713.

REID, C.J., and RATTIGAN, J.

References:—(a) 21 A. 311, F.; 76 P.R. 1890, Diss.; 21 O. 66, 5 A. 86 and 7 A. 39, R.

(13) *Limitation—Plea of limitation regarding a previous application for execution—Civil Procedure Code (Act XIV of 1882), Ss. 234 and 248.*

In this case an application for execution was made on 20th August, 1903, which was admittedly within time. The next (the fifth) application for execution was made on 7th September, 1906. In this application the decree-holder prayed, *first*, that the names of certain persons including the appellant should be entered in place of a deceased judgment-debtor, *secondly*, that certain property should be attached, and *thirdly*, for a rateable distribution in the sale proceeds. The sixth application was made on 14th November, 1907, by the respondent who had purchased the decree and was thrown out on his failure to prove the purchase. The seventh and last application was made on 21st December, 1907. It was resisted on the ground that the fifth application on which the present one depended for its validity was barred by limitation.

On the fifth application notices were issued under S. 234, Civ. Pro. Code, to show cause why the heirs of the deceased judgment-debtor should not be brought on the record. No one appeared and the names were entered. The decree-holder was then called upon to furnish process fees for notices under S. 248, Civ. Pro. Code, to show cause why the application for

Execution of decree—(Continued).

execution should not be granted. The application was ultimately thrown out because the decree-holder failed to furnish the process fees.

Held, that in these circumstances the Court could not be considered to have determined that the application was made within time.

The ruling in *Mungul Prasad Dicit v. Gurga Kant Talari*, (1), cannot be extended to cases in which the judgment-debtor does not get an opportunity of putting forward a plea of limitation. **Kaniz Fatima v. Muhammad Jafart Ali**, 13 O.C. 90.

CHAMIER and EVANS, O.J.CS.

Reference:—8 C. 51, R.

(11) *Decree, execution of—Execution, if may be directed against a person not a party to the decree—Benami.*

A person, who is neither a party to the decree nor a representative of the judgment-debtors, cannot be made liable for the decretal amount, on the ground that the judgment-debtors were *benamidars* for him. **Jadu Nath Bose v. Sri-Mati Premmoni Dasi**, 14 C.W.N. 774.

JENKINS, C.J., and DOSS, J.

(15) *Decree for rent—Assignee, representative of, if competent to carry on execution proceedings—Execution proceedings, initiated by original decree-holders—Conveyance authorizing the assignee to carry on all execution proceedings, effect of—Code of Civil Procedure (Act V of 1908), O. 22, Rule 12—Representatives of assignee, if competent to prefer appeal against order made in execution proceedings—Fresh proceedings, initiation by representatives, if necessary—Code of Civil Procedure (Act XIV of 1882), S. 232—Limitation Act (XV of 1877), S. 22—Limitation—Bengal Tenancy Act (VIII of 1882), S. 148 (h)—Landlord's interest, vesting of, in the assignee.*

On the death of an execution creditor or of a judgment-debtor, the proceedings do not lapse, and the provisions relating to substitution upon the death, marriage, or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor.

During the pendency of an appeal in execution proceedings, on the death of the appellant, it is open to his legal representatives to apply for leave to prosecute the appeal (a).

Execution of decree—(Continued).

There is no provision in the Code of Civil Procedure (Act XIV of 1882), which renders necessary the actual substitution of the name of an assignee or legal representatives for the validity of the proceedings in execution; all that S. 292 provides is that the assignee should apply for execution of the decree and that his name should be brought on the record (b).

S. 22 of the Limitation Act (XV of 1877), applies only to suits and does not govern execution proceedings (c).

S. 148 (h), Bengal Tenancy Act, does not speak of the assignor's interest, but of the landlord's interest.

By the purchase at a sale in execution of a decree for rent due on *putni*, and by the subsequent service of notice under S. 167 of the Bengal Tenancy Act, the purchaser supersedes the rights of both the *putnidar* and *durpatnidar* and becomes entitled to realize rent directly from the tenants and is their landlord, and it cannot be maintained that the landlord's interest has not become vested in the purchaser (d).

When a landlord obtains a decree for rent and applies for execution of that decree, and during the pendency of the execution proceedings, the interest of the landlord, by operation of law, vests in the superior landlord who thereby becomes the direct landlord of the tenants, and the interest of the landlord in the decree for rent is transferred to the superior landlord, who is authorized to carry on the execution already initiated, in the name of either the assignor or the assignee. S. 148 (h) does not debar the superior landlord from executing the decree for rent, in the same manner as the landlord decree-holder might have done (e).

The Court is bound to allow execution at the instance of the recorded decree-holder, unless intimation has been given in the regular way prescribed by law for the admission of another person who obtains leave to carry on execution as an assignee (f).

The Court may, however, if satisfied that the decree has really been assigned, direct that the proceeds realized are not to be taken out by the recorded decree-holder, but retained for the benefit of the assignee. **Monmotho Nath Mitter v. Rakhal Chandra Tewary**, 10 C.L.J. 396 = 8 Ind. Cas. 324 = 14 C.W.N. 752.

MOOKERJEE and VINCENT, JJ.

References:—(a) 3 B. 221; 6 A. 255; 18 B. 224; 2 C. 327 = 4 I.A. 66, R. (b) 19 W.R. 255;

Execution of decree—(Continued).

4 All. H.C.R. 90; 15 W.R. 283; 9 B. 179; 36 C. 543 = 9 C.L.J. 271, R. (c) 34 C. 612 = 5 C.L.J. 486, D. and *expl.* (d) 1 C.W.N. 694, D. and *expl.* (e) 1 C.L.J. 500 (506); 7 C.L.J. 425; 33 C. 566 = 3 C.L.J. 470, R. (f) 15 W.R. 271; 18 C. 639, R.

(16) *Hindu Law—Mitakshara—Survivorship—Decree against father—Execution against son—Civil Procedure Code (Act XIV of 1882), S. 244.*

A *Mitakshara* son, who has succeeded by right of survivorship, may be brought upon the record of the proceedings in execution of a decree against his deceased father, and execution can be carried on against the properties in his hands, coming by descent or survivorship, unless he can successfully raise the plea of illegality or immorality. **Ratishwar Singh v. Gulab Chand**, 6 Ind. Cas. 582.

CHATTERJEE and VINCENT, JJ.

References:—34 C. 642 (F.B.); 11 C.W.N. 593; 5 C.L.J. 491; 2 M.L.T. 207, *relied on*; 5 C. 148; 6 I.A. 88; 4 C.L.R. 226; 18 C. 157 (P.C.); 17 I.A. 195; D.; 11 C.W.N. 163; 5 C.L.J. 80; 34 C. 642 (F.B.); 11 C.W.N. 593; 5 C.L.J. 491; 2 M.L.T. 207, *overruled*.

(17) *Transfer of a decree passed by Civil Court for execution to a Rent Court—Civil Procedure Code (Act V of 1908), Ss. 38, 39 and Or. XXI.*

Held, that there is nothing in the language of Ss. 38 and 39 or of the Rules in Order XXI of Act V of 1908, which indicates an intention on the part of the Legislature that a Court should not transfer a decree for execution except to another Court of the same kind as itself.

A decree passed by the Civil Court can therefore be transferred for execution to a Rent Court and *vice versa*. **Indar Parshad v. Fateh Chand**, 13 O.C. 119.

CHAMIER and EVANS, J.CS.

References:—9 C. 295; 22 A. 182; 36 C. 252, R.

(18) *Joint-decree—Devolution of portion of rights under decree to judgment-debtor—Effect—Execution by one of several decree-holders.*

Where, subsequent to a decree, a portion of the rights to which the decree relates devolves, either by inheritance or otherwise, upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only

Execution of decree—(Continued).

pro tanto. This rule of law is sufficiently general to comprehend alike, cases in which the decree is for money only and where it is for immoveable property (a).

A co-plaintiff can obtain execution according to the extent of his interest in the decree, and there is nothing in the former Civil Procedure Code which bars such an application (b). **Fazal Ilahi v. Habib Bakhsh**, 61 P.R. 1910-90 P.W.R. 1910=7 Ind. Cas. 474.

SCOTT-SMITH, J.

References :—(a) 10 A. 570, F. (b) 9 C. 482, F.

(19) *Attachment—Alienation by debtor to defeat execution.*

Where a genuine sale is made for good and valid consideration to pay off the debts due to one creditor in preference to the debt due to another, then, even if the sale is effected with a view to delay and defeat this latter creditor, it cannot be held to be void (a). **Yedanta Ramanujachar v. Ranganna**, 15 M.C.C.R. 108.

NANJUNDAYYA and KRISHNA RAO, JJ.

References :—(a) (1886), 8 A. 178, F.; (1900) 25 B. 202, R.

(20) *Striking off execution petition—Effect.*

An order striking off a petition cannot always be understood as having been made only for statistical purposes. **Mulinti Virana Gowd v. Timma Reddi**, 8 M.L.T. 268.

BENSON and KRISHNASWAMI IYER, JJ.

(21) *Decree conditional on payment—No payment—Application for execution more than three years after decree—Limitation.*

Where a decree directs the defendant to surrender a garden on the plaintiff paying him a certain amount for improvements, his application for delivery more than three years from the date of the decree is time-barred. **Ramappa v. Charda Bhatta**, 8 M.L.T. 251.

WALLIS and KRISHNASWAMI IYER, JJ.

References :—26 M. 780, F.; 24 A. 300, Not F.

(22) *Limitation Act (XV of 1877), Sch. II, Art. 178—Execution of decree—Obstruction placed in the way of execution—Time to run from the removal of the obstruction—Revival of previous application for execution—Limitation.*

A decree-holder made an application for execution of his decree on 31st of March, 1905,

Execution of decree—(Continued).

and attached certain property. The judgment-debtor objected that the property sought to be attached was not liable to attachment. The objection, however, was rejected finally by the High Court on 11th of March, 1907. The decree-holder then made a second application on the 16th of June, 1909, for execution by attachment and sale of the same property.

Held, that the second application was not time-barred. It was really, though not in form, an application to revive the first application. **Sheikh Ali Hussain v. Sheikh Rafi-Ul-Lah**, 7 Ind. Cas. 707.

CHAMIER, J.

References :—27 A. 334; 7 Bom. L.R. 433; 1 C.L.J. 381; 15 M.L.J. 258; 9 C.W.N. 601; 2 A.L.J. 397; 24 B. 345; 23 C. 397; 28 M. 50 (F.B.), F.

(22-a) *Appeal—Usurpation of jurisdiction by Court below—Party not to assume inconsistent position—Execution—Court executing decree not to question validity of decree—C.P.C. (Act XIV of 1882), S. 457—Married woman appointed guardian ad litem—C.P.C. (Act V of 1908), S. 47.*

When jurisdiction has been usurped by a Court, an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction; in other words, a party, who has induced a Court to act without jurisdiction, cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction (a).

Therefore, where an order of the Court below purports to have been made under S. 47 of the C.P.C., 1908, it must be taken to be a decree and appealable as such.

A party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent (b).

An execution Court, when called upon to execute the decree, must proceed on the assumption that there is a valid decree capable of execution. The party who seeks to attack the decree must do so in a separate proceeding, for example, by a suit or an appeal or an application for review (c).

An infant was represented by his mother, a married woman, as his guardian *ad litem* in contravention of S. 457 of the C.P.C., 1908.

Execution of decree—(Continued).

A decree was passed against him. When the decree-holder applied to execute the decree, it was objected on behalf of the infant by his mother that the decree could not be executed against him, because there was no valid decree against him :

Held, that the objection must be overruled on the ground that the question of the validity of the decree could not be examined in execution proceedings under S. 47 of the Code of 1908. **Bindeswari Prosad Singh v. Lakpat Nath Singh**, 8 Ind. Cas. 26.

MOOKERJEE and TEUNON, J.J.

References :—(a) 10 I.A. 4; 9 C. 482; 23 M. 517; 28 M. 127, *F.* (b) 30 Ch. D. 67 at p. 82; 54 L. Ch. 1154; 53 L.T. 306; 33 W.R. 803; 3 B.L.R.A.C. 214; 17 W.R. 422; 21 W.R. 374; 24 W.R. 273; 2 C.L.R. 208; 6 C. 55; 5 C.L.J. 95, at p. 105; 5 C.L.J. 148 at p. 169, *F.* (c) 36 I.A. 168; 31 A. 572; 3 Ind. Cas. 864; 13 C.W.N. 1182; 10 C.L.J. 318; 6 A.L.J. 822; 11 Bom. L.R. 1225; 6 M.L.T. 280; 19 M.L.J. 631; 32 I.A. 23; 2 A.L.J. 71; 1 O. L.J. 584; 7 Bom. L.R. 1; 9 C.W.N. 201; 32 C. 296, *Rel.*

(22-b) *Execution of decree, lease granted in—Jurisdiction of Court executing the decree—Lease, grant of fresh, or extension of period of—Collector, power of, in granting lease—Decree, satisfaction of.*

In execution of a Civil Court decree, the Collector gave a 12 years' lease of the property of the judgment-debtor, subject to the payment of a particular sum which was to go towards the satisfaction of the decree. Subsequently a portion of the property passed out of the possession of the lessee, and the Court, in accordance with the recommendation of the Collector, sanctioned the extension of the lease to a further period of 10 years.

Held, that, after the lease had been given, the decree must be considered to have been satisfied, and the Court executing the decree became *functus officio* and had no jurisdiction to authorize the grant of a fresh lease or to extend the term of the original lease. **Madho Prasad v. Mahtab Chand**, 8 Ind. Cas. 410.

CHAMIER, J.C.

(22-c) *C.P.C. (Act XIV 1882), S. 244—Validity of decree cannot be questioned in execution—Necessity of notice in proclamation as to claim of invalidity.*

The validity of a mortgage decree cannot be enquired into in execution proceedings for the

Execution of decree—(Continued).

sale of the mortgaged premises, but the Court is bound to fully notify in the proclamation of sale that a claim has been put forward based on the invalidity of the decree, and that any one purchasing would buy subject to any subsequent decree declaring the decree against the mortgaged premises invalid. **Ma Kyi v. U Maung Gyi**, 8 Ind. Cas. 610.

FOX, C.J. and PARLETT, J.

(23) Application for, when is in accordance with law. See LIMITATION ACT (1877), No. 109, 12 Bom. L.R. 13.

(24) Assignment of decree by some of decree-holders to one of them—Application by assignee, whether in accordance with law. See ASSIGNMENT, No. 1, 5 Ind. Cas. 120.

(25) —Simultaneously against same property in more than one Court. See CIV. PRO. CODE (1882), No. 195, 11 C.L.J. 69.

(26) Previous order in—Effect of interpretation of decree—*Res judicata*. See CIV. PRO. CODE, (1908), No. 25, 7 A.L.J. 190.

(27) Property sold subject to mortgage—Right of auction purchaser to question validity of mortgage. See MORTGAGE (GENERAL), No. 11, 7, A.L.J. 199.

(28) Execution—Decree for possession—Resistance—Procedure. See CIV. PRO. CODE (1908), No. 128, 14 P.R. 1910.

(29) Application for, "in accordance with law"—Application not made on durable paper as required by rules of Court—Application asking relief, the right to which may not be established—Effect of—Rules framed under S. 652, C.P.C. (1882), Nature of. See LIMITATION ACT (1877), No. 111, 3 Sind. L.R. 171.

(30) Sale-certificate—Vagueness in description—Effect. See MORTGAGE (REDEMPTION), No. 6, 7 M.L.T. 191.

(31) Application against one of several joint judgment-debtors, effect of, against others. See LIMITATION ACT (1908), No. 30, 13 O.C. 48.

(32) Obstruction to—Complaint after one month—Registration as a suit and dismissal—Legality. See CIV. PRO. CODE (1882), No. 168, 7 M.L.T. 223.

(33) Nature of right to enforce. See CIV. PRO. CODE (1908), No. 34, 7 A.L.J. 420.

(34) Of Presy. S. C. Court—Jurisdiction—See ACT XV OF 1884 (PRESY. S.C. COURTS), No. 2, 14 C.W.N. 662.

Execution of decree—(Continued).

(35) Assignment of decree—Execution by assignee—Notice to transferor and to judgment-debtor. See CIV. PRO. CODE (1882), No. 89, 11 C.L.J. 354.

(36) Application for—Limitation—Order passed on application even after expiry of 12 years. See CIV. PRO. CODE (1882), No. 86, 7 M.L.T. 353.

(37) Decree passed severally against debtors—Sale of joint property of debtors in execution—Irregularity. See CIV. PRO. CODE (1882), No. 154, 5 Ind. Cas. 647.

(38) Decree for custody of wife—Conversion and re-conversion of wife—Effect on. See RES JUDICATA, No. 8, 59 P.W.R. 1910.

(39) Compromise to have rest of decree executed at future time—Step-in-aid of execution—Acknowledgment. See LIMITATION ACT (1877), No. 29, 6 Ind. Cas. 366.

(40) Restraining defendant from executing his decree Injunction. See SPECIFIC RELIEF ACT, No. 34, 6 Ind. Cas. 444.

(41) Judgment debtor discovered to be dead on date of application for execution—Application for substitution after expiry of period of limitation. See ACT VIII OF 1885 (BENGAL TENANCY), No. 58, 14 C.W.N. 971.

(42) Payment out of Court—Mode of certifying. See CIV. PRO. CODE (MYSORE), No. 16, 15 M.C.C.R. 64.

(43) Uncertified adjustment—Fraudulent execution—Punishment under criminal law. See CIV. PRO. CODE (1882), No. 123, 12 Bom. L.R. 686.

(44) Application for—Production of decree copy whether necessary—Practice. See CIV. PRO. CODE (MYSORE), No. 13, 15 M.C.C.R. 117.

(45) —by creditor having notice of his debt being included in the insolvent's schedule—Liability of creditor for costs of insolvent. See INSOLVENCY ACT (1848), No. 1, 8 M.L.T. 202.

(46) Judgment-debtor in jail—Power of Insolvency Court to release him. See ACT III OF 1907 (PRO. INSOLVENCY), No. 5, 30 P.L.R. 1910.

(47) Attachment of property—Transmission of decree by Baroda Court to British Court—Application to execute decree by attaching other property in British India—Limitation. See CIV. PRO. CODE (1908), No. 35, 12 Bom. L.R. 344.

Execution of decree—(Concluded).

(48) —by transferee—Refusal of Court to execute—Separate suit. See CIV. PRO. CODE (MYSORE), No. 10, 15 M.C.C.R. 981.

(49) Stay of proceedings while estate declared encumbered—Limitation. See ACT VI OF 1876 (CHOTA NAGPUR), No. 1, 7 Ind. Cas. 787.

(50) Right to pre-emption property sold in. See PRE-EMPTION, No. 45, 203 P.L.R. 1910.

(51) Parties unnecessarily impleaded in execution proceedings—Failure to prefer claim—Estoppel—See CIV. PRO. CODE (1882), No. 105-a, 8 Ind. Cas. 161.

(52) Occupation by judgment-debtors after execution—Fresh cause of action. See CIV. PRO. CODE (1882), No. 129, 8 Ind. Cas. 463.

(53) Limitation—Objection by judgment debtor—Service of notice—Effect—Opportunity to contest validity of order—Estoppel—See CIV. PRO. CODE (1882), No. 113, 8 Ind. Cas. 22.

(54) Effect of striking off application for—12 years' rule in, to be strictly observed. See CIV. PRO. CODE (1909), No. 35 a-i, 8 Ind. Cas. 727.

Execution proceedings.

- (1) *Criminal Procedure Code (Act V of 1898)*, S. 476—*Execution proceeding, resisting process in—Report to Munsif—Order for prosecution by his successor in office—"Court," meaning of—Execution proceeding if "Judicial proceeding"—Order under S. 476 to be promptly made.*

The word "Court" in S. 476, Cr. P.C., is to be understood as bearing its natural meaning with the sense of continuity this implies, notwithstanding any change of officers.

An execution proceeding is a "judicial proceeding" within the meaning of S. 476 of the Code, the definition in S. 4, cl. (m) being clearly not exhaustive.

Action under S. 476, Cr. P. Code, should, as far as possible, be prompt and expeditious. **Shaikh Bahadur v. Shaikh Eradutulla Mallick**, 14 C.W.N. 799.

JENKINS, C.J., BRETT, WOODROFFE, MOOKERJEE, HOLMWOOD, SHARFUD-DIN and DOSS, JJ.

References :—34 A. 551; S.C. 11 C.W.N. 568 (1907), *reconsidered*.

(2) *Re-hearing of*. See CIV. PRO. CODE (1908), No. 73, 12 C.L.J. 6.

(3) *Decision in, in prior suit—Whether operates as res judicata in subsequent suit*. See CIV. PRO. CODE (1882), No. 11, 6 Ind. Cas. 229.

Execution proceedings—(Concluded).

(4) When operate as *res judicata*. See CIV. PRO. CODE (1908), No. 30, 7 Ind. Cas. 55.

(5) Order in—*Res judicata*. See RES JUDICATA, No. 18, 15 M.C.C.R. 146.

Execution sale.

(1) *Sale duly confirmed, validity of—Attachment by a Court without jurisdiction, effect of—Irregularity in the attachment.*

Held, that a sale ordered by a Court having jurisdiction and duly confirmed by it is not invalidated by proof that the original attachment was made by a Court not having jurisdiction. The absence of regularly perfected attachment amounts at most to an irregularity, which does not affect the validity of the sale after it has been duly confirmed. **Adil Khan v. Mirza Mohammad Sadik Ali Khan**, 13 O.C. 43 5 Ind. Cas. 795.

CHAMIER and EVANS, JJ.

(2) *Sale of holding—Application to set aside sale on ground that holding was not transferable—Limitation—Want of judgment-debtor's knowledge of the order for sale—Civ. Pro. Code (Act XIV of 1882), S. 244.*

When a judgment-debtor seeks to set aside a sale on the ground that the holding sold was not transferable, the application is one made under S. 244, C.P.C., 1882, and may be presented within three years from the date of sale.

Before the judgment-debtor can ask for reversal of the sale, it has to be proved that he was not aware of the order for sale, because if he was aware of the order, he ought to have prevented the sale by an objection taken at the proper time (a). **Sadek Sardar v. Kall Prasanna Saha**, 7 Ind. Cas. 48.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 26 G. 727; 3 C.W.N. 586, F.

(3) *Decree—Execution—Court-sale—Suit by auction-purchaser for refund of purchase money on failure of consideration—Maintainability of the suit—Civ. Pro. Code (Act V of 1908), S. 102—Suit whether cognizable by Small Causes Court—Second appeal.*

The plaintiff, an auction purchaser at a Court sale, on finding that the judgment-debtor had no saleable interest in the property sold, filed a suit to recover possession of the property, or, in the alternative, to obtain refund of the purchase-money on the footing of a total

Execution Sale—(Continued).

failure of consideration. The failure of consideration alleged was that the trust-deed, under which the judgment-debtor was stated to have an interest in the property sold, had not been stamped. It was objected that the suit would not lie :—

Held, that the right of the plaintiff to maintain the suit was made clear by the provisions of the Civ. Pro. Code in the manner indicated in (a).

Held, also, that the trust-deed not having been duly stamped could not be admitted in evidence (S. 35 of the Stamp Act, 1899); and that it must, therefore, be taken to be non-existent.

Held, further, that the purchaser had been caused, however innocently, to make a mistake as to the substance of the thing which was the subject of the sale. He was led to believe that he was purchasing a right under a trust-deed, whereas, so far as it appeared from the facts proved, no trust-deed was in existence. There had, therefore, been an entire failure of consideration.

Under the Civ. Pro. Code a warranty of some saleable interest, when the right, title and interest of a judgment-debtor is put up for sale, is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase-money which has been received by the judgment-creditor is recognised. The liability of the judgment-creditor under the circumstances to refund the purchase-money which has been paid to him at a Court-sale being thus established, there can be no objection to treating the relations of the parties, namely, the judgment-creditor and the Court-sale purchaser, as relations in the nature of contract.

On second appeal a preliminary objection was taken that, as the amount decreed in respect of purchase-money and interest in the first Court amounted to less than Rs. 500, no second appeal lay :—

Held, overruling the objection, that the claim was not only for money, but also for possession, and, therefore, the suit was not as framed cognizable by a Court of Small Causes. **Rustomji v. Vinayak**, 12 Bom. L.R. 723.

BASIL SCOTT, C.J., and BATCHELOR, J.

Reference :—(a) (1893), 17 Mad. 228.

(4) *Void sale—Suit for setting aside an execution sale—Limitation Act, Sch. I, Art. 13*

Execution sale—(Continued).

—*Representative of judgment-debtor bound by execution proceedings only to the extent of assets received.*

Where a sale in execution is null and void for want of jurisdiction in the Court ordering it or for other causes, or where it does not affect a stranger's interest, held that Art. 12, Sch. I, of the Limitation Act, does not apply to a suit to have such sale set aside or to a suit which has indirectly the effect of setting it aside.

Where, in an execution proceeding on the death of the judgment-debtor, the name of K was substituted as his legal representative, held that K was bound by the proceedings held in execution only to the extent of the assets received by her as heir of the deceased, and not with respect to property acquired by K by purchase. **Chauharja Baksh v. Musst. Kaniz Fatima Bibi**, 13 O.C. 297.

References:—I.L.R. 25 Cal. 179 J.P.'s Select Case No. 215, F.; 11 Bom. 130 and 20 Mad. 118, R.

LINDSAY, J.C.

(5) *Execution of decree—Sale of immovables—Bona fide mistake about the property sold.*

When, in a Court sale, the Amin intended to sell property subject to encumbrances, but the purchaser *bona fide* believed he was buying it free of them, the Court can set aside the sale and order a resale.

In such a case an order that the purchaser might take the property free of encumbrances, except when made with the consent of all the parties, is *ultra vires* and illegal. **Dasappa v. C. Bhaskarasetty**, 15 M.C.C.R. 221.

KRISHNA RAO and SETLUR, JJ.

(8-a) *Sale—Application for setting aside—Fraud—Second appeal, whether competent—Change in law—C.P.C. (Act XIV of 1882), S. 244—C.P.C. (Act V of 1908), Ss. 2, 47, 104 sub-S. (2), 154, O. XXI, rr. 90, 92—Application for setting aside sale on ground of fraud placed on same footing with those made on ground of irregularity, as regards appeal.*

In December, 1908, an application for setting aside a sale was made by the judgment-debtor on the ground of material irregularity and fraud. The first Court granted the application and set aside the sale in August, 1909. On appeal, the lower appellate Court allowed the appeal

Execution sale—(Concluded).

and rejected the application. The judgment-debtor then proffered a second appeal and contended that, as the application was made under the Code of 1882, it fell under S. 244 of the Code and a second appeal was competent.

Held, that, the order of the first Court having been made when the Code of 1908 had come into operation, the order should be treated as one made under O. XXI, r. 92, sub-r. (1); that the application must have been treated by the first Court as one under r. 90 which has effected a material alteration in the law and had placed cases in which a sale was impeached on the ground of fraud on the same footing as cases in which the sale was impeached on the ground of material irregularity; and that under S. 104 sub S. (2) a second appeal was incompetent. **Bhadreswar Goloi v. Bishnu Charan Sen**, 8 Ind. Cas. 3.

MOOKERJEE and TEUNON, JJ.

(6) Decree satisfied—Effect of subsequent. See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), No. 1, 11 C.L.J. 266.

(7) Non-service of notice on judgment-debtor, if ground for setting aside the sale—Effect of confirmation of sale. See RECEIVER, No. 3, 14 C.W.N. 560.

(8) Admission by judgment-debtor that sale proclamation had been issued—Time not granted to him—Subsequent application by him for setting aside sale—Estoppel. See CIV. PRO. CODE (1882), No. 108, 5 Ind. Cas. 489.

(9) Order setting aside or refusing to set aside sale—Appeal—Second appeal. See CIV. PRO. CODE (1909), No. 31, 6 Ind. Cas. 573.

(10) Question as to what was sold at, is a question relating to execution. See CIV. PRO. CODE (1908), No. 32, 7 Ind. Cas. 91.

(11) Order refusing to set aside—Appeal. See CIV. PRO. CODE (1908), No. 124, 105 P.W.R. 1910.

(12) Purchase by stranger—Subsequent modification of decree—Whether sale affected. See PLEADINGS, No. 6, 7 Ind. Cas. 166.

(13) Application for—Whether continuation of former application for attachment. See CIV. PRO. CODE (1882), No. 87, 8 M.L.T. 367.

(14)—held for more than seven days—legality. See CIV. PRO. CODE (1908), No. 118-b, 8 Ind. Cas. 564.

Executor.

- (1) *Will—Executor accepting office and acting as executor—Right to set up adverse title—Estoppel—Executor not taking out probate—Effect—Members of joint family acquiring property without aid of ancestral property—Nature of property—Presumption—Hindu Law.*

If an executor under a will accepts the office and acts as an executor with full knowledge of all the circumstances bearing on his rights, he will subsequently be estopped from repudiating the will and setting up an adverse title as against a beneficiary claiming under the will (a).

Pre White, C.J., and Wallis, J.—The fact that an executor has not taken out probate (at any rate where the law does not require him to do so) is immaterial.

Pre Wallis and Miller, JJ.—Where members of a joint family acquired property by working together, without the aid of the ancestral property, the presumption is they acquire it as joint family property, unless a different intention to acquire it as co-owners is proved (c). **Munisawmi Chetty v. Maruthammal**, 8 M.L.T. 124 = 20 M.L.J. 687 = 7 Ind. Cas. 176.

WHITE, C.J., WALLIS and MILLER, JJ.

References:—(a) 29 M. 239 (280), *P.*; Bigelow on Estoppel 5th Edition, p. 554, *R.*; (1905, 2 Ch. 70) *not appld.* (b) 8 B. 241; 27 B 140; and 32 I.A. 244 *R.* (c) 24 M. 149, *R.*

- (2) *Will—Executor—Liability to account—Death of executor—Suit for account against his legal representative—Probate and Administration Act (V of 1881), S. 98.*

The defendant was the son of the deceased executor of the will of the plaintiff's husband. The prayer in the plaint was : *firstly* for a decree for an account on the footing that the defendant was liable to render an account for the period during which his father acted as executor, and, *secondly*, for a decree for the amount as may be found due upon adjustment of account :

Held, that, assuming that the legal representative of a deceased executor was not only liable for a *devastavit* committed by the latter, but might also be called upon to render any account which the latter should have, but had not, rendered, the plaintiff had failed to establish her claim to an account, as there was nothing to show that the account due from the deceased executor under S. 98 of the Probate Act had not been rendered, or that there rested upon the deceased executor any duty to account over and

Executor—(Concluded).

above the duty imposed by the section. **Khettramoni Dasl v. Dharendra Nath Roy**, 7 Ind. Cas. 805.

RICHARDSON, J.

- (2-a) Trade of testator carried on by the—Liability of the. See **TRADE**, No. 1, 12 Bom. L.R. 1.

(3) Whether, is a trustee for specific purposes within the meaning of S. 10 of Limitation Act—Suit against—for recovery of sums misappropriated—Limitation. See **LIMITATION ACT** (1908), No. 4, 7 M.L.T. 123.

(4) —applying for probate—Position of—Dismissal of application for default—Whether, may propound will again. See **CIV. PRO. CODE** (1882), No. 63, 14 C.W.N. 924.

(5)—in sole possession of the shares in joint stock companies—Juridical possession—Applicability of proviso to S. 178, Contract Act. See **CONTRACT ACT**, No. 58, 12 Bom. L.R. 870.

Executor de son tort.

Whether widow of one member in possession of joint family is an. See **HINDU LAW (JOINT FAMILY)**, No. 6, 7 M.L.T. 211.

Ex parte decree.

- (1) *Civil Procedure Code (Act XIV of 1882), S. 108—Ex parte decree, setting aside—Non-service of summons—Fraud—Separate suit to set aside ex parte decree—Right of suit, when arises.*

It is not open to the defendant, against whom an *ex parte* decree has been passed, to challenge the decree in an independent action, on the ground that the summons was not served on him. His remedy, if he wishes to set aside the *ex parte* decree on that ground, is by an application under S. 108, Civil Procedure Code, 1882. He cannot have that decree set aside in an independent action, except by establishing that the decree was obtained by fraud (a). **Lakshminarain Dutt v. Fazil Mahomed**, 7 Ind. Cas. 163.

SHARFUDDIN and DOSS, JJ.

References:—(a) 21 C. 605; 28 C. 475; 29 C. 395; and 21 A. 279, *relied upon*.

- (2) *C.P.C. (Act V of 1908), S. 11—Res judicata—Finally decided—Ex parte decree—Decree executed—Fraud—Minor's right to relief on the ground of fraud by fresh suit not allowed—Limitation Act (IX of 1908), Sch. II, Art. 95—Limitation—Suit to set aside decree on the ground of fraud.*

***Ex parte* decree—(Continued).**

In 1900 an *ex parte* decree for possession of land was passed against the defendants, who were minors and represented by their cousins as guardians *ad litem*. The decree was executed and mutation of names was effected in 1902. In 1904 a decree for produce was passed against the defendants.

In the present suit filed in 1907, the defendants sued to recover possession of the land and alleged that the *ex parte* decree was a nullity and they were not bound by it and the subsequent proceedings, for the guardians had colluded with the opposite side.

Held that the suit was not maintainable, until and unless the *ex parte* decree against them was set aside. The right as to the possession of the land was *res judicata* so long as that decree subsisted. *Prima facie* a suit to set aside the *ex parte* decree would be barred under Art. 95, Limitation Act (a). **Dial Singh v. Allah Ditta**, 47 P.L.R. 1910.

RATTIGAN, J.

Reference :—(a) P.L.R. 1900, p. 431, R.

(2-a) C.P.C. (Act XIV of 1882), S. 108—Application to set aside *ex parte* decree—Applicant sued as partner but not served personally—Sufficient cause.

When a defendant, against whom an *ex parte* decree has been passed as one of the partners without the summons having been served on him individually, applies for the setting aside of the *ex parte* decree, and he denies that he is a partner of the other defendants, the Court should set aside the *ex parte* decree and re-hear the case on its merits. It should not put upon the defendant the burden of proving that he is not a partner, before setting aside the *ex parte* decree. To do so would be trying in the miscellaneous application a question arising on the hearing of the case on its merits. Such procedure is not contemplated by S. 108 of the C.P.C. (1882). **Chokalingam Chetty v. Soobramonian Chetty**, 8 Ind. Cas. 448.

FOX, C.J. and PARLETT, J.

(2-b) *Fraud*—*Ex parte* decree—Bona fide, belief.

Where it is alleged that an *ex parte* decree was obtained by fraud, and it is shown that the defendant did not reside at the place where the summons was served, it is not fraud on the part of the plaintiff if he had a *bona fide* belief that the defendant resided there. **Maung Ngwe Ya v. Allagappa Chetty**, 8 Ind. Cas. 599.

LOWIS, J.

***Ex parte* decree—(Concluded).**

(3) —affirmed in appeal—Application to set it aside—Jurisdiction. See CIV. PRO. CODE (1882), No. 91, 7 A.L.J. 598.

(4) —against one and, on contest, against other defendants—Appeal—Decree affirmed—Jurisdiction of first Court to set aside. See CIV. PRO. CODE (1882), No. 67, 5 Ind. Cas. 525.

(5) Court's inherent powers to set aside. See CIV. PRO. CODE (1908), No. 103, 12 Bom. L.R. 462.

(6) Transfer of—Payment of decree amount into executing Court—Application to set aside, made in Court passing decree, before entering satisfaction of decree, whether proper. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 5, 54 P.R. 1910.

(7) —in rent suit—*Res judicata*. See RES JUDICATA, No. 14, 6 Ind. Cas. 860.

(8) Setting aside—Limitation. See CIV. PRO CODE (1882), No. 191, 12 Bom. L.R. 730.

(9) Summons not served upon defendant—Setting aside—Review of judgment—application beyond time—Excuse of delay. See CIV. PRO. CODE (1908), No. 108, 12 Bom. L.R. 886.

(10) Suit based on—*Onus*. See FOREIGN JUDGMENT, No. 3, 41 P.L.R. 1910.

(11) Setting aside—Right of minor. See LIMITATION ACT (1908), No. 24, 8 Ind. Cas. 543.

***Ex parte* order.**

(1) Investigation under S. 280, C.P.C., 1882—*Ex parte* order—Adjudication on the merits—Regular suit—Limitation. See LIMITATION ACT (XV OF 1877), No. 74, 28 P.R. 1910.

(2) Order refusing to set aside *ex parte* dismissal of application to set aside sale—Confirmation of sale—Appeal. See CIV. PRO. CODE (1882), No. 64, 6 Ind. Cas. 148.

Expropriatory tenant.

(1) Rent payable by an *ex-proprietary tenant*—Person entitled to receive—Land Revenue Act (III of 1901), S. 36—Rent Act (Oudh) Ss. 7-A and 126.

The respondent sold his share in a village to the appellant and became an expropriatory tenant of land which had been his *sir*, and the rent payable therefor was determined under section 36 of the Land Revenue Act.

Held, that the respondent was the tenant of the appellant alone, and not of all the co-sharers

Expropriatory tenant—(Concluded).

in the village, and therefore the appellant alone was entitled to maintain a suit for arrears of rent against the respondent. **Chhote Lal v. Ramadhin**, 13 O.C. 70=5 Ind. Cas. 945.

CHAMIER and EVANS, O.J.C.S.

Fair comment.

Mis-statement of fact in comment—Effect. See **LIBEL**, No. 1, 14 C.W.N. 713.

False Imprisonment.

Preventing intending passenger of ferry boat to return from wharf through turnstile without payment. See **FERRY**, No. 1, 14 C.W.N. 410.

Family arrangement.

(1) *Family arrangement—Descendants of parties how far bound—Intention of parties.*

One Rupe Singh was the sole owner of a holding of 471 kanals of land, nearly whole of which was acquired by him. According to his wishes, a family arrangement was arrived at, to which his sons Suba Singh and Dewa Singh and Grandson Kishen Singh, son of Dewa Singh, consented. Under it 205 kanals were allowed to Suba Singh, 109 kanals to Dewa Singh and 157 to Kishen Singh. After the death of Dewa Singh, the sons of Kishen Singh sued their uncle Bishen Singh for half share in the land that was allowed to Dewa Singh.

Held, that the claim was not valid. In such cases effect must be given to the intention of the parties and there was no doubt that Kishen Singh was finally provided for without further prejudice to the rights of the defendant, the other son of Dewa Singh. The plaintiffs were not justified in re-opening the matter and claiming any portion of the land then awarded to Dewa Singh. **Bishen Singh v. Jawala Singh**, 20 P.L.R. 1910.

REID, C.J. and KENSINGTON, J.

(2) Binding character of—Powers of father—See **HINDU LAW (ALIENATION)**, No. 10, 12 Bom. L. R. 621.

Father and son.

(1) Decree against sons for debt due by father—Form of decree—Personal decree. See **DECREE**, No. 6, 6 Ind. Cas. 397.

(2) Decree against father how far binding on sons. See **HINDU LAW (GENERAL)**, No. 2, 8 M.L.T. 355.

(3) Purchase by father in son's name. See **BENAMI TRANSACTIONS**, No. 2-a, 8 Ind. Cas. 450.

Ferry.

(1) *False imprisonment—Preventing intending passenger of ferry boat to return from wharf through turnstile without payment—Reasonable condition.*

The plaintiff, with a view to take the defendant Company's ferry boat, paid the usual charge of a penny on entering the defendant Company's wharf, then changed his mind and wanted to return through a turnstile provided by the Company for exit, but, having refused to pay the penny which he was asked to do to be allowed to go through the turnstile, was by force prevented from going through it, there being no complaint of any excessive violence having been used.

Held,—that there was no false imprisonment, as the defendant Company was entitled to impose a reasonable condition before allowing the plaintiff to pass through their turnstile from a place to which he had gone of his own free will, and which he had contracted to leave by a different exit. The payment of one penny was a quite fair condition, and if the plaintiff did not choose to comply with it, the defendant was not bound to let him through.

Held, further, that the question whether the attention of the plaintiff had been sufficiently drawn to the Company's notices saying that the fare must be paid was immaterial for the decision of the case. **Archibald Nugent Robertson v. The Balmain New Ferry Company Ltd.**, 14 C.W.N. 410 (P.C.)=5 Ind. Cas. 942.

LORD CHANCELLOR, LORD MACNAGHTEN, LORD COLLIER and SIR ARTHUR WILSON.

(2) Suit for rent of a—Jurisdiction. See **ACT IX OF 1887 (PROVL. S. C. COURTS)**, No. 9, 14 C.W.N. 994.

(3) Loss of income of—Construction of Railway Bridge—Compensation. See **ACQUISITION OF LAND**, No. 1, 6 Ind. Cas. 343.

Financial Commissioner (Punjab).

—When would interfere in revision. See **REVISION**, No. 2, 2 P.R. 1910 (Rev.).

Fishery.

(1) Meaning of—. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 46, 5 Ind. Cas. 158.

(2) Right of—Rights of stranger—Effect of change in course of river. See **BOUNDARY**, No. 2, 12 C.L.J. 216.

Flag.

Right to hoist a—Suit of civil nature. See CIV. PRO. CODE (1882), No. 4, 7 A.L.J. 880.

Foreign judgment.

- (1) *Foreign judgment—Suit on—Jurisdiction—Onus of proof—Foreign judgment being ex parte is immaterial—Civil Procedure Code, 1908, section 14—Retrospective effect—Res judicata.*

A plaint was presented in 1895 in Ludhiana. At the hearing all the parties were present and the question of jurisdiction being raised, the plaint was returned for presentation, without any protest, to the Nabha Court which in 1898 passed an *ex parte* decree against defendant.

The plaintiff then filed a fresh suit on the foreign judgment. The defendant contended

- (1) that the Nabha Court had no jurisdiction;
- (2) no decree can be given by a British Court on an *ex parte* foreign judgment;
- (3) the decision of the Nabha Court was not on the merits.

The Divisional Judge held :

(1) That the plaintiff's suit is really based on the plaint of 1895, and

(2) under section 14 of C.P.C., 1908, the *onus* lies on the defendant to show that the Nabha Courts had no jurisdiction which he had failed, to discharge.

Held by the Chief Court, affirming the lower Court's decree but on different grounds, that the learned Divisional Judge was wrong on both points :

(1) That the plaintiff's suit was not based on the original plaint of 1895 but on the *ex parte* judgment of the Nabha Court.

(2) That, under the old Code the burden of proving jurisdiction lay on the plaintiff when the issue was tried in the first Court; and that the subsequent change of law in S. 14 of the new Code did not take effect retrospectively :

(3) That, although the initial *onus* was on plaintiff, still that *onus* was shifted by the fact of the plaint having been returned by the Ludhiana Court for presentation to the Nabha Court without any protest, and that defendant did nothing to discharge this shifted *onus* :

(4) That the Nabha Court had jurisdiction to try the case :

(5) That the fact of the decree being *ex parte* is in the circumstances immaterial :

(6) That the decision was obviously on the merits. **Udhe Singh v. Puran Chand**, 165 P.W.R. 1909.

JOHNSTONE, J.

Foreign judgment—(Continued).

- (2) *Foreign judgment, suit on—Judgment passed ex parte whether can be enforced in the forum of another country subject to the same Sovereign—Private international law, rules of—Authority of British Parliament recognising jurisdiction must be clear and express—Charter of 1833—(Ceylon), S. 24—Ceylon Ordinance, II of 1889 Ss. 9, 704—"Apparor defend the action," meaning of—Obtaining of leave to defend action; whether amounts to voluntary submission to the jurisdiction of the Court—Decision of the foreign Court otherwise than on the merits of the case—Effect on its enforcement in a Court in British India.*

Appellant obtained a decree against the respondent, in a suit instituted by him in a Court in Ceylon, on a pro-note. The suit having been instituted under the summary procedure provided by Chapter LIII of the Ceylon Ordinance II of 1889 (analogous to section 532 of Act XIV of 1882), defendant appeared by an attorney and applied for leave to defend the suit. Leave was granted to him on condition of his furnishing security. The respondent did not furnish security, and did not appear at the trial, when judgment was passed against him during his absence. The respondent having left Ceylon and settled in British India, appellant brought the present suit against him in a British Indian Court. The respondent pleaded want of jurisdiction, as (1) under the rules of Private International Law, the judgment of a foreign Court passed *in absentem* could not be enforced in a British Indian Court, (2) the respondent did not appear at the trial and there was no decision on the merits.

Held, (1) that though Ceylon and British India owed allegiance to the same Sovereign, the enforceability of the judgments of the Courts of either country on those of the other was guided by the Rule of Private International Law, *viz.*, that the judgment of a foreign Court passed against the defendant *in absentem* cannot be enforced against him in a Court in British India (*a*).

(2) That neither by section 23 of the Charter of 1833, nor by S. 9 of Ordinance, No. II of 1889 (Ceylon Legislative Enactments, Vol. II, p. 576), are the Ceylon Courts empowered by the British Parliament to adjudicate in a matter, in which the cause of action arose within their jurisdiction, so as to bind by their

Foreign judgment—(Continued).

decree a defendant who is a resident of British India and a subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Ceylon Court. Such jurisdiction, having regard to the principles of International Law, would only be recognized in British India, if it was conferred by the Supreme Legislature, by express and clear words (b).

(3) That a decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by the comity of nations, only because the defendant entered into the contract in the territory of the *forum* which passed the decree (c).

(4) That the defendant, though he was *ex parte* at the trial must be deemed to have voluntarily submitted to the jurisdiction of the Ceylon Court, as he applied for leave to defend the action.

(5) The words "*appear or defend*" in S. 704 of the Ceylon Ordinance II of 1889 are the equivalent of "*appear and defend*" and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted, and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all.

(6) It is not even necessary that the submission must be by an act done in the course of the action itself, for it can be constituted by a contract to that effect, entered into between the plaintiff and the defendant previously to the action (d).

(7) A judgment of a foreign Court, which does not decide upon the merits of the dispute, or instance, if a suit is dismissed as being barred by the Law for Limitation of suits prevailing in that Court cannot be pleaded as a bar to a suit instituted in the Court of the plaintiff's domicile on the same cause of action (e). **Shaik Atham Sahib v. Daoud Sahib**, 3 Ind. Cas. 190 = 19 M.L.J. 459 = 32 M. 469.

MUNRO and ABDUR RAHIM, JJ.

References :—(a) 22 C. 222 = 21 I.A. 171 ; 28 C. 641, D. ; 29 C. 509 ; (1908) 1 K.B. 302 = 77 L.J. K.B. 180 ; 98 L.T. 304 ; 24 T.L.R. 85 ; Halsbury's Laws of England, Vol. VI, p. 291, R. (b) 22 C. 222 = 21 I.A. 171 ; (1909) 1 K.B. 302 = 77 L.J.K.B. 180 ; 98 L.T. 304 ; 24 T.L.R. 85, R. (c) 22 C. 222 = 21 I.A. 171 ; 29 M. 69 ; 29 M. 239 at p. 279 ; 1 M.L.T. 71 ; 16 M.L.J. 238, R. (d) (1908) 1 K.B. 302 ; 77 L.J.K.B.

Foreign judgment—(Continued).

180 ; 98 L.T. 304 ; 24 T.L.R. 85 ; 55 L.J.N.S. (Q.B.D.), p. 39 ; 2 M. 407 ; 18 M. 327, R. (e) 1 P.D. 393, (1904), p. 41 ; 79 L.J.P. 2 ; 89 L.T. 481 ; 9 Asp. M.C. 497, R.

(3) *Foreign judgment—Ex parte decree, suit based on—Onus—C.P.C. (Act XIV of 1882), Applicability of—Limitation Act (XV of 1877), S. 14.*

The plaintiff brought a suit in the Ludhiana District. The plaint was returned for presentation in the Court of Nabha Native State. The plaintiff subsequently obtained an *ex parte* decree. He then brought the present suit in the Ludhiana District on the basis of the *ex parte* decree obtained by him. The first Court held that it was for plaintiff to prove (i) that the suit based on an *ex parte* foreign judgment was maintainable (ii) that defendant could not object to the jurisdiction of the Nabha Court, (iii) that the Nabha Court had jurisdiction ; and it found that plaintiff had not proved these things, and so dismissed the suit.

The Divisional Judge set aside the dismissal and remanded the case for retrial, holding that the suit was based on the plaint in the first suit.

Held that the suit was not based on the plaint in the first suit. If the present suit failed, the plaintiff could bring a suit on the original cause of action, asking the Court to exclude, in computing limitation, the years spent in prosecuting his claim in Nabha.

Held, also, that it was not permissible to apply S. 14 of the new C.P.C in the circumstances ; under the old Code the burden of proof lay upon plaintiff to show that Nabha Court had jurisdiction, and it would be unfair to treat the matter of *onus* as it is treated in the new Code and so give the new Code this sort of retrospective effect. The initial *onus* was on plaintiff, but this *onus* was shifted when plaintiff shewed that, when the case was before Ludhiana Court, all the parties were present and the question of jurisdiction was somehow raised, probably at the instance of defendant or then a co-defendant, and the plaint was returned without any protest by any person present.

Held also that the Nabha Court had jurisdiction, that the fact of the decree being *ex parte* was in the circumstances immaterial and that the decision was obviously on the merits. **Udhe Singh v. Pura Chand**, 41 P.L.R. 1910. JOHNSTONE, J.

Foreign judgment—(Concluded).

- (4) *Foreign judgment—Defendant resident of British India—Ex parte trial—Whether binding.*

A foreign judgment obtained *ex parte* against a defendant described as a resident of British India cannot bind the defendant. **R.M.A. Saminatha Pillay v. N.A.K. Abdul Gafoor Sahib**, 8 M.L.T. 287.

BENSON and KRISHNASWAMI AIYAR, JJ.

Foreign territory.

(1) Order of excommunication passed in—Cause of action in—Defendant residing in British India—Suit for defamation whether maintainable in British India. See JURISDICTION (GENERAL), No. 1, 7 M.L.T. 42.

(2) Award affecting property out of British India—Convertibility into decree in British India. See AWARD, No. 2, 11 P.W.R. 1910.

Forest Act.

See ACT V OF 1882 (MADRAS).

Forma pauperis.

See PAUPER.

Fraud.

- (1) *Suit to set aside a decree, on the ground of—Personal service not affected—Conduct of plaintiff.*

The mere fact that personal service of summons has not been effected on a defendant would not make the *ex parte* decree obtained against him, abortive. But where the non-service is due to the fraudulent conduct of the plaintiff and others acting with him the decree may be set aside as fraudulent. **Tika Ram v. Doulat**, 7 A.L.J. 74 = 4 Ind. Cas. 596.

STANLEY, C.J. and BANERJI, J.

Reference :—21 C. 619, F.

(2)—in execution sale—Nature of proof of—Onus of—Inadequacy of price and arrangement between persons not to bid against each other—Effect. See CIV. PRO. CODE (1908), No. 153, 150 P.W.R. 1909.

(3) When may be presumed—Inadequacy of consideration—Presumption. See TRANSFER OF PROPERTY ACT, No. 24, 5 Ind. Cas. 179.

(4) Decree whether fraudulent—Point of law—Second appeal. See CIV. PRO. CODE (1908), No. 46, 5 Ind. Cas. 398.

(5) Fraud—Setting aside decree of another Court—Jurisdiction. See JURISDICTION (GENERAL), No. 2, 5 Ind. Cas. 648.

Fraud—(Concluded).

(6) Effect of—Limitation. See LIMITATION ACT (1877), No. 18, 6 Ind. Cas. 154.

(7) Plaintiff's case resting solely on—Fraud negatived—Case on mistake whether allowable. See PLEADINGS, No. 3, 6 Ind. Cas. 472.

(8) Fraudulent decree—Effect—Nullity—Remedy against such decree. See CIV. PRO. CODE (1908), No. 93, 7 Ind. Cas. 11.

(9) Alienation—Fraud—Creditor. See ALIENATION, No. 2, 15 M.C.C.R. 104.

(10) *Ex parte* decree, setting aside of—Fraud—*Bona fide* belief as to defendant's residence. See EX PARTE DECREE, NO. 2-b, 8 Ind. Cas. 599.

(11) Joint decree—Setting aside decree on ground of. See DECREE, No. 9-b, 13 O.C. 388.

(12) Judgment in *personam*—Who can set aside on ground of—. See DECREE, No 9-a, 8 Ind. Cas. 614.

Fraudulent transfers.

- (1) *Transfer to secure a debt and transfer to hinder realisation of decree—Distinction—Fraud.*

Where a transferee not only intends to secure his own debt by the transfer of property from the debtor, but also to prevent a decree-holder from realising his decree by attaching the property transferred, the transfer is fraudulent. **Maung San v. Sit Twan**, 5 L.B.R. 195.

HARTNOLL, J.

References :—34 C. 999, F; 5 M.H.C.R. 368, R.

(2) Test of—Effect of consideration—Intent to defraud essential. See REGISTRATION ACT (1877), No. 22, 7 Ind. Cas. 614.

Ful Bench.

Power of, on cases referred to it. See CIV. PRO. CODE, 1908, No. 20, 12 P.W.R. 1910.

Future crops.

Mortgage of. See MORTGAGE (GENERAL), No. 16, 5 Ind. Cas. 373.

Future rents.

Mortgage of—Registration. See REGISTRATION ACT (1877), No. 1, 6 Ind. Cas. 504.

Garden.

(1) What constitutes. See ACT XI OF 1859 (REVENUE SALE LAW), No. 5-a, 7 Ind. Cas. 912.

General Clauses Act.

(1) See ACT X OF 1897.

(2) See ACT I OF 1904 (N.W.P.).

Gift.

- (1) *Gift by a Native Christian to his three children—Joint tenancy or tenancy-in-common—Indian Succession Act (X of 1865), S. 93—English Law.*

A Native Christian made a gift of property to his three children. Two of them died. *Held* that the surviving brother took the interest of the deceased by the principle of survivorship.

Held that the gift was joint, and the donees took as joint-tenants.

The rule of English Law is to presume that the donees are joint tenants. This principle is adopted by the Indian Legislature in the illustration to S. 93 of the Succession Act. Though the illustration deals with the case of a legacy, the same principle is applicable to wills as to gifts, unless there are special rules justifying a deviation. **Arakal Joseph Gabriel v. Domingos Inas**, 7 M.L.T. 379 = 6 Ind. Cas. 7 = 20 M.L.J. 377.

BENSON and KRISHNASAWMY AYER, JJ.

References :—23 B. 80, R. ; 28 A. 38, D.

- (2) *Succession—Agreement that land would go to a shrine on the death of persons who were parties to the agreement—Gift in favour of shrine by one of the parties—Suit to question the gift by another party.*

When the parties to the present suit and others had agreed in a previous case that, on the death of persons who were parties to the agreement, the land in dispute would go to a shrine.

Held that a gift of her share by one of the parties, a female, in favour of one of the managers of the shrine, was not liable to be questioned by a person who was also a party to the agreement and claimed a right to the land as an heir of the donor. **Inayat Ali Sha v. Wilayat Shah**, 46 P.L.R. 1910.

JOHNSTONE, J.

- (3) *Consideration in shape of services rendered or to be rendered—Grant of assessment—Registration. See TRANSFER OF PROPERTY ACT, No. 37, 12 Bom. L.R. 9.*

- (4) *Deed of—Agreement contrary to the terms of the—Evidence to prove the agreement. See LIMITATION ACT (1877), No. 59, 5 Ind. Cas. 497.*

- (5)—by owner while ousted by trespasser—Validity of—Nature of possession to support gift. See MAHOMEDAN LAW (GIFT), No. 3, 13 O.C. 347.

Gift—(Concluded).

- (6) *Joint gift to adult and minor—Gift by parent to child—Possession. See MAHOMEDAN LAW (GIFT), No. 5, 8 Ind. Cas. 38.*

Golden Temple, Amritsar.

- (1) *Golden Temple, Amritsar—(Darbar Sahib) —Its 1859 Dastur-ul-Amal—Pujari disobeying its provisions—Failing to pay half of the Ardas to the Temple Treasury—Misconduct—Right of Manager to prevent him from entering the temple—Interference of Civil Court—Court fee Rs. 10.*

Held, that :

- (1) The Dastur-ul-Amal prepared in 1859 for the management of the Golden Temple, Amritsar, rightly sets out the arrangements and practice and custom relating to the temple and its officials :

(2) If a Pujari does not obey its provisions or does not follow the custom of the Institution, as for instance by withholding half of the Ardas (subscription) realized by him which he is bound to pay into the Temple Treasury, he is guilty of decided misconduct, which justified the Managing Committee of the Institution in taking necessary steps to prevent him from entering the Temple for the purpose of discharging his duty as Pujari, and that such a matter is within the cognizance of a Civil Court.

- (2) A person setting up a special custom must prove it. **Sarda Man Singh v. Ganga Singh**, 100 P.W.R. 1909.

TREMLETT and POWELL, JJ.

Goods.

- (1) *Sale of—Loss by misdirection of, by railway—Negligence of agent—Liability. See PRINCIPAL AND AGENT, No. 4, 7 A.L.J. 732.*

- (2) *Sale of—Stipulations as to time of delivery, whether of the essence of contract. See SALE, No. 4, 13 O.C. 143.*

Government.

- (1) *Suit against, for recovery of a tank—Acts constituting adverse possession. See ADVERSE-POSSESSION, No. 2, 5 Ind. Cas. 118.*

- (2) *Adverse possession as against—Possession and enjoyment by plaintiff—Burden of proof. See MADRAS ACT V OF 1882 (FOREST), No. 1, 7 M.L.T. 241.*

- (3) *Duty of—to maintain Irrigation works in repair—Deficiency of water supply owing to non-repair—Loss to ryot in consequence—Whether suit lies against Government therefor, See WATER, No. 1, 7 M.L.T. 397.*

Government—(Concluded).

(4) *Suit against—Jurisdiction of Civil Courts.* See ACT IV OF 1898 (LOWER BURMA TOWN AND VILLAGE LANDS), No. 1, 5 L.B.R. 163.

(5)—*employing a shroff to pass Babashai coins—Shroff passing shikkai coins—Mint officers accepting the coins—Estoppel—Loss to Government—Measure of damages.* See MAXIM, No. 1, 12 Bom. L.R. 769.

(6) *Sale—Dispossession by Government—Stipulation for refund of purchase money—Legality.* See SAIE, No. 8, 8 M.L.T. 312.

Government pronote.

(1) *Nog. Instr. Act applicable to—Transfer of—Consideration—Burden of proof—* See PROMISSORY NOTE, No. 6, 12 C.L.J. 470.

Grant.

(1) *Grant—Construction, principle of construction—Godavari lankas, shifting nature of—Lease by Government—Description by indefinite—Extent to prevail—Lessee entitled to damages for short extent.*

The Government gave a lease of S. Lanka in the Godavari river, and the extent was given as 777-64 acres. The boundaries of the lankas are of a shifting character owing to the action of the floods in the river. The area being much less than the extent granted, the lessee brought his suit for damages, for the short extent.

Held, that the fact that the boundaries are of a shifting character, and the property leased is liable either to diminish or increase by a process of accretion, entitles the man, who is contemplating taking the lease, to rely upon the area stated in the lease.

The primary canon of interpretation of a deed or grant, where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably, is that the description of the boundaries, if it is precise and accurate dominates the description of the quantity (a).

There is also a supplementary canon equally well-established, though instances of its application are much less frequent than those of the other, that, if the description of the boundaries is vague and uncertain, it yields to the description of the quantity (b).

A party who lets premises agrees to give possession, and if he fails to do so, the lessee may recover damages against him (c). **Permaraja Venkiah Garoo v. The Secretary of State for India**, 7 M.L.T. 390=6 Ind. Cas. 727.

WHITE, C.J. and ABDUR RAHIM, J.

Grant—(Concluded).

References:—(a) 10 C.L.J. 570 (583, 584), F.; M & W. 183=63 P.R. 569, 12 Cl. & F. 151; (1898), 2 Ch. 551; (1899) 2 Ch. 309; 4 Wheaton U.S. 444, R. (b) (1867) L.R. 1 P.C. 436; (1866) L.R. 1 Ch. App. 412; (1905) 2 Ch. 164; (1902) A.C. 454; (1822) 161 W.S. 229=7 Wheaton U.S. 7, R. (c) 5 Bing. 440=30 R.R. 699, R.

(2) *Grant of land by Collector—Favourable assessment—Long occupation by grantee—Sudden enhancement of assessment by Government—Illegality.*

Where lands are granted by the Collector, whether—with or without authority, at a favourable rate of assessment, and the grantees enjoyed them on such conditions for nearly a hundred years, and then full assessment was levied by Government;

held, that the imposition of the full assessment was illegal and could not be levied. **The Secretary of State for India in Council v. Komandur Narasimhachariar**, 8 M.L.T. 378.

MILLER & MUNRO, JJ.

(3) *Joint family property—Confiscation—Government grant of part of property to one member of the family—Nature of estate granted.* See HINDU LAW (JOINT FAMILY), No. 9, 12 Bom. L.R. 656.

(4) — of soil of a village, and not of land revenue—Applicability of Pensions Act. See ACT XXIII OF 1871 (PENSIONS), No. 1, 7 M.L.T. 53 (P.C.).

Grove holder.

Position of—Right to pre-emption. See PRE-EMPTION, No. 32, 13 O.C. 202.

Guardian ad litem.

Costs—Guardian ad litem of a lunatic—Guardian filing on unnecessary appeal—Personal liability of the guardian to pay—Costs.

The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendants whom he represents, if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents, he must personally pay the costs incurred. **Shapurji Hormauji Harver v. Monosseh Jacob Monosseh**, 11 Bom. L.R. 1011=34 B. 374.

SCOTT, C.J., and BATCHELOR, J.

Guardian and minor.

- (1) *Mortgage by guardian, validity of—Guardians and Wards Act (VIII of 1890), S. 31—Order, if to substantially comply with the provisions of the section—Order obtained on misrepresentation of fact and not by fraud—Mortgagee entitled to amount advanced.*

A mortgage executed by a certificated guardian of a minor's property, in pursuance of a permission obtained on misrepresentation of fact and not by fraud, is a valid mortgage, even though the permission ought not to have been granted. A mortgagee is not bound to go behind the order of the Court permitting the mortgage, where no case of fraud exists (*a*).

An order granting permission to the guardian to transfer is sufficient, if it substantially, though not in form, complies with the provisions of S. 31 of the Guardians and Wards Act. Thus an order not reciting the necessity for which the loan was required is valid, if the petition on which the order was granted contained the requirements provided in S. 31 of the said Act.

A mortgagee is not entitled to recover any larger sum than what he has actually advanced. **Maharaja Sir Ramaswar Singh Bahadur v. Dhunpat Singh**, 11 C.L.J. 197=5 Ind. Cas. 334.

HARRINGTON and CHATTERJEE, J.J.

References:—12 I.A. 47 (50); 11 C. 379, F.

- (2) *Minor—Money borrowed by de facto guardian for minor's benefit—Liability of the minor—Equity—Punjab Courts Act (XVIII of 1884), S. 70 (a).*

Held, that money borrowed by the *de facto* guardian or agent of a minor for the minor's benefit, as, for instance, to pay the Government Revenue for which the minor is liable as lambardar, is legally recoverable from the minor's estate, although he is not personally liable therefor.

The High Court is not justified to interfere on revision where substantial justice is done to the parties. In such a case, revision under S. 70 (a) of Act XVIII of 1884 does not lie, even where the lower appellate Court has erred in law. **Umar Hayat v. Devl Das**, 5 P.W.R. 1910=5 Ind. Cas. 590.

RATTIGAN, J.

- (3) *Appointment of guardian—Minor Hindu co-parcener—Guardian of property whether can be appointed guardian of person—*

Guardian and minor—(Continued).

Status of the family—Suit by one co-parcener against another for possession, whether effects separation—Partition.

A guardian cannot be appointed to the estate of a minor co-parcener of a joint Hindu family, who has no separate property (*a*).

The status of the minor places no difficulty in the way of appointing a guardian of the person, but different considerations apply to the guardianship of property (*b*).

It is a fact that individual members of a joint Hindu family frequently hold property, in which the other members of the family have no share, and a suit by one against another, based on the allegation that an acquisition was for the joint family and not merely for the member in whose name it was recorded, does not effect a separation (*c*).

So, a suit by a co-parcener against a minor co-parcener, to establish the fact that a mortgage transaction effected by the minor's father was on behalf of the joint family, does not effect a partition. **Ram Kishen v. Beli Ram**, 23 P.R. 1910=33 P.W.R. 1910=5 Ind. Cas. 887.

REID, C.J. and JOHNSTONE, J.

References:—(a) 25 A. 407 (P.C.). (b) 30 B. 152. (c) 2 P.R. 1892 and 1 C. 434, D.

- (4) *Civ. Pro. Code (Act XIV of 1882), Ss. 244, 457—"Party," means party duly represented—Minor represented by married woman or person with adverse interest as guardian ad litem if bound by decree—Appointment of married woman as guardian of person under Guardians and Wards Act (VIII of 1890), S. 53, if removes disqualification—Construction of statutes.*

S. 244, Civ. Pro. Code, 1882, applied to questions arising between parties to the suit in which the decree was passed, that is to say between parties who had been properly made parties in accordance with the provisions of the Code.

Where decrees were passed against a minor represented in the proceedings either by a married sister or an uncle whose interest was adverse to the minor's, *held*, that the minor was never a party to any of these suits in the proper sense of the term, and a suit on her behalf, for a declaration that the decrees and sales in execution thereof were invalid against her, was maintainable.

Guardian and minor—(Continued).

A married woman was disqualified by S. 457 of the Code from being appointed a guardian *ad litem* on behalf of a minor. The fact of her having been appointed the guardian of the person of the minor under S. 53 of the Guardians and Wards Act of 1930, did not remove the disqualification.

The later^a enactment left S. 457, C.P.C., untouched, the effect of the two statutes read together being, that a guardian of the person of a minor, if properly qualified, might be preferred as guardian in the suit. **Mussamat Rashid-un-nisa v. Muhammad Ismail Khan**, 13 C.W.N. 1192 (P.C.) = 10 C.L.J. 318 = 6 A. L. J. 822 = 11 Bom. L.R. 1225 = 6 M.L.T. 279 = 19 M.L.J. 631.

LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (5) *Alienation by de facto guardian—Minority of husband of minor Hindu wife—Legal necessity—Income of property not sufficient to meet necessity—Alienation if valid.*

The acts of a *de facto* guardian in alienating the estate of a minor married Hindu female, during the minority of her legal guardian the husband, will be valid, if a necessity for the money sought to be raised is established, as, for instance, that it is wanted for repairs, and if the income of the property be not sufficient to provide the requisite funds. **Adhar Chandra Dutt v. Kiritibash Bairagee**, 6 Ind. Cas. 638.

HOLMWOOD and SHARFUDDIN, JJ.

Reference:—10 C. 823, F.

- (6) *Minor, proper representation of—Guardian ad litem, propriety of the appointment of the person who executed the mortgage-deed which was the subject of suit—Decree or order made against minor.*

The general rule is that, if a minor is properly represented by a next friend or guardian *ad litem* and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and the next friend or guardian is not guilty of gross negligence, a minor is as much bound by the decree or order made in the suit, whether it was made for his benefit or not, as if he were of full age.

Where the person appointed guardian *ad litem* of the present plaintiff in a previous litigation was not only his certificated guardian, but also his father and natural guardian who

Guardian and minor—(Continued).

had the power to mortgage the plaintiff's property for his benefit, *held*, that the plaintiff was properly represented, notwithstanding the fact that the aforesaid guardian *ad litem* was the person who had on behalf of the minor executed the mortgage-deed which was the subject of suit. **Madari v. Har Dayal**, 13 O.C. 158.

CHAMIER and EVANS, JJ.

- (7) *Limitation—Alienation of immoveable property by a minor's predecessor to one who was afterwards appointed the minor's guardian—Suit by the minor to recover that property—Cause of action—Onus on plaintiffs of proving suit is within limitation—Decision as to age of minor in appointment of guardian proceedings not judgment in rem—Guardian when not estopped from disputing ward's age—Entry in birth register and register of vaccination—Former statement of a person as to date of his own birth—Paper of Tambol—Admission of a party—Previous statement of a witness—Power of guardian—Statement of legal practitioner binding on his client—Construction of the Law of evidence—Indian Limitation Act, XV of 1877, S. 7 and Arts. 142 and 144—Indian Evidence Act, I of 1872, Ss. 10, 13, 18, 21, 33, 41, 43, 45, 155 and 157—Act XI, of 1858, Ss. 10 and 18—Ss. 561 of Act XIV of 1882 (= O. 41. R. 22 of Act V of 1908).*

Held, that:—

- (1) The cause of action of a suit by a ward to recover his property, whether moveable or immoveable, misappropriated or alienated by the guardian, arises from the date of the guardian's removal. But where immoveable property has already been alienated and parted with by the ward's predecessor-in-title, the suit to recover it by the alienor himself or his successor, on the ground of invalidity of the alienation, is governed by twelve years' rule of limitation, and the right to sue accrues from the date of alienation, whether Arts. 142 or 144 of Act XV of 1877 (now Act IX of 1908) applies.

- (2) One cause of action cannot come into existence by instalments on different dates (a).

- (3) It is generally for the plaintiff to show that his suit is not barred by limitation. So where a person, after attaining majority, sues to recover his property in the hands of his guardian or other persons, for which cause of action

Guardian and minor—(Continued).

has arisen during his minority, he is bound to prove that the suit is within the three years' limit allowed by S. 7, Limitation Act, 1908.

(4) The decisions of an issue as to the age of a minor, in proceedings relating to the appointment of the guardian for person or property or both of such minor or in curatorship proceedings, are not judgments *in rem* enumerated in S. 41 of Act I of 1872 which are declared to be conclusive against the world, although under S. 43 of this Act, these are relevant to prove that at or up to a certain time the said minor was under tutelage.

(5) In a suit by a ward to recover his property from the guardian appointed by a competent Court, the guardian is not estopped from disputing the age of the ward, unless it is shown that the former (guardian), by his declaration, act or omission, has caused or permitted the latter (ward) to believe anything about the ward's age.

(6) An entry in a Birth Register kept by some competent authority is relevant to prove the age of the person to whom it relates, provided it is not in any way suspicious.

(7) An entry in a vaccination register showing the age of the person vaccinated can be relevant to corroborate the vaccinator's evidence as to the age, if otherwise reliable, but in itself it is of no value, because the age of a child is likely to be very cursorily recorded, as it is not a matter of importance for the operation.

(8) Former statements of a person giving the date of his own birth, even if admissible under the combined operation of S. 21 (1) read with Ss. 32 (7) and 13, cl. (d) of the Indian Evidence Act (I of 1872), do not possess any great probative force, because the source of his information after all is hearsay.

(9) Under the combined force of Ss. 10 and 13 of Act XL of 1859 (now Ss. 29 and 30 of Act VIII of 1890), the only restrictions upon a certified guardian are, that he cannot sell or mortgage the ward's immoveable property or lease it for five years without permission of the Court; in other respects he has the full rights of a proprietor.

(10) The statement of witnesses examined in a judicial proceeding cannot be used in any subsequent judicial proceedings, when any of the conditions laid down under S. 33 of the Indian Evidence Act (I of 1872), is wanting. But such statements can be used either to contradict them under S. 155 (3) or to corroborate them under S. 157 of the Act (c).

Guardian and minor—(Continued).

(11) Under the provisions of S. 21 (2) or (3), only those admissions are relevant which are made by a principal party to the suit or that party's agent, but they do not apply to the statements of third parties, who subsequently are admitted as legal representatives of the original parties concerned.

(12) A *tambol* register or paperis relevant to corroborate the testimony of a witness, who proves the happening or not happening of a certain event at or about the time of the wedding, on the occasion of which he is shown to have paid the *tambol* personally.

(13) A statement as to relevant facts made by a legal practitioner on behalf of his client is to be treated as tantamount to that of his client, even if the former makes it without consulting the latter (d).

(14) The Evidence Act is in itself of the nature of the Code of the principles and the Law of Evidence which the Indian Courts are to observe, and the object of such enactments is that the Law should be ascertained, as regards any point specially dealt with in them, by interpreting the language used in those enactments and assigning to it its natural meaning, and not by searching for authorities elsewhere (e).

(15) Inadmissible evidence can be used to complete the narrative of a case, but decision of any issue cannot be based thereon.

(16) Plaintiff can amend the plaint only to the extent allowed by the Court. So where a plaint is returned to add parties, a prayer for reliefs asked therein cannot be altered, and the plaint is to be treated as originally framed, although not expressly objected to either by the first Court or the other party.

(17) Cross-objection or cross-appeal cannot be entertained for any relief not asked originally in the plaint, and cross-objection is admissible in so far only as it relates to matter opened up in the main appeal (f).

(18) If a plaintiff asks for "the following reliefs and such other relief as to the Court may seem just and proper to grant, namely," and follows this up with several prayers without any disjunctive adverb, the presumption is that they are intended to be cumulative and not alternative.

(19) Six per cent. interest should be allowed on the sums withheld by the defendant from the date of institution of the suit to date of

Guardian and minor—(Continued).

satisfaction of the decrees. **Husaina Sahib v. Nur and Muhammadji**, 86 P.W.R. 1910=7 Ind. Cas. 505.

JOHNSTON and WILLIAMS, J.J.

References :—(a) C. 33 P.R. 1897, R. (b) 18 All. 478 and 17 Cal. 849, R. (c) Cr. 20 S.W. R. 69 and 2 All. L.J.R. 91, R. (d) 21 Mad. p. 274 at p. 277, R. (e) 23 Cal. 563 (P.C.), F. (f) 28 All. 95 and 26 Cal. 114, R.

(8) Minor—Guardian—Arbitration.

The *de facto* guardian of a minor is competent, on behalf of the minor, to submit to arbitration the differences between him and his other relations in regard to the succession to family property, and such submission, if beneficial to the minor, is binding on him (a). **Mariambi v. Aadul Jaleel**, 15 M.C.C.R. 129.

STANLEY, ISMAI, C.J. and KRISHNA RAO, J.

References :—(a) (1861), 1 W.R. 281; and (1864), 11 M.H.C.R. 47.

(9) Guardian—Power of District Judge to order prosecution of—Appeal.

Upon an appeal against an order passed by the District Judge, directing prosecution of a person who was appointed guardian of a minor and required to furnish security.

Held that the order was not appealable.

Held, further, that the District Judge had no jurisdiction to pass the order, which must be reversed and set aside as *ultra vires*. **Sital Das v. Jesi Bai**, 88 P.L.R. 1910.

CHEVIS, J. •

(10) Minors—Rules—Appointment of a guardian.

A person residing out of the jurisdiction of a Court is not a desirable person to be appointed the guardian of a minor; nor is a person, guilty of contumacious disregard of the orders of the Court with regard to the production of the minor, a fit person to be appointed as guardian. **Gopi Bai v. Krishna Rao**, 15 M.C.C.R. 291.

KRISHNA RAO, J. and CHANDRASEKHAR AIYAR, OFFG, J.

(11) Surrender by a guardian of the absolute occupancy holding of a minor, when binding on minor. See OCCUPANCY HOLDING, No. 1, 6 N.L.R. 6.

(12) See ACT VIII OF 1890 (GUARDIANS AND WARDS).

Guardian and minor—(Concluded).

(13) Suit by minor to recover property transferred by guardian—Practice—Procedure—Limitation. See LIMITATION ACT (1877), No. 61, 7 A.L.J. 337.

(14) Refusal to appoint guardian—Procedure. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 16, 7 A.L.J. 328.

(15)—Guardian—Power to revive a barred debt. See HINDU LAW (ALIENATION), No. 6, 7 M.L.T. 382.

(16) Application to set aside sale—Effect of minority. See LIMITATION ACT (1877), No. 9, 5 P.L.R. 1910.

(17) Considerations for appointing guardian. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 5 Ind. Cas. 571.

(18) Guardian *ad litem* if may waive issue of fresh proclamation for adjourned sale. See CIV. PRO. CODE (1882), No. 142, 14 C.W.N. 1019.

(19) Contract for sale by guardian—Registration. See SPECIFIC PERFORMANCE, No. 2, 7 A.L.J. 887.

(20) Minor's property in possession of trustee—whether guardian of minor's property can be appointed. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 1, 6 Ind. Cas. 862.

(21) Whether guardian has power to consent to waive fresh proclamation. See CIV. PRO. CODE (1882), No. 143, 6 Ind. Cas. 813.

(22) Qualifications for appointment as guardian. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 6, 13 O.C. 140.

(23)—. See ACT III OF 1901 (U. P. LAND REVENUE), No. 14, 7 A.L.J. 1169.

(24)—See PRE-EMPTION, No. 45, 203 P.L.R. 1910.

(25) Nature of guardian's possession. See LIMITATION ACT (1877), No. 95, 12 Bom.L.R. 956.

(26) Mutation of names in favour of guardian—Adverse possession. See EVIDENCE ACT, No. 2, 9 Ind. Cas. 728.

Guardians and Wards Act.

See ACT VIII OF 1890.

Guzerat Talukdars Act.

See ACT VI OF 1888 (BOMBAY).

Handwriting.

(1) Value of opinion of expert in. See BANKER AND CUSTOMER, No. 10, 8 Ind. Cas. 98.

Hansard's Reports.

Admissibility of, in evidence. See **LIBEL**, No. 1, 14 C.W.N. 713.

Hath.

Profits from, not liable to road cess—. See **ACT IX OF 1880 (BENGAL CESS)**, No. 1, 5 Ind. Cas. 254.

Hearing.

(1) Munsarim's power to fix date for—. See **REVISION**, No. 7, 13 O.C. 341.

Heir.

(1) Liability of heirs of tenant—. See **LANDLORD AND TENANT**, No. 48, 7 Ind. Cas. 840.

Hereditary Office.

(1) *Alienation of office by mother-in-law to son-in-law—Validity.*

In this case a woman alienated a hereditary office in favour of her son-in-law, as she herself could not perform the ceremonies and carry out the other duties of the office. *Held* that the alienation conveyed the rights as a manager to the son-in-law, though, as an alienation to continue in force beyond the life-time of the mother-in-law, it may be invalid. **Subraya Kakrannaya v. Subraya Padyaya**, 8 M.L.T. 325.

SANKARAN NAIR and **KRISHNASWAMI IYER**, JJ.

Hereditary Offices Act.

See **ACT III OF 1874 (BOMBAY)**.

Hereditary village Offices.

See **ACT III OF 1895 (MADRAS)**.

Hiba-bil-ewaz.

See **MAHOMEDAN LAW (GIFT)**.

High Court.

(1) *Indian High Courts Act, S. 9—Letters Patent (Madras), cls. 11 and 44—Ordinary original civil jurisdiction of High Court—Power of Indian Legislature to alter limits of—S. 539, C.P.C., 1882—Whether confers jurisdiction to High Court to try suits relating to charities in the Mofussil.*

A suit was instituted by the Advocate-General, on the Original Side of the High Court at Madras, for the appointment of trustees and for the settlement of a scheme for the management of the Rameswaram Temple in the Madura District.

Held, that the Indian Legislature has the power of altering the local limits of the ordinary original civil jurisdiction (*vide* cls. 11 and

High Court—(Concluded).

44 of the Letters Patent), and that the exercise of such power would not be opposed to the provisions of S. 9, Indian High Courts Act (a).

S. 539, C.P.C., 1882, does not confer on the High Court in its original jurisdiction, power to entertain suits about charities in the Mofussil (b).

S. 539 does not, in a sufficiently clear and unambiguous manner, manifest the intention of the Indian Legislature to override the limitation imposed by the Letters Patent, under the authority of Parliament, on the exercise of Original jurisdiction by the High Court, beyond the Presidency Towns. **The Advocate-General of Madras v. A.L.A.R. Arunachalam Chetty**, 7 M.L.T. 292=5 Ind. Cas. 729=20 M.L.J. 387.

WALLIS, J.

References:—(a) 5 I.A. 178, F.; (b) 9 M. 253; 17 M. 467, not F.; 28 A. 117, Appr.; 7 A. and E. 491, R.

(2) Incompetency of Division Bench to reopen questions decided by a single Bench in the order of reference to a Division Bench. See **CIV. PRO. CODE (1892)**, No. 153, 150 P.W.R. 1909.

(3) Power of, to amend decree after leave granted to appeal to Privy Council—Practice of Calcutta High Court. See **DECREE**, No. 1, 11 C.L.J. 155.

(4) High Court—Power to issue Mandamus—Marriage of a ward under Court of Wards—Postponement of—Power to remove ward from Court of Wards. See **ACT I OF 1902 (MADRAS COURT OF WARDS)**, No. 1, 7 M.L.T. 73.

(5)—if may grant *interim* protection and appoint receiver pending appeal. See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 1, 14 C.W.N. 586.

(6) Power of, to consider questions of fact. See **REMAND**, No. 2, 13 O.C. 352.

(7)—if can review the order of Collector. See **ACT I OF 1894 (LAND ACQUISITION)**, No. 6, 12 C.L.J. 505.

(8) Effect of O. 34, C.P.C., 1908, on practice of. See **MORTGAGE (GENERAL)**, Nos. 57 and 58, 37 C. 907.

High Court (Bombay).

Resident's Court at Aden—Revisionary powers of Bombay High Court. See **ACT II OF 1864 (ADEN)**, No. 1, 12 Bom. L.R. 149.

High Court (Calcutta).

Constitution of Bench — Practice — Division Court if empowered to hear references under S. 14, Legal Practitioners Act. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 7, 14 C.W.N. 275.

High Court Rules (Calcutta).

(1) Rule 340, whether overrides S. 87, Probate and Administration Act. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 11, 37 C. 224.

(2) High Court, original side—Revisional jurisdiction over Presy. S. C. Court—Practice—Appellate side Rules, Rule IV (a). See SANCTION TO PROSECUTE, No. 2, 14 C.W.N. 806.

(3) General Rules and Circular Orders (Civil), Chap. VI, Rules 36 (b), 37 (b). See COSTS, No. 3, 11 C.L.J. 217.

High Court Rules (Madras).

(1) High Court (Madras) Original Side Rules, r. 470—Application by sureties to vacate administration bond—Legality. See ACT X OF 1865 (SUCCESSION), No. 12, 7 M.L.T. 160.

(2) Madras High Court Rules (in original side), 1902, R. 47—Counter claims—Whether could be set up against each plaintiff—Court's discretion. See PARTNERSHIP, No. 4, 9 M.L.T. 73.

Highway.

(1) *Highway — Public user — Dedication — Unrestricted dedication, presumption as to — Burden of proof — Rival religious sects — Marching in procession with music on a highway — Hindu temple — Dedication by trustees, presumption of.*

Dedication must be presumed from the user by the public of a thoroughfare as a highway, whoever was the owner of the soil at the time of dedication (a).

The rule of English Common Law that dedication of a highway arises by the fact of the private ownership of the soil does not apply to India.

Where a Hindu temple stood on such highway, there is no presumption that the dedication was by the trustees of the temple any more than that the common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public.

Where there has been a general user by the public, a dedication without reservation would be presumed, if that was possible, and the burden of proving the reservation will lie on the party contending for it (b).

Highway—(Concluded).

Though the proper use of a highway is for passing and re-passing, and user for any other purpose may amount to a trespass, marching in procession with music is not an excessive use of a highway (c).

Though property vested in trustees cannot be presumed to have been dedicated as a highway, where such dedication would be contrary to the purposes of the trust, a procession with music by Mahomedan inhabitants will not, in the absence of evidence, contravene the purposes of the trusts of a Hindu temple, even assuming that the dedication was by the trustees of the temple (d). **Vibudapriya v. Esoof Sahib**, 8 Ind. Cas. 175.

WALLIS and KRISHNASAWMI AIYAR, JJ.

References:—(a) 75 R.R. 653; 11 Q.B. 877; 17 L.J.Q.B. 177; 12 Jur. 322; 6 App. Cas. 636; 50 L.J.P.C. 55; 45 L.T. 50, R. (b) 9 R. 770; 1 Taunt 279; 63 R.R. 782; 11 M. and W. 827; 7 B. & C. 257; 5 L.J. (O.S.) K.B. 285; 31 R.R. 186; 99 R.R. 792; 4 E. & B. 860; 3 C.L.R. 686; 24 L.J.M.C. 113; 1 Jur. (N.S.) 691; 1 Dear C.C. 502; 3 W.R. 372; 25 L.T. (O.S.) 65; (1893) 1 Q.B. 142; 62 L.J. Q.B. 117; 4 R. 155; 68 L.T. 35; 41 W.R. 332; 57 J.P. 278; (1900) 1 Q.B. 755; 69 L.J. Q.B. 511; 82 L.T. 321; 48 W.R. 385, R. (c) 30 M. 185; 4 A.L.J. 333; 11 C.W.N. 585; 5 C.L.J. 566; 17 M.L.J. 240; 9 Bom. L.R. 663; 2 M.L.T. 204, R.; 26 M. 376; 32 M. 478; 6 Ind. Cas. 716; 32 M. 527; 6 M.L.T. 285; 19 M.L.J. 467; 4 Ind. Cas. 870, R. (d) 39 R.R. 521 at p. 529; 5 Bar and Ad. 469; 2 N. and M. 583; (1902) 1 Ch. 557; 71 L.J. Ch. 378; 99 L.T. 738; 50 W.R. 549; 66 J.P. 404, R.

Hindu Law.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—CEREMONIES.
- 5.—DEBTS.
- 6.—GIFT.
- 7.—GUARDIANSHIP.
- 8.—IMPARTIBLE ESTATES.
- 9.—INHERITANCE.
- 10.—JOINT FAMILY.
- 11.—MAINTENANCE.
- 12.—MARRIAGE.
- 13 & 14.—PARTITION.
- 15.—RELIGIOUS ENDOWMENTS.

Hindu Law—(Continued).

- 16.—RESIDENCE.
- 17.—RE-UNION.
- 18.—REVERSIONER.
- 19.—SELF-ACQUISITION.
- 20.—STRIDHAN.
- 21.—SUCCESSION.
- 22.—WIDOW.
- 23.—WILL.

—1.—General.

- (1) *Liability of grandson to contribute towards grandmother's funeral ceremonies.*

A grandson, under Hindu Law, is not liable to contribute equally with his father, for the funeral expenses of the latter's mother. **Ranga Sastrigal v. Samanna Sastri**, 5 Ind. Cas. 55 = 7 M.L.J. 263.

BENSON and ABDUR RAHIM, JJ.

References: —32 C. 26; 9 Bom. L.R. 1187, R.

- (2) *Question of adoption of father decided against him—Decree how far binding on sons.*

If, on the facts of a particular case, the father was held to have represented his sons in the previous proceedings, the latter will be bound by the judgement against their father.

Held that, in this case, where the question of the father's adoption was in dispute in the previous suit, and the father fought the matter out, he must be held to have represented the sons. **Basana Raju v. Bhoga Raju**, 8 M.L.T. 355.

References: —17 M.L.J. 180; 22 M. 461, P.; 10 A. 411; 29 A. 1, not P.

- (3) Law applicable to self-acquisitions of Nambudris. See MALABAR LAW, No. 7, 6 Ind. Cas. 583.

—2.—Adoption.

- (1) *Adoption—Daughter's son—Family custom—Estoppel—One reversioner does not claim through another—Misjoinder—Code of Civil Procedure (Act XIV of 1882), S. 575—Question dependent on evidence, raised after the evidence, not entertainable.*

The general rule of Hindu Law is, that a daughter's son cannot be adopted, but it may be varied by family custom.

A question, the solution of which is dependent upon evidence, cannot be entertained at a stage when the evidence was closed and nothing but the argument remained.

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

A document, which is a deed of transfer, by certain ladies in possession, as Hindu widows, of the estate of the last male owner, and which purports to bind the ladies alone, although assented to by the plaintiff's father, creates no estoppel against the plaintiffs, as the latter claim title through the last male owner and not through their father.

S. 578 of the Civil Procedure Code, has the effect of preventing the misjoinder of causes of action from being made a ground of appeal and being dealt with on appeal. **Rub Narain v. Musammat Gopal Devi**, 6 A.L.J. 567 (P.C.) = 10 C.L.J. 58 = 13 C.W.N. 920 = 5 M.L.T. 423 11 Bom. L.R. 833 = 36 C. 780 = 3 Ind. Cas. 392 = 93 P.R. 1909 = 19 M.L.J. 548.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (2) *Adoption by widow of a deceased co-parcener with the consent of her husband's brother's widow in whom the estate had rested on her husband's decease—Adoption defeating an estate already vested, principle deducible from the analogy of.*

A and B were undivided co-parceners. A having predeceased B, the family properties vested in B by survivorship, and on B's death descended to his widow. After B's death, A's widow adopted the second defendant as a son. The lower Court found that the adoption was made with the implied consent of, and without opposition from B's widow.

Held (Miller, J., doubting) that the consent of B's widow, even if given, could not validate the adoption, as the estate had already vested in her. **Adivi Suryaprakasa Row v. Nidamarty Gangaraju**, 4 Ind. Cas. 386 = 7 M.L.T. 236.

WALLIS and MILLER, JJ.

References: —10 M.J.A. 279; 3 W.R. 15 (P.C.); 1 M. 174; 4 I.A. 1; 26 W.R. 21; 8 C. 302; 8 I.A. 229; 10 M. 205; 17 C. 518; 26 B. 526; 33 C. 1306; 4 C.L.J. 357; 11 C.W.N. 12; 28 B. 461; 8 M.H.C. Rep. 108; 1 M. 69; 25 W.R. 291; 3 I.A. 154; 14 B. 463; 22 B. 551; 23 B. 327, R.

- (3) *Widow—Re-marriage—Step-mother—Adoption.*

B, a Hindu, died leaving behind him a widow and a step-mother. The former by re-marriage

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

lost all rights to B's property. The step-mother adopted a boy. *Held*, that the boy so adopted acquired no right to B's property, such adoption being invalid. **Puttaka v. Lokanna**, 15 M.C.C.R. 83.

STANLEY ISMAY, C.J. and KRISHNA RAO, J.

(4) *Sudras—Adoption—Marriage, whether a bar to—Dattaka Chandrika, authority of.*

Amongst the Sudras, marriage is a bar to adoption. Among them a boy can only be adopted up till marriage, but not afterwards (a).

The *Dattaka Chandrika* has been accepted as an authority by High Courts in India and is a work of high authority. **Damodarji v. The Collector of Banda**, 7 A.L.J. 927=7 Ind. Cas. 418.

STANLEY, C.J., and KARAMAT HUSAIN, J.

Reference:—(a) 9 A. 253, R.

(5) *Dispute as to adoption—Compromise by minor's natural guardian—Validity of the compromise.*

Where a dispute arises as to the factum or validity of the adoption of a minor, the minor's natural father or, in his absence, those who would, according to Hindu Law, be the minor's natural guardians, are entitled to protect his interests against rival claimants, and to enter into a compromise, provided that be for the minor's benefit (a).

Whether such a compromise is in any particular case beneficial to the minor or not is, generally speaking, a question of fact; but that question must be determined with due regard to certain principles of law. It is not enough that there was a dispute, but it is essential that the rights of the respective parties were fair subject of doubt, and that, to avoid the expense and delay of legal inquiry, the parties entered into an amicable settlement. It is also necessary that each of the parties, before entering into the compromise, put forward an honest claim, that is, a claim, which however ill-founded, each party honestly believed he was warranted in making, and which they intended to pursue and would have pursued but for the compromise. Further, the parties should have been on equal terms as to information or means of information, and that there was no bad faith on the part of any. Where a compromise is entered into under these circumstances, the law will up-hold it, even

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

though there may be in the terms of it inequality of benefit (b). **Lingappa Ningappa Shiwalli v. Sangawa Gandapagowda**, 12 Bom. L. R. 370=6 Ind. Cas. 523.

CHANDAVARKAR and KNIGHT, JJ.

References:—(a) 9 Bom. 365, F. (b) 2 M.J. A. 181; 32 Ch. D. 267, F.

(6) *Adoption—Mother's sister's son—Father's brother's son.*

Under Hindu Law, a man cannot adopt his mother's sister's son, although he may also happen to be his father's brother's son. **Wal-bai v. Heerbai**, 11 Bom. L.R. 1172 34 B. 491.

MACLEOD, J.

(7) *Adoption—Daughter's son—Family custom—Estoppel—One reversioner does not claim through another—Misjoinder—Code of Civil Procedure (Act XIV of 1882), S. 578—Question dependent on evidence, raised after the evidence, not entertainable.*

The general rule of Hindu Law is that a daughter's son cannot be adopted, but it may be varied by family custom.

A question, the solution of which is dependent upon evidence, cannot be entertained at a stage when the evidence was closed and nothing but the argument remained.

A document, which is a deed of transfer, by certain ladies in possession, as Hindu widows, of the estate of the last male owner, and which purports to bind the ladies alone, although assented to by the plaintiff's father, creates no estoppel against the plaintiffs, as the latter claim title through the last male owner and not through their father.

S. 578 of the Civil Procedure Code has the effect of preventing the misjoinder of causes of action from being made a ground of appeal and being dealt with on appeal. **Rup Narain v. Musammat Gopal Devi**, 6 A.L.J. 567 (P.C.) = 10 C.L.J. 58=13 C.W.N. 920 = 5 M.L.T. 423=11 Bom. L. R. 833=36 C. 780=3 Ind. Cas. 382=93 P.R. 1909=68 P.L.R. 1910.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(8) *Payment of money to adoptive mother to induce her to adopt—Bribe—Adopted son making a gift of his property in adoptive*

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

family to his natural brother—The son having sons—Gift void—Father's power to gift property—Sale—Father's power to sell property—Gift—Revocation—Spes Successions.

B agreed with C to adopt N, a son of C, but B refused to carry out the agreement unless she was paid a sum of money. C borrowed Rs. 8,000 and paid that sum to B as an inducement to her to adopt his son N. The adoption then took place; and C, being poor, obtained from B some lands at Chinchwad yielding an annual income of Rs. 188 for parting with his son. In consideration of payment of Rs. 8,000 to B and in exchange for the lands at Chinchwad, and having regard to the benefit he had derived from the act of his natural father in giving him in adoption into a well-to-do family, N conveyed by way of gift certain lands, to S, his natural brother. At the date of the gift N had only one son (plaintiff No. 1); and three more sons (plaintiffs Nos. 2—4) were born after that date. After N's death the plaintiffs sued to recover possession of the lands from S, on the ground that they were part of the joint ancestral property of N and themselves, of which it was not competent to N to make a gift:

Held, (1) as to Rs. 8,000 that its payment to B, having been a bribe, was illegal in its inception; that even if it was regarded as a debt contracted by C, it could not bind his sons, because it was contracted for an illegal purpose; and that, as N by his adoption had ceased to be C's son at the time of the gift to S, he was under no pious obligation to satisfy C's debts.

(2) As to exchange of lands, that the transaction could only amount to a sale; and that it was not competent to N to effect it, for there was no antecedent debt, and, if there was an antecedent debt of C to discharge, N was not liable to pay it as by his adoption he had ceased to be C's son.

(3) As to consideration of love and affection, that it was not competent to N to make a gift of ancestral property in which his sons had taken by their birth a vested interest.

(4) That, therefore, the gift by N was void and inoperative.

Where, on Hindu's death, the adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive, and with an eye solely to the fitness of

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself. If she is so induced, the money paid to her is a bribe which is condemned by all Smriti writers as an illegal payment.

A Hindu father is not competent to make a gift of property which is immoveable, which is joint ancestral estate, and in which sons have taken a vested interest by their birth.

The texts of Hindu Law show that a gift once made cannot be resumed, if it is to a benefactor or to a father. These texts apply as between the donor and the donee and relate to property which it was competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are regulated by special texts dealing with that estate; and such of these special texts as relate to gifts form exceptions to the general texts on the subject.

A Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an antecedent debt, which had been contracted for a purpose, neither illegal nor immoral.

An agreement by a expectant heir to make a gift of property which he hopes to get after his adoption, is invalid and inoperative according to Hindu Law. *Shri Sitaram Pandit v. Shri Harihar Pandit*, 12 Bom. L.R. 910.

CHANDAVARKAR and HEATON, JJ.

References:—L.R. 25 I.A. 183 (189), 8 Bom. L.R. 252, followed. "

(8-a) Evidence—Medical certificate—Proof—Adoption of son after death of natural father and succession to inheritance—Whether son loses inheritance—Determination of case according to allegation and proof.

A certificate of a Civil Surgeon, which was not deposed to by that officer, should not be admitted in evidence (a).

The determination in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made (b).

Where a son has been adopted after the death of his natural father, and has succeeded to the inheritance, he does not, by subsequent

Hindu Law—(Continued).**—2.—Adoption—(Concluded).**

adoption into another family, lose the inheritance so as to relegate it to the widow or other heirs of his natural father (c). **Rampoor Rai v. Bhogia**, 8, Ind. Cas. 718.

CASPERSZ, J.

References :—(a) 9 W.R. Cr. 23, F. (b) 11 M. I.A. 7; 2 Ind. Jur. (N.S.) 87; 6 W.R. (P.C.) 57, Rel. (c) 1 C.L.J. 388, R.

(9) Burden of proof. See **ADOPTION**, No. 1, 7 M.L.T. 57 (P.C.).

(10) Application of Hindu Law to Jains—Effect of custom. See **JAINS**, No. 1, 14 C.W.N. 545.

(11) "Power to adopt son," meaning of—Whether adoption of second boy after death of first valid—Adoption of orphan—Validity. See **LIMITATION ACT** (1877), No. 71, 7 Ind. Cas. 427.

(12) Status of adopted son. See **ACT II OF 1901 (AGRA TENANCY)**, No. 6-a, 8 Ind. Cas. 228.

—3.—Alienation.

(1) *Manager, powers of—Alienation by manager not for family necessity—Ratification by other members—Effect—Power of alienation of manager and widow compared.*

The manager of a joint Hindu family mortgaged family properties, for no justifiable family necessity, but the transaction was ratified by the other members. *Held* that the manager of a joint Hindu family is not the agent of the family in the strict sense of the term (a). No ratification is possible where the agent does not purport to act, though without authority, on behalf of a principal (b). So the alienation, if rested on the footing of a contractual agency, is invalid.

Held also that any alienation by the manager with assent of the other members will give a good title to the alienee, even though the alienation is not for any family necessity. Such assent is not that of a principal to the acts of an agent, but it is the supplying, by the consent of the co-parceners, the want of capacity on the part of the manager to alienate family property. An assent by some alone, though evidence of the propriety of an alienation, will not, in the face of positive proof of its impropriety, suffice to pass their interest, for such assent does not amount to a transfer.

Held further that, whereas an alienation by the widow is only voidable and not void (c), it

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

has invariably been accepted as a sound canon of Hindu Law, that, where the alienation by the manager is not for any justifiable necessity, it is void as regards the shares of the other members of the family, and, where such necessity exists, it is valid in its entirety (d).

Held also that if a manager's alienation is void because it is not for justifiable necessity, the assent of the remaining members of the co-parcenary must be given at the time of the alienation. A subsequent assent of all the remaining members does not validate the alienation, apart from any question of estoppel (e). **Kandasami Asari v. Somaskanta Ela Nidhi**, 7 M.L.T. 165 = 20 M.L.J. 371 = 5 Ind. Cas. 922.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) 26 M. 544, R. (b) 1901 A. C. 240. (c) 25 C. 1; 34 C. 329, R. (d) 14 M. 26 (28); 24 C. 77 (82); 3 Bom. L.R. 682, R. (e) 15 M.L.J. 492; 30 A. 1, R.

(2) *Widow's power—Gift—Spiritual benefit of her own soul—Legal necessity—Transfer of small portion of her husband's estate—Daughter—Next reversioner—Right to sue to set aside an alienation.*

A daughter, according to Hindu Law, is the next reversioner (a). As such she is entitled to sue to set aside a gift made by her mother of her father's property (b).

A widow cannot alienate, by way of gift, even an insignificant portion of her husband's property of the benefit of her own soul (c). **Pandit Umadat v. Musammat Bhagwan Dei**, 5 Ind. Cas. 283.

KARAMAT HUSAIN, J.

References :—(a) 15 A. 132, F. (b) 6 C. 764, F. (c) 4 A. 482, F.

(3) *Mother's power to alienate minor son's ancestral estate.*

A mother has no right to mortgage her minor son's ancestral property without a lawful necessity. **Mathura Pershad v. Mussammat Mahtabi**, 5 Ind. Cas. 287.

KNOX and PIGGOTT, JJ.

(4) *Mitakshara—Joint family—Partition—Representation by member that he has power to charge joint family property—Right of purchaser.*

A member of a joint *Mitakshara* family, who had represented to his purchasers that he had

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

power to charge joint family property, which he knew he did not possess, is bound to make good his representation, as far as he could, by the exercise of such proprietary right over the property as he individually possessed, namely, by a partition of the property by an ascertainment of the shares in which it was thereafter to be held, and the property should be held by the joint family in defined shares, and the shares of the alienating members should be held subject to a lien for the purchaser's claim. **Mount Ram Sundar Dass v. Barham Deo Narain Thakur**, 2 Ind. Cas. 986=14 C.W.N. 552.

STEPHEN and VINCENT, JJ.

References:—20 W.R. 192=12 B.J.R. 90; 1 Ind. Cas. 670=13 C.W.N. 815; F.; 18 C. 157 (P.C.)=17 I.A. 194; 19 C. 401, *R.*

- (5) *Sale by a widow to satisfy her husband's debt barred by limitation, whether valid—Nature of the debt.*

A debt which is barred by limitation may be a debt which the debtor's widow might properly satisfy by the alienation of her husband's estate (a).

So if a sale by a widow is in *bona fide* satisfaction of a debt due by her husband and is otherwise such that, had the debt not been barred, it can be upheld under the Hindu Law as a sale for proper purposes, the mere fact that the debt is irrecoverable in consequence of the law of limitation will not of itself make the sale voidable by the reversioners. **Kandasami Mannavan v. Rajagopalasami Thevan**, 7 M.L.T. 363=5 Ind. Cas. 382.

BENSON and MILLER, JJ.

Reference:—13 M. 189, *R.*

- (6) *Minor—Guardian, power of, to revive a barred debt—Burden of proof.*

The guardian of a minor has no authority to bind the minor's estate by seeking to revive his father's debts barred at the time.

Where a mortgage was executed by a mother on behalf of her minor sons, the mortgagee is bound to show that it was executed for purposes binding on the minors. **Yeerappa Nalek v. Muthusami Nalek**, 7 M.L.T. 383.

BENSON and KRISHNASWAMI IYER, JJ.

References:—5 M. 169; 19 M. 255; 17 M. 221; 26 M. 390, *F.*

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

- (7) *Transfer of Property Act (IV of 1882). S. 43—Transfer by mother during minority of the son—Son died and mother succeeded—Reversioner—Suit for declaration—Cause of action.*

A Hindu mother executed a deed of transfer during the minority of her son. The son died, and the mother succeeded to the property. The reversioner then brought the suit for a declaration that the transfer was not binding on him: *Held*, that the suit was maintainable. The transfer became operative from the time the mother became entitled to the property after the death of her son, and the cause of action in favour of the reversioner arose at that time. **Baru Gir v. Mahant Tulshi Das**, 6 Ind. Cas. 37.

GRIFFIN and TUDBALL, JJ.

- (8) *Joint family property—Alienation—Manager's power—Payment of antecedent debt and Government Revenue—Suit by minor to set aside alienation—Purchaser bound to prove the character and nature of the antecedent debts also that the property was insufficient to pay Government Revenue—Legal necessity—Benefit to minor—Evidence—Burden.*

The Manager of a joint Hindu family executed, on his own behalf and on behalf of his minor nephews, a sale-deed in respect of the joint property, to pay off some antecedent debts and also some Government Revenue. The purchaser happened to be the wife of the mortgagee, whose mortgage-debt the sale-deed purported to pay.

The minors brought the suit to set aside the sale:

Held, that the purchaser was, under the circumstances, bound to prove that the mortgages, for the payment of which the sale-deed was executed, were of a character binding upon the minors (a).

Held, further, that, in order to make the minor liable for the Government Revenue, the purchaser must show that in fact the property was insufficient to meet the Government demand. **Musammat Dhanyanta v. Banarsi Lal**, 6 Ind. Cas. 191.

KNOX and KARAMAT HUSAIN, JJ.

Reference:—6 M.I.A. 393, *R.*

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

(9) *Daughter succeeding to father's estate—Performance of father's shrad—Gift on occasion of shrad ceremony—Validity of gift—Whether can be impeached by reversioners.*

According to Hindu ceremonial law, it is competent to the daughter to minister to the spiritual needs of her father, in all those ways in which the widow is competent to serve the spiritual needs of her husband.

A gift by a Hindu daughter, succeeding to the estate of her deceased father, of some of those properties, on the occasion of her father's shrad ceremony in a holy place, is valid, and cannot be impeached by the reversioners, provided the property sold or gifted bears a small proportion to the estate inherited. **Yappuluri Tatayya v. Garinalla Ramakrishnamma**, 6 Ind. Cas. 240.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—8 M. 552; 11 M. 288; 4 A. 482; 22 C. 506; 7 W.R. 146; 10 W.R. 309; 8 M.L.A. 529 (551), R.

(10) *Family arrangement—Binding character of—Ancestral property—Joint family—Vested interest of a son by his birth—Release by the father—Sons bound by the release.*

In the case of a family arrangement, where there is sufficient motive for it, the Court will not consider the question of consideration, and disturb the transaction on the ground of the inequality of the benefit, unless there was fraud or some other ground, which in law vitiates it.

Under Hindu law, a son takes a vested interest by birth in the ancestral estate; but it does not follow that he is absolutely independent of his father, where the two are joint and where the son is a minor. The father has the right in certain cases and under certain conditions to alienate the estate and bind his son by the alienation; in a partition among the members of the joint family, of which the father and the son are co-parceners, the father represents both himself and his son; and in all transactions the father has power to act on behalf of the son as well as his own, especially where the son is a minor.

In family arrangements, the father represents and has power to bind his minor sons, in the absence of fraud or other circumstances sufficient in law to vitiate the transaction. In such

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

a case, what has to be looked to is, whether, having regard to the circumstances surrounding the transaction and its object, the father acted so as to bind both himself and his minor sons. **Ramadas Chablidas v. Chablidas Lalloo Bhoj**, 12 Bom.L.R. 621.—7 Ind. Cas. 134.

CHANDAVARKAR and MACLEOD, JJ.

(11) *Nitakshara—Alienation—Legal necessity—Second marriage of a co-parcener whose first wife is dead—Marriage expenses,—whether a family necessity.*

The first marriage of a co-parcener in a joint Hindu family is a legal necessity (a).

The second marriage of a co-parcener, also, is a family necessity, for which the joint family property can be mortgaged by the manager of the family, if the co-parcener's first wife is dead and he is still of marriageable age. The expense of such marriage is a legal necessity even if the marriage is in Asura form and a price has to be paid for the bride. **Bhagirathi v. Jakhu Ram Upadhis**, 6 Ind. Cas. 465.

RICHARDS and TUDHALL, JJ.

References:—(a) 32 B. 81; 9 Bom. L.R. 1366; 3 M.L.T. 44, F.; 27 M. 206; 14 M.L.J. 179, not appr.

(12) *Alienation—Custom or Hindu law—Sale of ancestral house—Bunjahi Khatri, Dhobis by occupation of Nara in Teshil Khuta of Rawalpindi district—Objection by reversioner—Burden of proof.*

Found, that, Bunjahi Khatri being Dhobis by occupation, of the village Nara in Teshil Kahuta of the Rawalpindi district, are governed by Hindu law, and have not adopted the rules of agricultural custom in matters of alienation of ancestral property. Consequently the reversioners of a vendor cannot object to the sale of ancestral house to a stranger on the ground of there being necessity.

Held, that, where parties *prima facie* belong to a non-agricultural tribe, it has to be proved affirmatively, by those who assert, that they are governed by rules of agricultural custom instead of their personal law (a). **Dhera Singh v. Tara Singh**, 85 P.W.R. 1910=7 Ind. Cas. 527.

SHAH DIN and CHEVIS, JJ.

References:—(a) C. 12 P. R. 1906; C. 102 P. R.=78 P.W.R. 1907; C. 115 P.R.=207 P.W.R. 1907; C. 55 P. R.=105 P.W.R. 1908 and C. 69 P.R.=125 P.W.R. 1908.

Hindu Law—(Continued).**--- 3.—Alienation—(Concluded).**

- (13) *Joint family—Alienation—Member born after alienation—Right to question alienation.*

A member of a joint Hindu family, born after an alienation of the family property, cannot question the alienation. **Chuttan Lal v. Kallu**, 8 Ind. Cas. 719.

STANLEY C.J., and BANERJI, J.

References:—A.W.N. (1906) 26; 3 A.L.J. 38 F.; 11 W.R. 480; 13 C.W.N. 815; 1 Ind. Cas. 670, F.

(14) *Alienation by widow—One suit to have several alienations declared invalid—Misjoinder—Appeal.* See **HINDU LAW (WIDOW)**, No. 8, 6 Ind. Cas. 248.

(15) *Alienation by father—Antecedent debt—Liability of sons.* See **MORTGAGE (GENERAL)**, No. 26, 6 Ind. Cas. 331.

(16) *Widow's power of alienation over self-acquired property.* See **HINDU LAW (WIDOW)**, No. 10, 7 Ind. Cas. 27.

(17) *Father's powers of alienation.* See **HINDU LAW (ADOPTION)** No. 8, 12, Bom. L.R. 910.

(18) *Alienation for paying off debt contracted for marriage of junior member—Meaning of "family necessity."* See **HINDU LAW (MARRIAGE)**, No. 4, 20 M.L.J. 855.

(19) *Mortgage by Hindu lady—Suit against reversioners and their transferee—Decree by first Court—Appeal by transferee—Dismissal of whole suit, whether legal.* See **CIV. PRO. CODE (1908)**, No. 149, 5 Ind. Cas. 388.

—4.—Ceremonies.

Shradh — Agradani — Brahmin — Gift—Offerings to the dead.

A Brahmin of the Agradani class, who is invited to the shradh ceremony and acts there, does not thereby acquire a vested interest in the offerings. If, therefore, the performer of the shradh gives away the articles to other Agradani Brahmins, he has no cause of action against the latter, though he may be entitled to remuneration from the person who employed him. **Harī Charan Agradani v. Sastī Charan Agradani**, 11 C.L.J. 275 = 6 Ind. Cas. 175.

MOOKERJEE and TEUNON, JJ.

—5.—Debts.

- (1) *Hindu Law—Widow's right of residence—Execution of decree for family debt—No right of widow to claim residence in family*

Hindu Law—(Continued).**—5.—Debts—(Continued).**

house—Necessity to find nature of debt—Jurisdiction—Decree holder's right to reduce decretal amount in his suit under S. 283, Civ. Pro. Code—Effect of bona fide obtaining decree against prima facie legal representative of a deceased debtor.

Held, that, a decree obtained against a debtor or his legal representative for an ordinary debt incurred in family affairs takes precedence of the debtor's widow's right of residence in the family house left by the debtor (her husband).

Held, also, that, where property attached in execution of a decree is released on a person's objection under S. 278, Civ. Pro. Code, 1882, it is open to the decree-holder to reduce his claim under the decree to any extent he likes, in order to make his suit under S. 283 of the said Code cognizable by a Court of a certain grade; (provided the market value of the property in dispute does not exceed its pecuniary jurisdiction, in the case in which the judgment-debtor resists the objector's claim and sides with the decree-holder).

Held, further, that, where a creditor obtains a decree for the debt due against a person whom he believes to be the legal representative of his deceased debtor, the real representative of the deceased, who has taken no step to get the decree set aside within proper time, is, afterwards, incompetent to question its validity.

There is no need for a positive finding as to the nature of the debt, where no contrary allegation is made. **Mussammat Bhagwantī v. Messrs. Macdonald & Co.**, 152 P.W.R. 1909.

JOHNSTONE, J.

References:—36 P.W.R. (1907) = 118 P.W.R. 1907, F.

- (2) *Hindu Law—Hindu daughter's estate acquired by person not entitled, under compromise—Alienation for necessity—Debt incurred in litigation to preserve estate—Liability of successor to pay debt incurred by predecessor to preserve estate.*

The title to the property of a deceased owner was contested between his grandson and two daughters of a predeceased son. A compromise was ultimately effected, under which the latter got certain shares. *Held*, that, in the circumstances of the case, it must be held that, under the compromise, the daughters were intended to take each a Hindu "daughter's estate" in the share allotted to her.

Hindu Law—(Continued).**—5.—Debts—(Continued).**

Held, further, that the transfer of a portion of the property by one of the daughters was for legal necessity.

The preservation of the estate and the costs of litigation for that purpose are objects, which justify a widow in incurring a debt and in alienating a sufficient amount of the property to discharge it.

The general principle of Hindu Law, that he who takes the estate becomes liable for the debts of the estate, is specially applicable in a case where, but for the debt, the estate would have been lost to him. **Munshi Carim-uddin v. Kunwar Gobind Krishna Narain**, 13 C.W. N. 1117 (P.C.) = 11 Bom. L.R. 911 = 6 A.L.J. 807 = 6 M.L.T. 275 = 10 C.L.J. 243 = 31 A. 497 = 19 M.L.J. 687.

LORD MACNAGHTEN, LORD ATKINSON,
LORD COLLINS and SIR ANDREW
SCOBLE.

- (3) *Contract Act, S. 218—Debts due by father as an agent—Son's liability to pay the debt, when arises—Its nature—Misappropriation by father—Debt, whether illegal.*

If any debt is due by an agent, under the Hindu Law, his son also is liable to pay the debt, and the son's liability arises at the same time as the father's. The fact that the father subsequently misappropriated the sum or even made himself criminally liable does not alter son's liability. **Tirumalayappa Moodeliar v. Veerabudra**, 19 M.L.J. 759 = 4 Ind. Cas. 1090.

BENSON, O.C.J.* and KRISHNASWAMI
AYER, J.

References:—31 M. 161 and 31 M. 472, *Appl.*

- (4) *Suit in forma pauperis by father as next friend—Dismissal—Order to pay costs under S. 440, C.P.C. (1882)—Nature of the liability—Son's liability to pay such debts—Nature of the debt—Immorality—Fine.*

Where a Hindu father brought a suit in *forma pauperis* as a next friend, and, when the suit was dismissed, he was ordered to pay the costs due to Government, under S. 440, C.P.C., 1882, *held*, the liability to pay the costs was clearly imposed as a penalty for his misconduct, that the debt thus incurred by the father is tainted with immorality and is in the nature of a fine, and that the sons are not therefore

Hindu Law—(Continued).**—5.—Debts—(Continued).**

bound to pay it. **Ramiengar v. Secretary of State for India in Council: Yedantachariar v. Secretary of State for India in Council**, 6 M.L.T. 308 = 20 M.L.J. 89.

MUNRO and ABDUR RAHIM, JJ.

- (5) *Joint debt of father and son—Promissory notes—Executed by minor son—Liability of father.*

Money was borrowed by a father and son, the latter being a minor. The son executed promissory notes. The creditor instituted a suit against both the father and the son, and attached the promissory notes with the plaint.

Held that, as the suit was not brought upon the notes alone, the plaintiff was entitled to a decree on the debt, there being a finding that money was borrowed. It is well settled that a creditor, who has got a security for an advance of money made by him, may, as a rule, sue for the original consideration, provided that he has not endorsed, or lost, or parted with the original security under such circumstances as to make the debtor liable to some third person. **Sri Nath Das v. Angad Singh**, 7 A.L.J. 459 = 6 Ind. Cas. 126.

STANLEY, C.J. and GRIFFIN, J.

References:—7 C. 256, and 28 A. 298, *F.*

- (6) *Mitakshara—Father's debts—Son's obligation to pay costs awarded against father in litigation—"Danda"—No vyavaharika.*

Certain persons, who had applied for a succession certificate in respect of debts due to a deceased relative, were successfully resisted in these proceedings by one L. They then sued L for a declaration of their right of heirship, and the suit was decreed with costs against L. L, who was living with his son and grandson as members of a joint *Mitakshara* family, having died, the decree-holders sought to recover the amount of the decree from L's son and grandson:

Held, on a review of the authorities, that L's son and grandson were bound to satisfy this decree.

Per Chatterjee, J.—Costs awarded by Court against a defeated litigant is not "danda" within the meaning of the text of *Yajnavalkya* quoted in *Mitakshara*, Ch. VI, S. 3, verse 47. Nor are they covered by the description "not *vyavaharika*" in the text of *Ushanas* referred

Hindu Law—(Continued).**—5.—Debts—(Continued).**

to in 32 B. 348. **Paryag Sahu v. Kasi Sahu**, 14 C.W.N. 659 = 6 Ind. Cas. 258 = 11 C.L.J. 599.

CHATTERJEE and RICHARDSON, JJ.

Reference :—32 B. 348, R.

(7) *Money borrowed for marriage of a member and for maintenance of the family—Money lent after due enquiry, but some portion not properly applied—Right of creditor.*

The plaintiff advanced some money for the purpose of defendant's marriage and maintenance of the family, after making due enquiry. The sum lent for marriage was not in excess of defendant's status, but of the sum lent for maintenance, some portion was not applied therefor.

Held that the plaintiff was entitled to recover the whole sum lent, and the fact that the whole amount borrowed for maintenance was not applied towards it does not affect plaintiff's right to recover the full sum. **Raghunatha Mahanty v. Damodara Mahanty**, 7 M.L.T. 384 = 6 Ind. Cas. 720.

BENSON and KRISHNASWAMI IYER, JJ.

(8) *Mitakshara—Joint family property—Father's powers—Alienation—Antecedent debt—Evidence—Burden of proof—Declaratory suit—Sons bound to prove invalidity of alienation—Suit for possession—Sons bound to prove immorality.*

Where a Hindu father alienated the family property to pay off his private antecedent debts, and the sons sued for a declaration that the alienation was invalid : *Held*, that the onus lay on the sons to prove that the transfer was invalid.

In a suit to recover possession of the joint family property alienated by the father in consideration of an antecedent debt, it is for the sons to show that the debt was tainted with immorality. **Persottam Patak v. Sheo Shanker Kolapuri**, 7 Ind. Cas. 163.

RICHARDS and TUDHALL, JJ.

References :—1 I.A. 321 ; 14 B.L.R. 187 ; 22 W.R. 56 ; 6 I.A. 88 ; 5 C. 148 ; 4 C.L.R. 226 ; 13 C. 21 ; 13 I.A. 1, *relied upon*.

(9) *Son's liability for father's debts—Mortgage—Suit for sale—Sons not made parties—Property sold in execution of decree for sale—Transfer of Property Act (IV*

Hindu Law—(Continued).**—5.—Debts—(Continued).**

of 1882), S. 85—*Purchase by mortgagee decree-holder—Son's right to redeem.*

After a sale of joint family property has taken place in execution of a decree passed upon a mortgage executed by the father, his sons are not entitled to sue to recover their shares in the property, merely on the ground that they were not parties to the suit brought by the mortgagee, and they cannot sue to redeem the property or their interests in that property simply on that ground (a). The fact that the purchaser in execution of the decree was not a stranger, but the mortgagee himself, would make no difference in the rights of the sons (b). **Balwant Singh v. Aman Singh**, 7 A.L.J. 852 = 7 Ind. Cas. 112.

TUDHALL and CHAMIER, JJ.

References :—(a) 25 All. 214 (F.B.). (b) 30 All. 256, *not F.* ; 28 All. 182, *F.*

(10) *Joint family—Debt contracted for the marriage of a co-parcener, when binding on the other co-parceners.*

According to Hindu Law as applied to Sudras, a debt reasonably contracted for the marriage of a co-parcener in a joint family is binding on the other co-parceners as a debt contracted for a family purpose. **Chikka Muniappa v. Venkatasami**, 15 M.C.C.R. 159 (F.B.).

STANLEY ISMAY, C.J., KRISHNA RAO, and SETLUR, JJ.

(11) *Joint family—Father and son—Ancestral property—Hypothecation by father—Son's rights.*

Ancestral property belonging to a family consisting of a father and son was hypothecated by the father alone. In a suit to which the son was not a party, a decree was obtained against the father and the property was brought to sale. Being resisted in his attempt to obtain possession of the property, the auction purchaser brought a suit against the son.

Held that, in such a suit, it was open to the son to plead that, in the absence of proof that the debt was incurred for the sake of the family, his interests were not affected by the sale. **Kala v. Jayare Gouda**, 15 M.C.C.R. 233 (F.B.).

STANLEY ISMAY, C.J., KRISHNA RAO, and SETLUR, JJ.

(12) *Mitakshara Joint family—Debt—Legal necessity—Decree for pre-emption in favour*

Hindu Law—(Continued).**—5.—Debts—(Concluded).**

of Hindu father—Money borrowed to comply with the decree—Application of money.

A decree for pre-emption, providing that the pre-emptor shall acquire the property if he pays the amount mentioned therein, is a debt. Where a Hindu father borrows money for complying with a pre-emption decree, his son is liable to pay the debt.

A creditor who advances money to a Hindu father is not bound to see to the application of the money. **Nathu v. Kundan Lal**, 7 A.L.J. 1182.

RICHARDS and GRIFFIN, JJ.

(13) Decree against father alone—Partition prior to decree—Attachment of joint family property—Son's share released—Right of suit under S. 283, C.P.C.

The plaintiff obtained a decree for money against the father of defendants Nos. 1 and 2 and attached property in execution. On the claim of defendants Nos. 1 and 2, half the property was released from attachment. The present suit is under S. 283 of the old Code of Civil procedure. It was found that at the date of the former suit defendants Nos. 1 and 2 were divided from their father.

Held that, assuming that a judgment debt against the father arising after a valid partition could be a ground of action to enforce the son's liability, the suit not being for enforcement of the father's judgment debt against the sons also, it was not sustainable, as the property was not joint family property after partition. **Lakshmana Chettiar v. Govindarajulu Naidu**, 8 M.L.T. 349.

MILLER and KRISHNASWAMY IYER, JJ.

(14) Balance struck by one of the joint debtors when binding on the other. See **DEBTOR AND CREDITOR**, No. 1, 138 P.W.R. 1910.

(15) Decree against assets in hands of mortgagor's sons—Property coming by survivorship, if assets. See **TRANSFER OF PROPERTY ACT**, No. 67, 5 Ind. Cas. 146.

(16) Decree against father—Execution against son—Survivorship. See **EXECUTION OF DECREE**, No. 16, 6 Ind. Cas. 582.

—6.—Gift.

(1) Gift to daughters by way of marriage portion—Gift made by brother to sister who was not provided with marriage portion by father—Validity of.

Hindu Law—(Continued).**—6.—Gift—(Continued).**

A Hindu father is entitled to make gifts, by way of marriage portions to his daughters, out of the family property, to a reasonable extent.

Those passages in the *Mitakshara* (I, VII, 6—14) which were held in *Ramasawmy Ayyar v. Venguduswamy Ayyar* (22 M. 213) to authorise a qualified owner to make, out of the family property, customary marriage gifts of land, expressly direct brothers to provide for the marriage of their maiden sisters (a).

If a brother finds that his sister, though married in his father's life-time, has been, for any reason, left without a marriage portion, which she ought to have received, he will be within his powers, if he makes good the deficiency out of the family property. Such a gift once made, cannot, therefore, be recalled by him or avoided by his son. **Kudutamma v. Narasimha Charyulu**, 17 M.L.J. 528—5 M.L.T. 40.

WALLIS and MILLER, JJ.

Reference :—(a) 22 M. 113, R.

(2)—Gift from father to daughter—Construction—Intention of donor—Right of donee—Absolute or life-estate—Putra pou-tradi krame—Heirs of donee's husband excluded.

A gift from a Hindu father to his daughter ran thus :—"You do remain in possession of the land held by myself, down to your sons, sons' sons and so on in succession (*putra pou-tradi krame*); you shall not give up any land in favour of any body, and your sons and heirs in succession will have a right to own and possess the property, your husband and husband's heirs or any member of another family being excluded."

Held, that the intention of the donor must be ascertained from a consideration of the entire passage in the deed of gift, and that, in considering that passage, effect, must be given to what is known to be the usual intention of a Hindu in disposing of his property, which is to keep the property in the family so that it may pass to persons who may be able to confer spiritual benefit on the donor, that, in the present case, the intention of the donor was to create a life-estate in favour of the donee with the remainder over to her sons or sons' sons in succession, and that under the gift no heritable right passed to the daughter of the donee.

Hindu Law—(Continued).**—6.—Gift—(Concluded).**

Nanda Gopal Sinha Rai v. Sreemutty Parashmoni Debi, 6 Ind. Cas. 354.

BRETT and SHARFUDDIN, JJ.

References:—21 A. 7 (14); 22 W.R. 409; 14 B.L.R. 226; 8 I.A. 46 (61); 7 C. 304; 10 C.L.R. 349; 24 I.A. 76 (88); 24 C. 834, *It.*

(3) *Undivided family—Gift by one member without the consent of others—Validity.*

A member of an undivided family consisting of a father and three sons is not competent to make a gift without the consent of the other members of the family. **Visalakshi Ayl v. Mahalinga Alampiran**, 8 M.L.T. 200=7 Ind. Cas. 800.

BENSON and KRISHNASWAMI IYER, JJ.

(4) *Gift by father—Son's right to impeach.*

A gift, by the father, of land forming part of the ancestral estate of the family of which the father and son were members, can be impeached by the son. **Chinnaya Goundan v. The Collector of Salem for and on behalf of Subbraya Gounden**, 9 M.L.T. 290.

WHITE, C.J. and ABDUR RAHIM, J

Reference:—30 M. 452, *F.*

(5) *Nibandha—Registration.* See TRANSFER OF PROPERTY ACT, No. 37, 12 Bom. L.R. 9.

(6) *Gift by Hindu co-parcener—Suit for declaration and possession by other co-parcener—No prayer for setting aside the gift—Limitation.* See LIMITATION ACT (1877), No. 60, 7 A.L.J. 783.

—7.—Guardianship.

Right of adoptive father to guardianship of the person and property of the minor adoptee in preference to natural father. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 10, 5 L.B.R. 133.

—8.—(Impartible estates).

(1) *Impartible estate—Maintenance grant—Partition—Inheritance.*

The decision in (a) does not mean to go so far as to lay down the broad rule that, in no circumstances, whatever, can an impartible ancestral estate, which was originally the joint property of several members of a family, become the separate property of one member.

A separation in estate and from the joint family does not follow as a necessary consequence from the receipt of a maintenance grant by one of the members of a joint Hindu family.

Hindu Law—(Continued).**—8.—(Impartible estates)—(Continued).**

R and B were members of a Hindu family where the ancestral estate consisted of impartible property. B, the younger brother, was a man of licentious habits, and made himself a nuisance to his brother R, who in consequence executed a maintenance grant in favour of B, with the object of enabling the latter to support his own family and pursue his vicious habits, without applying for funds in each case, as occasion arose, to the head of the family.

B then lived in a separate house built by him on the family homestead land just outside the old family dwelling house, and he and his branch of the family were afterwards separate in food and in worship, and he paid the expenses of his family out of the profits of the property granted to him for maintenance, and by borrowing money on mortgages on that property. *Held*, that the facts were not sufficient to prove that there was a complete separation between B and R, by which B sacrificed his expectancy to succeed to the family property, on the failure of nearer male heirs of R. **Chaturbuj Narain Singh v. Tara Kumri**, 5 Ind. Cas. 193.

BRETT and SHARFUDDIN, JJ.

References:—(a) 36 C. 481; 13 C.W.N. 838; 2 Ind. Cas. 290, *R.*

(2) *Liability of estate for debts of previous holder—Madras Act (111 of 1904) (Court of Wards), Ss. 41, 55 (1) and (3).*

An impartible Zamindari is assets in the hands of the successor liable to be proceeded against in execution of decrees for money against the previous holder (a).

The provisions of S. 41, Court of Wards Act, are absolute, except in so far as they are cut down by S. 55 (3). That sub-section only applies when the estate is relinquished under S. 55 (1). **Kalappa Reddi v. Akkappa Nayanam**, 8 M.L.T. 297.

WALLIS and KRISHNASWAMI IYER, JJ.

References:—(a) 30 M. 454; 32 M. 429, *F.*

(3) *Will—Disposition of impartible Zamindari—Validity.*

An impartible Zamindari may be disposed of by the Will of the Zamindar, whether the heir-at-law is his son or his brother. **Muthusawmy Naick v. Bangarammal**, 8 Ind. Cas. 332.

MILLER and SANKARAN NAIR, JJ.

Reference:—18 M. 287, *R.*

Hindu Law—(Continued).**—8.—(Impartible estates)—(Concluded).**

(4) Whether succession certificate should be taken by successor in impartible estates.— See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 1-a, 7 Ind. Cas. 806.

—9.—Inheritance.**(1) Mitakshara—Inheritance—Step-mother—Father's sister's son.**

Under the *Mitakshara* Law in Bengal, a step-mother is not entitled to succeed to the estate of her step-son in preference to his father's sister's son. **Mussammat Tahaldai Kumri v. Gaya Prasad Sahu**, 5 Ind. Cas. 135 = 14 C.W.N. 443 = 37 C. 214.

BRETT and SHARFUDDIN, JJ.

References :—B.L.R. Sup. Vol. (F.B.) 67, relied on; 5 M. 29; 5 M. 32; 16 A. 221, F.; 4 B. 188; 5 B. 110; 7 C.L.R. 145; 7 I.A. 212; 19 B. 707 not F.; 12 M.I.A. at 136; 10 W.R. (P.C.) 17; 1 B.L.R. (P.C.) 1, R.

(2) Inheritance—Sagotra sapinda—Priority between paternal uncle's son and deceased brother's daughter—Mayukha.

Under the *Mayukha*, a paternal uncle's son of the deceased propositus succeeds in preference to deceased brother's daughter of the same. **Bai Manekbai v. Naranji Dwarkadas**, 12 Bom. L.R. 454 = 6 Ind. Cas. 398.

SCOTT, C.J., and BATCHELOR, J.

(3) Daughters—Property inherited from father—Stridhan—Estate taken by them—Separate and absolute interest—Survivorship.

In the Bombay Presidency, a daughter taking property from her father inherits it as *stridhan*. If more daughters than one inherit the property, they take their shares separately and absolutely.

Where the property so inherited is not physically divided, it is held by the daughters as tenants-in-common, not as joint tenants, and there is no survivorship between them. **Yithappa Kasha Hekde v. Savitri Ganap Bhatta**, 12 Bom. L.R. 487 = 7 Ind. Cas. 445 = 34 B. 510.

SCOTT, C.J., and BATCHELOR, J.

(4) Inheritance—Uncle of half-blood—Cousin of whole blood—Preference between.

An uncle of the half blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter. Where there is a difference in

Hindu Law—(Continued).**—9.—Inheritance—(Continued).**

the degree of relationship, the rule of whole blood and half blood does not apply. **Kesri v. Ganga Sahai**, 7 A.L.J. 560 (F.B.) = 6 Ind. Cas. 364.

KNOX, BANERJI, and RICHARDS, JJ.

Reference :—19 A. 215, D.

(5) —Kamatis—Mayukha and Mitakshara, applicability of—Anvadhya stridhan—Succession—Husband—Son born of woman by adulterous intercourse—Priority between—Shudras—Marriage—Presumption as to form of marriage.

The Kamatis, settled in Bombay, are governed, for the purpose of inheritance, by the law of the *Mitakshara* and the *Mayukha* where they agree; where they differ, the *Mayukha* law must prevail.

To the *Anvadhya stridhan* of a woman, her husband is, on her death, entitled to succeed in preference to the son born of her by adulterous intercourse. Even among Shudras, the law will presume a marriage to have been according to the approved form, if the parties belong to a respectable family. **Jagannath Raghnath v. Narayan L. Shethi**, 12 Bom. L.R. 545.

CHANDAVARKAR and HEATON, JJ.

(6) Mitakshara—Inheritance—Samanodakas and Bandhus, contest between—Cause of action.

Samanodakas are those who participate in the same oblations of water, and include descendants from a common ancestor more remotely related than the thirteenth degree from the *propositus*. A sister's son is only a *bandhu*. A *samanodaka* is a nearer heir to a deceased Hindu than a *bandhu* and will exclude the latter. Where, therefore, B was in the thirteenth degree from the common ancestor L, and D was in the fourteenth degree from him, and B's widow executed a deed of compromise declaring that after her death D would become entitled to the possession of B's property, held that this gave no cause of action to B's sister's son for a suit for declaration of title and cancellation of the deed. **Rambaran Rai v. Kamla Prasad**, 7 A.L.J. 802 = 6 Ind. Cas. 698.

TUDHALL and CHAMIER, JJ.

(7) Mitakshara—Inheritance—Daughter's daughter's sons—Bandhus—Alienation by Hindu widow—Legal necessity.

Hindu Law—(Continued).**—9.—Inheritance—(Continued).**

The sons of a daughter's daughter of a Hindu governed by the Mitakshara Law are *bandhus*, and, as such, in the absence of other nearer heirs, inherit his estate. **Ramphal Thakur v. Paumati**, 7 A.L.J. 776=7 Ind. Cas. 292.

STANLEY, C.J., and GRIFFIN, J.

Reference :—6 A.L.J. R. 557, F.

- (8) *Custom—Partition by Hindu Jat of Fero-sepur of his property between sons—Claim of sons living in the house of father to the separate property left by father—Meaning of 'shamil'—Interpretation and value of Rivaj-i-am.*

Held, that, after partition of property by father between his sons, a son living with his father in the same house, but cooking and cultivating separately, is not joint within the ordinary Hindu sense of the word, and cannot also be said to have remained *shamil* with his father, according to the following provision of the Rivaj-i-am.

Jo beta bad taqsim ke apne bap ke shamil rahe, etc.

Consequently the son is not entitled to inherit the separate property left by his father to the exclusion of his own other brothers.

Held, also, that, ordinarily, an entry of a custom in a Rivaj-i-am, unsupported by instances, is of little or no value.

Held, further, that where materials on the record to prove a fact are imperfect on both sides, the Court is justified in deciding it on probabilities. **Lal Singh v. Hira Singh and Bhanga Singh**, 84 P.W.R. 1910=7 Ind. Cas. 352.

JOHNSTONE and SHAH DIN, JJ.

- (9) *Hindu Law—Daughter's rights—Reversioners—Limitation.*

When one of two daughters inheriting the property of a Hindu father renounces her share in favour of her sister, the interest which the latter possesses in the said half is nothing more than the limited interest which every female takes in the property inherited by her from a male.

The statute of limitation can never run against reversioners in consequence of any possession on the part of the intermediate female heirs, so long as they hold the property as heirs of the last male holder and do not claim independently of him. **Subramanyaya v. Nanjappa alias Shamayya**, 15 M.C.C.R. 99.

STANLEY ISMAY, C.J., and KRISHNA RAO, J.

Hindu Law—(Continued).**—9.—Inheritance—(Concluded).**

- (10) *Inheritance—Daughter's daughter—Daughter's son's son.*

According to the school of Hindu Law which prevails in Southern India, daughter's daughter is to be preferred in the lines of heirs to a daughter's son's son. **Seshamma v. Sampathiengar**, 15 M.C.C.R. 303.

ISMAY, C.J., and SETLUR, O.J.

- (11) *Dayabhaga—Sisters—Inheritance—Childless widow—Survivorship—Usufructuary mortgage of whole property by one sister—Decree for joint possession obtained by another—Separation of interest—Partition, true test of.*

A Hindu daughter is entitled to take by survivorship the whole of the property of her father, which had originally descended jointly to herself and her sister, notwithstanding the fact that, at the time of her sister's death, when it became open to her to claim the whole estate by right of survivorship, she had become a childless widow (a).

What constitutes the true test of partition according to Hindu Law is the intention of the members of the family to become separate owners.

Where one of two Hindu daughters had granted a usufructuary mortgage in respect of the entire estate left by their father, and the other daughter got a decree for joint possession : *held* that there was no effective separation in interest between the sisters, no renunciation of the right of survivorship and no such definition of interests to justify the conclusion that the sisters so separated that the principle of survivorship had ceased to operate (b). **Kedar Gain v. Ramoni Dass**, 7 Ind. Cas. 894.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 23 W.R. 214 ; 15 B.L.R. 10 ; 2 I.A. 113 (P.C.), F. (b) 24 C. 339, D.

- (12)—applicability to Cutchi Memons. See CUTCHI MEMONS, No. 1, 4 S.L.R. 77.

- (13) *Widow's right to inherit her husband's joint property—Hindu khetris residing in towns.* See PARTNERSHIP, No. 8, 142 P.W.R. 1910.

- (14) *Sudras—Rights of illegitimate son.* See ADVERSE POSSESSION, No. 1, 5 Ind. Cas. 84.

—10.—Joint family.

- (1) *Practice—Array of parties—Mitakshara—Joint Hindu family—Trade-debt—Bond in favour of one co-parcener—Suit by obligee—Non-joinder of other co-parceners.*

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

Where a contract is entered into on behalf of a joint family business by a member of the family in its own name, it is not necessary that any members of the joint family, other than he who entered into the contract, should be parties to the suit brought thereon. **Durga Parshad v. Damodar Das**, 7 A.L.J. 161=32 A. 183=5 Ind. Cas. 767.

STANLEY, C.J., and BANERJI, J.

References:—27 All. 361, F.; 29 All. 311, D.

- (2) *Mitakshara joint family property—Effect of partition—Profits from investment of joint family property if joint family property—Suit against karta for partition and accounts—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 62, 127—A family may be joint with reference to certain properties though divided in respect of others (a).*

Where plaintiff sued for partition and account of profits of joint family property in the hands of the karta, Art. 127 and not Art. 62 of Sch. II of the Limitation Act (XV of 1877) applied (b).

Profits derived from the investment of joint family capital in business or from immoveable properties belonging to the joint family are joint family property. A suit for account in respect of such money, being incidental to the suit for ascertainment of share on partition, comes under Art. 127 of the Limitation Act (c). **Ajodhya Purshad v. Mahadeo Purshad**, 14 C.W.N. 221=3 Ind. Cas. 9.

STEPHEN and VINCENT, JJ.

References:—(a) 18 B. 611; 23 B. 597, 601, R. (b) 18 M. 418, F.; 24 C. 309; 6 A. 442, Dis. (c) 14 C. 493, R.

- (3) *Hindu family firm—Trade—Manager passing promissory notes in the firm's name, to accommodate a friend, and without consideration—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes.*

A member of a joint Hindu family trading firm passed promissory notes in the name of the firm. The notes were passed by the member to accommodate a friend of his and without any advantage to the firm. In a suit against the firm on those promissory notes, a minor co-parcener in the firm contended that he was not liable.

Held, that the minor's share in the firm was liable.

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

Per Chandavarkar, J.—The rule of Hindu Law that debts contracted by the managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception.

Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes; the creditor is not bound to inquire into the purpose of the debt, to bind the whole family thereby, because that power is necessary for the very existence of the family. Whether the debt was contracted for the purpose of the family profession or not, it binds the members.

When a joint Hindu family embarks on a trade for the purpose of its livelihood, it is bound by all the rules and laws applicable to that trade.

A joint Hindu family, which carries on a trade handed down from its ancestors, becomes the trading family; trade being one of its *kulacharas*, it attracts to itself all the necessary incidents of trade. Co-parceners in a joint family become partners when they trade in union.

A member of a firm (including joint family firms) has power to bind the other members, whether they are minors or adults, by means of negotiable instruments given in the name of the firm in favour of a *bona fide* holder for value.

Per Batchelor, J.—The Courts, in establishing the legal relations of a joint Hindu family firm, treat it as a kind of partnership and apply the principles of that law.

The test to be applied in cases where a debt is created by the manager is rather the apparent authority of the manager than the actual necessity of the family; for, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. **Raghunathji Tarachand v. The Bank of Bombay**, 11 Bom. L.R. 255=2 Ind. Cas. 173=34 B. 72.

CHANDAVARKAR and BATCHELOR, JJ.

- (4) *Joint family—Lease executed by one member—Security bond executed by him and other members—Whether joint family property.*

Where a lease was executed by one member, in regard to lands which had been held by the

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

family for fourteen years, and a security bond was executed by that member, and his father for himself and as guardian for his two other minor sons, and the lease would not have been registered but for the security bond,

held that the lease was for the benefit of the family. **Sundaram Iyer v. Ramaswami Iyer**, 7 M.L.T. 92=5 Ind. Cas. 762.

WALLIS and SANKARAN NAIR, JJ.

- (5) *Sale by adult members for maintenance of family—Absence of motive to defeat interests of other members—Binding nature—Transfer of Property Act, IV of 1882, Ss. 105, 107—Lease from month to month—Necessity for registration.*

Where a house, the only property of a joint Hindu family, was sold under a deed executed by all the adult members of the family, for raising funds for the maintenance of the family, and no suggestion of any motive to defeat the interests of the other members of the family by an improper sale was made. *Held*, that the sale would be binding on all the members of the family.

A lease of a house from month to month is not required to be registered under the Transfer of Property Act.

In the case of a lease which is not by law required to be in writing registered, the mere assent of the lessor to the lease executed by the lessee is sufficient to make it valid when accompanied by delivery of possession. **A. D. Narayana Sah v. Kadigar Parasurama Sah**, 7 M.L.T. 116=5 Ind. Cas. 826.

SIR ARNOLD WHITE, C.J., and KRISHNASWAMY IYER, J.

Reference:—30 M. 322, D. and doubted.

- (6) *Decree against one member—Death before execution—Liability of undivided brother—Fresh suit against the widow and the undivided brother—Maintainability—Civil Pro. Code (1882), S. 244—Cause of action—Executor de son tort, whether widow in possession of joint family property is an—Parties to partnership suit.*

R brought a suit for dissolution of a partnership, and accounts for recovery of a sum, against S and others, and obtained a decree, against S. Before the execution of the decree, S died leaving an undivided brother and a widow. The decree was sought to be executed against both, but execution was struck off

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

against the undivided brother. Then R brought a fresh suit against the widow, the undivided brother, and his son, for the recovery of the amounts decreed in the previous suit, with interest, and based his cause of action on the decree in the previous suit.

Held that the suit as against the widow was barred by S. 244, C.P.C. Even if she was in possession of joint family property, she cannot be regarded as an executor *de son tort* in regard to it. An executor *de son tort* is a person who intermeddles with the estate of a deceased person. The joint family property cannot be regarded as the estate of S, as the interest he had in it passed at his death to his co-parceners by survivorship.

The sons of S, if any, would be under a pious obligation to pay the decree debt, and the passing of the decree would give a fresh cause of action against them, quite independently of the original cause of action (b). But the undivided brother and his son are not bound to pay any debt contracted by him, unless for the benefit of the family. The decree debt is not the original debt, but a new debt (c), and must of its own force, give a cause of action, if the plaintiffs are to maintain a suit upon it.

Held that the suit was rightly dismissed.

In a suit for winding up a partnership, each partner having a distinct interest must be a party. **Ramaswamy Iyer v. Veerappa Chetty**, 7 M.L.T. 211.

MILLER and MUNRO, JJ.

References:—(a) 3 M. 359; 29 M. 351, D. (b) & (c) 27 M. R.

- (7) *Manager—Power to give discharge of debt on behalf of all—Senior in age becoming manager—Attainment of majority by senior—Suit for recovery of debt, brought more than three years after limitation.*

In a joint Hindu family, the manager is competent to give a valid discharge on behalf of all. The senior member in age becomes the manager of the family. A suit for the recovery of money, brought more than three years after the senior member attained his majority, is barred (a). **Anantarama Madhyastha v. Mandarthi Srinivasa Adiga**, 8 M.L.T. 71=7 Ind. Cas. 267.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—(a) 16 M. 436, R.; 25 M. 26, D.

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

(8) *Hindu Law—Mitakshara—Joint Hindu family—Powers of manager—Mortgage of family property made by managing member—Decree for sale—Sale of mortgaged property—Suit by son and other members to recover the family property—Transfer of Property Act (IV of 1882), S. 85—Defendants—Managing member and sometimes represent adult members.*

When property mortgaged by a father in a Hindu joint family has passed away from the family, either by means of a foreclosure against the father or by means of a sale in execution of a decree against him upon a mortgage, the sons cannot recover the family property or their interests in it, merely because they were not made parties to the suit brought by or against their father.

A person may be a necessary party to a suit upon a mortgage, although the plaintiff is not aware of his existence, in the sense that, if he is not impleaded, he cannot be concluded or his rights affected by the decree passed in the suit. *Prima facie* all persons interested in the right to redeem must be made parties to a suit by a mortgagee, but the rule is not inflexible. In certain circumstances the whole family may be held bound by the result of suits brought by or against the manager.

Therefore, where, in a suit upon a mortgage, the managing member of the family defended the suit with the consent of the other adult members who were not parties to the suit, *held*, that these persons were bound by the result of the previous suit, and they were precluded from instituting a suit of their own to recover the mortgaged property sold in execution of the previous decree, upon the ground that they had not been impleaded in the previous suit. **Jaddo Kura v. Sheo Shanker**, 7 A.L.J. 945.

TUDHALL and CHAMIER, JJ.

(9) *Joint family property—Confiscation—Government grant of a part of the property to one member of the family—Whether the estate comprised in the grant was joint or separate—Separation of one member of the joint family—His subsequent claim to a share of the joint property—Partition.*

Before the annexation of Oudh, certain estates belonged to an undivided Hindu family consisting of three brothers, G, U and R, of whom G, the eldest, was the manager. The estates were confiscated, but the Government

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

made G a grant of the estate in suit. G, when examined with a view to the preparation of the Khewat, of the estate, stated that he and his brothers were "joint in equal shares." The Khewat which was signed by the three brothers and countersigned by the presiding officer, gave under the head "Shares of Proprietors" "and Names of Zemindars," the names of the three brothers "all three in equal shares." G never disputed the right and title of his brothers to a joint share in the property:

Held, that it must be inferred that, under a family arrangement, which could not now be questioned, the three brothers became jointly entitled as members of an undivided Hindu family to the estate in suit, although the Government grant was to G alone.

The three brothers continued to live jointly until 1867, when U quarrelled with G, left the family home and brought a suit for partition. R too brought a similar suit, claiming one-third of the estate, but he remained with G, and withdrew his claim. G died in 1869, U, then made, G's widow a defendant, and a decree was made by consent giving U one-third of the estate. R made an arrangement with G's widow who executed a will in his favour that she was to remain in possession, and that his rights were to be in abeyance during her life. On the death of G's widow in 1896, U claimed one-half or in the alternative one-fourth share of the two-thirds of the estate that was in her possession during her life.

Held, on the evidence, that U had altogether failed to prove that G died entitled to either two-thirds or one-third of the estate as separate property; and that R remained joint with G till the latter's death, and then became entitled to two-thirds of the estate. **Maharaj Kedar Nath v. Thakur Ratan Singh**, 12 Bom. L.R. 656 (P.C.) = 14 C.W.N. 985 = 8 M.L.T. 193 = 12 C.L.J. 225 = 31 A. 415.

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ALI.

(10) *Joint family—Right to sue—Right of a coparcener to sue on a promissory note passed to him—Conciliator's certificate—Production in course of suit—Dekkhani Agriculturists Relief Act (XVII of 1879)—Onus of proof—Question of onus in Court of appeal—Practice.*

Where credit is given to an individual member in a Hindu family, by an outsider, in respect

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

of a contract, whether it be of money lending or of letting, the contract is one on which that member alone is entitled to sue. This principle is extended to leases executed in favour of a single co-parcener in a joint Hindu family (a).

The production of the conciliator's certificate, required by the Dekkhan Agriculturists Relief Act, 1879, is not a condition precedent to the maintenance of a suit. All that the law requires is that the suit should not be heard. It is not that the Court has no jurisdiction to allow the suit to lie, but the Court has no jurisdiction to hear the suit. Hence, if the Court finds at the trial that the certificate is not produced or is defective, it ought to postpone the hearing, and allow the party an opportunity of producing the conciliator's certificate (b).

The question of *onus* of proof has greater force in an original trial, where the question is which party is to begin. But where the trial has ended, and where the plaintiff has let evidence on his own behalf, the contention that the *onus* of proof was wrongly thrown loses all its force in an appeal, because an appellate Court has to see whether, having regard to the evidence adduced by both parties, the lower Court's conclusion is shown to its satisfaction by the appellant to be erroneous or not. The duty of an appellate Court, in this respect, is different from the duty which is imposed on a Court of original trial. In an appeal, the appellate Court should not reverse the decree unless it is clearly shown to be erroneous. The questions of *onus* becomes important and material in appeal only where the evidence is evenly balanced and conflicting; where that is the case, that party must fail, on whom the *onus* lay in the first instance. **Bandu Subrao Jamnis v. Jambu Taynappa Adake**, 12 Bom. L.R. 801.

CHANDAVARKAR and HEATON, JJ.

References:—(a) (1899) 24 Bom. 123; (1884) P.J. 38, F. (b) (1892) 17 Bom. 169, M.

(11) *Suit by manager on contract to which other members not parties—Rules for joinder of such parties—Difference between coparcenary and partnership.*

No one can sue on the contract who is not privy to it.

Where a contract is made by an agent on behalf of a principal, the principal is the proper person to sue for the breach of it. This is a corollary of Ss. 226 and 230, Indian Contract Act.

Hindu Law—(Continued).**—10.—Joint family—(Continued).**

Where a contract is made with the agent himself, that is, where the agent is treated as the actual party with whom the contract is made, the agent may sue.

All persons, who are partners in a firm at the time when the contract is made with it, should join in an action for breach of such contract.

In all actions in which ownership of property is the basis of the claim, *e.g.*, in suits for possession or for ejectment, all persons in whom the ownership is alleged to be must be joined as plaintiffs.

Now the members of a joint Hindu family form not a partnership but a co-parcenary.

A co-parcenary differs essentially from a partnership. The one is merely a form of ownership of property; the other is a legal relation created by agreement, one of the essential elements of which is that each member has to the other the relation of agent to principal. Co-parceners are joint owners of the family property; as such they have a corporate character; their mutual rights are the result of status. Partners are independent legal units bound together by certain legal relations as the result of contract.

The rules, as adopted to the case of members of a joint Hindu family, may be thus stated:—

(a) When a contract is entered into by any member in his own personal name, such member may sue on such contract as sole plaintiff.

(b) When a contract is entered into in the name of the family firm, all the persons who are really partners at the time when the contract is made are necessary parties to a suit on such contract; members not partners are not necessary parties.

(c) In a suit, not based on contract, for the recovery of joint family property, all joint owners are necessary parties. But the manager of the family may, perhaps, sue as the representative of the family as regards such property. **Damodhardas Hemandas v. Yishen Das Bherumal**, 4 S.L.R. 2 = 7 Ind. Cas. 584.

CROUCH, J. C.

References:—P.J., 1875, 366; 10 B. 435; 8 Bom. L.R. 813; 6 I.A. 233; 26 C. 349; 7 C. 739; 20 B. 435; 6 C. 815; 7 B. 217; 18 M. 33; 14 A. 524; 3 M. 234; 10 B. 32; 12 B. 158; 23 M. 190; 20 B. 11, 19; 11 B. 37, 41; 7 B. 467; 30 B. 477; 27 B. 157; 17 B. 917, R.; 29 A. 311; 32 M. 284, Diss.

Hindu Law—(Continued).**—10.—Joint family—(Concluded).**

(12) Members of joint family acquiring property without the aid of ancestral property—Nature of property—Presumption. See EXECUTOR, No. 1, 8 M.L.J. 124.

(13) Decree against father—Execution sale—Application under O. 21, 100, C.P.C., 1908. See CIV. PRO. CODE (1908), No. 129, 11 C.J. J. 61.

(14) Manager's power to acknowledge debt—Payment by eldest brother for all brothers including minor brothers—Effect. See LIMITATION ACT (1877), No. 26, 5 Ind. Cas. 484.

(15) Father represents his sons in a suit on mortgage against him. See TRANSFER OF PROPERTY ACT, No. 57, 12 Bom. L.R. 219.

(16) Position of eldest brother. See CIV. PRO. CODE (1908), No. 148, 53 P.W.R. 1910.

(17) Decree obtained against uncle executed against nephews—Succession by survivorship—Nephews not the legal representatives—Application bad—Limitation. See CIV. PRO. CODE (1908), No. 95, 7 A.L.J. 512.

(18) Minor member whether bound by reference to arbitration made by Karta. See CIV. PRO. CODE (1882), No. 205, 7 Ind. Cas. 31.

(19) Mortgage by manager—Right of other members. See TRANSFER OF PROPERTY ACT, No. 58, 12 Bom. L.R. 811.

(20) Father maintaining suit in representative capacity as manager of the family—Circumstances raising presumption. See ESTOPPEL, No. 2, 8 M.L.J. 204.

(21) Joint family property passing by survivorship—Whether forms part of 'general estate' within the meaning of Art. 98, Limitation Act. See LIMITATION ACT (1877), No. 64, 20 M.L.J. 639 = 33 M. 308.

—11.—(Maintenance).

(1) *Illegitimate son by adulterous intercourse, rights of—Maintenance—Heirship—Texts of Hindu Law.*

Suit for maintenance by an illegitimate son by a married woman kept as a concubine, against the undivided sons and brothers of his putative father, in consequence of their having taken the father's share of the family property by survivorship.

Held, that it is useless to consider whether the Hindu Law, as regards the claims of illegitimate sons as now administered, is in accord with the ancient Hindu texts or even the authoritative commentaries ;

Hindu Law—(Continued).**—11.—(Maintenance)—(Continued).**

That, though the High Court of Calcutta still adheres to the literal interpretation of the texts holding that the illegitimate son entitled to inherit amongst Sudras is the son of the female slave (a), the High Court of Madras, Bombay and Allahabad have adopted the view that an unmarried woman is on the same footing as the female slave with reference to the rights of the illegitimate sons born to her (b) ;

That, so far as right of maintenance is concerned, the illegitimate son by an adulterous intercourse stands upon the same footing as other kinds of illegitimate sons (c) ;

Although the Court has refused to give a decree for a share to the illegitimate son of a Sudra, where he is the offspring of an adulterous intercourse (d), such illegitimate son is entitled to maintenance against the surviving members of the putative father's joint family equally against the putative father (e).

Though adultery is an offence against the criminal law and the criminal himself may not acquire rights by the crime (f), there is no warrant for holding that the offspring of a criminal intercourse should be deprived of all rights. **Subramanya Mudali v. Velu**, 7 M.L.J. 161 = 20 M.L.J. 350 = 5 Ind. Cas. 919.

MILLER and KRISHNASWAMI IYER, JJ.

References :—(a) 1 C. 1 ; 19 C. 91 ; 28 C. 194, R. (b) 7 M. 407 ; 8 M. 557 ; 1 B. 97 ; 4 B. 27 ; 2 A. 134 ; 6 A. 329, R. (c) 1 M. 306 ; 8 M. 325 ; 1 B. 97, F. ; 8 M.H.C.R. 134 (143), R. (d) 4 M.H.C.R. 204 ; 8 M.H.C.R. 134 ; S.A. 57 of 1905, *appl* (e) 1 M. 306 ; 17 M. 160 (161), F. ; 7 M.L.A. 19 ; 12 M.L.A. 203 ; 27 M. 32, R. (f) 27 M. 591, R.

(2) *Widow—Unchastity—Subsequent chastity—Rare or starving maintenance not allowed—Will—Maintenance allowed by will.*

Under a will of her husband, a Hindu widow was entitled to maintenance at the rate of Rs. 24 a year, from his property. After her husband's death, the widow led for sometime an unchaste life, and gave birth to a child ; but since then she had been chaste. In a suit to recover the maintenance by the widow, the defendant contended that she had, owing to her misconduct, forfeited her right even to bare or starving maintenance :—

Held that, though the annuity was granted by the will as "maintenance," that word could not be understood as imposing any condition

Hindu Law—(Continued).**—11.—(Maintenance)—(Continued).**

or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will.

The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule, and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship.

The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence. **Parami Ramayya v. Mahadevi Shankarappa**, 12 Bom. L.R. 196=34 B. 278.

CHANDAVARKAR and HEATON, JJ.

References :—1 Bom. 559; 7 Bom. 84; 9 Bom. 108, *discussed*

(3) *Separate maintenance—Cruelty—Abandonment by wife—Husband and wife.*

The defendant kept a number of mistresses in his house, and, acting under the influence and at the instigation of some of them, he used to beat his wife, kick her, and threaten to cut her to pieces and shoot her. After having subjected his wife for some period to that kind of cruelty, he drove her out of his house; and though often requested to take her back or provide her with separate maintenance, he not only refused to have anything to do with her, but levelled against her charges of unchastity which he made no attempt to justify. In a suit to recover separate maintenance by the wife :—

Held, that the above facts entitled the wife to separate maintenance.

According to Hindu law, to entitle a wife to separate maintenance it is not necessary to prove cruelty, if there has been abandonment of the wife. **Sitabai v. Ramachandra Rao Y. Bhonsale**, 12 Bom. L.R. 373=6 Ind. Cas. 525.

CHANDAVARKAR and KNIGHT, JJ.

Hindu Law—(Continued).**—11.—Maintenance—(Concluded).**

(4) *Transfer of Property Act (IV of 1882), S. 39—Right of maintenance—Right of residence—Hindu widow—Alienation of family property—Hindu law—Necessity.*

Under Hindu law, a widow's right to maintenance can only become a charge upon any definite portion of an undivided family estate, when it has been made so by a decree of a Court or by an express agreement. Failing that, it is a pious obligation and can be defeated by sheer necessity. The widow's right to residence is generally referable to the ancestral house. Where the purchaser of an ancestral house is aware of the existence of widows, he may be deemed to be affected with notice of the right, even when the widows are not residing in the house at the time: *a fortiori* when the widows are actually residing at the time of the sale and purchase.

Where the sale of ancestral property is necessitated in the interests of the family as a whole, then a *bona fide* purchaser for value would acquire a right paramount to that of the widows either to maintenance or residence.

S. 39 of T. P. Act, 1882, commented on. **Yamnabai v. Nanabhai**, 12 Bom. L.R. 1075.

BEAMAN, J.

(5) Right of widowed daughter-in-law. See ACT II OF 1901 (AGRA TENANCY), No. 12, 7 A.L.J. 658.

(6) Property purchased out of money paid to widow for maintenance—Absolute property, See HINDU LAW (WIDOW), No. 12, 8 M.L.T. 284.

—12.—Marriage.

(1) *Marriage of a Hindu Sudra with a Christian woman converted to Hinduism, performed according to formalities prescribed by Hindu Law—How far valid—Custom—Community recognizing a marriage as valid—Marriage opposed to usages, validity of—Essential ceremonies to constitute a valid marriage—Effect of non-observance—Hindu Law—What it consists of—Application of—Caste 'Sudras'—Meaning of the terms.*

A, a Hindu of the Sudra caste (and belonging to the *kaikolar* class) married a woman, who was a Roman Catholic Christian before her marriage, but who became converted to Hinduism at the time of her marriage. They

Hindu Law—(Continued).**—12.—Marriage—(Continued).**

were living together as husband and wife for thirty or forty years. They were not treated as outcastes or put out of caste. The members of the Kaikolar community freely associated with them as Hindus and members of their community. In a suit brought by one of the reversioners of A for setting aside certain alienations made by his widow, the question arose whether this marriage of a Hindu with a convert from Christianity is valid.

Held, that this marriage is valid, (1) on the ground of custom, (2) because it is in conformity with Hindu Law which does not prohibit marriages between any persons who are not *Dwijas* or twice-born persons (a), (3) because, when the caste of which the parties are accepted members, recognise a marriage as valid, then it is legal marriage under Hindu Law.

According to the Hindu lawyers, *Vivaha Homam* and *Sapthapathi* have been prescribed as essential ceremonies to constitute a valid marriage. But it is notorious that marriages are performed in many cases without them, and it is now settled that, if by caste usage any other form is considered as constituting a marriage, then the adoption of that form under those conditions prescribed by the caste, with the intention of thereby completing the marriage union, is sufficient.

If, according to the usage of a community, a marriage is valid, or the community recognize a marriage as valid, then, in the absence of any statutory prohibition, it should be recognized as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu Law, unless it offends against rules which would render any other marriage invalid.

But a marriage opposed to the usages of the communities and not recognized by them may not be invalid if the marriage is valid under the ordinary Hindu Law.

The Hindu Law to be administered by the Courts consists of the *Shastras* which claim divine sanction and are followed by the *Brahmins* generally, and also of the usages or approved habitual practices of those communities whose caste status depends upon the degree of conformity of their usages to the *Shastras*.

The Hindu Law has to be applied to those only who are Hindus by religion, and where it

Hindu Law—(Continued).**—12.—Marriage—(Continued).**

is doubtful whether some of the communities can be treated as Hindus or Mahomedans, they will, in the absence of any statutory law, be governed, as to their marriages and inheritance, by the rules of justice, equity, and good conscience (b) or, in other words, as laid down by the Judicial Committee, according to the usages of the class or community (c).

The legal rules put forward by the sacred writers are primarily intended only for those who accept, in theory, the religious belief, the religious, social and moral obligations which form the foundation of that system, on the others, it is binding only by adoption, and, though it will be presumed that as Hindus they are governed by that system of law, circumstances may exist to throw the burden of proof on the party asserting that they have adopted any specific rule of Hindu Law (d).

A caste may be taken to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social or religious observances, to drink, food, ceremonial, pollution, occupation or marriage. Some of these usages may be common to others also. The caste is invariably known by a distinctive name for identification, it has its own rules for internal management and has also got power of exclusion.

By "Sudras" it was intended to include all Hindus who are not *Dwijas* or twice-born classes (e). **Muthusami Mudaliar v. Masilamani**, 7 M.L.T. 17 = 20 M.L.J. 49 = 5 Ind. Cas. 42.

SANKARAN NAIR and ABDUR RAHIM, JJ.

References :—(a) 1 M.H.C.R. 478 ; 2 M.H.C.R. 196 ; 13 M.L.A. 141 ; 14 M.J.A. 346 ; 25 B. 551 ; 22 B. 278 ; 30 C. 999 ; 15 C. 708, R. (b) 4 A. 343. (c) 9 M.L.A. 195. (d) 12 I.A. 72. (e) Manu Ch. X. cl. 1.

(2) *Joint Hindu family—Sister's marriage—Legal obligation—Minor members—Contract Act, S. 68—Necessaries—Meaning of.*

Reasonable expenses of a sister's marriage are chargeable on the family property in the hands of brothers, in the same way as the cost of her maintenance. Where, therefore, a creditor advances money to an infant for the marriage of his sister, he is entitled to be reimbursed from the property of the infant.

The term "necessaries" in S. 68 of the Contract Act is comprehensive and is not confined

Hindu Law—(Continued).**—12.—Marriage—(Continued).**

to the necessities of the person of the infant himself, but extends to necessities provided for other members of his family. **Nandan Prasad v. Ajodhya Prasad**, 7 A.L.J. 236 (F.B.)=5 Ind. Cas. 413.

STANLEY, C.J., BANERJI and PIGGOTT, JJ.

- (3) *Marriage expenses—General rule—Sudras—Right of daughter to be paid her marriage expenses—Family property in the hands of step-mother.*

The general rule under the Hindu Law, is that the marriage expenses are to be borne by the family property, just in the same way as the cost of maintenance (a), and this rule applies not only to Brahmins but to Sudras as well.

So, a daughter of a Sudra will be entitled to have her marriage expenses paid out of the father's estate in the hands of her step-mother. **Bapayya v. Rukhamma**, 19 M.L.J. 666.

MUNRO and SANKARAN NAIR, JJ.

Reference:—(a) 23 M. 512 (515), F.

- (4) *Joint family—'Family necessity', meaning of—Marriage of junior member—Debt for performance—Binding on family—Marriage—Necessity among Sudras—Nature of marriage among twice-born—Brother's marriage when not necessary.*

The marriage of a junior member of a co-parcenary body is a family purpose. Where it is reasonably necessary on the part of a prudent manager to borrow money for expenditure on such marriage, the transaction will bind the co-parceners.

Marriage is a *samskara* or initiatory ceremony amongst *sudras* and as such it ought to be performed in their case.

Under the Hindu Law, the stage of a householder is obligatory on all the twice-born. Marriage is a *vyavasthitha vikalpa* or fixed alternative, that is compulsory when certain conditions exist, and not an *ichchhika vikalpa* or an alternative to be chosen according to pleasure (a).

A debt borrowed for defraying the expenses of the marriage of a son is recoverable from the family property as having been incurred for a family purpose in case of necessity (b).

The marriage of an unmarried brother is not a duty cast on the married brothers, when there is no patrimony.

Hindu Law—(Continued).**—12.—Marriage—(Continued).**

Meaning of the phrase 'family necessity' explained. **Devulapalli Kameswara Sastry v. Polavarapu Venachariu**, 20 M.L.J. 855 =8 Ind. Cas. 195.

ABDUR RAHIM and KRISHNASWAMI IYER, JJ.

References: (a) 27 M. 206, diss. (b) 13 M. L.J. 75; 6 M.H.C. 371; 25 A. 407 (P.C.)=7 C. W.N. 681=5 Bom. L.R. 478=30 I.A. 165, J'. (c) 6 M. I. A. 393=18 W.R. 81 (note), R.

- (5) *Hindu Law—Marriages between persons of different castes, validity of—Hybrid castes, marriages of persons of—Recognition by family, effect of—Ancestral property, interest arising from birth in.*

Held, that marriages between persons belonging to two of the four primary castes, Brahmans, Kshatriyas, Vaishyas, and Sudras, are invalid, but this rule does not apply to marriages between persons of hybrid castes or between a person of hybrid caste and a person of one of the four primary castes.

One T was an illegitimate son of a Kshatriya R by a Kshatriya. T married a Thakurain of whom D was born, and D married a Thakurain of whom were born plaintiffs 1, 2, 3, and defendants 2 and 3.

It being found that the marriages of T and D had been recognised by the family and that both T and D were recognized by every one as Kshatriyas though they were known to belong to an illegitimate branch of the family, held that the marriages of T and D were lawful and the issue of them legitimate.

Held further, that D's sons became entitled on their birth to an interest in the property received by their father from L. **Daryal Singh v. Narpal Singh**, 13 O.C. 375.

CHAMBER and EVANS, J.CS.

References:—12 M. 72; 5 A.L.J. 629; 33 M. 342; 9 P.L.R. 160; 28 A. 459; 8 M.I.A. 400, 9 M.I.A. 199; 2 M.H.C.R. 50; 3 M.H.C.R. 50; 4 A. 343; 18 Cal. 264, R.

(6) General presumption as to the form of a Hindu marriage. See HINDU LAW (STRIDHAN), No. 2, 6 N.L.R. 3.

(7) Alienation for expenses of second marriage—Legal necessity. See HINDU LAW (ALIENATION), No. 11, 6 Ind. Cas. 465.

(8) Sudras—Presumption as to form of marriage. See HINDU LAW (INHERITANCE), No. 5, 12 Bom. L.R. 545.

Hindu Law—(Continued).**—12.—Marriage—(Concluded).**

(9) Debt contracted for marriage of co-parcener when binding. See HINDU LAW (DEBTS), No. 10, 15 M.C.C.R. 159.

(10) Law determining marital obligations where parties are Hindus—Agreement for future or present separation—Validity. See RESTITUTION OF CONJUGAL RIGHTS, No. 1, 8 M.L.T. 314.

—13 & 14.—Partition.

(1) *Partition—Award of arbitrators dividing properties of co-parceners and directing enjoyment till a certain date—Reservation of right to re-partition on the expiry of the period—Sale by one of the co-parceners of a portion of his share—Right of vendee to claim partition—Sale of a portion of one co-parcener's property in Court auction—Auction purchaser is a necessary party to the suit for partition—Auction purchaser impleaded after period of limitation, effect of.*

Defendants Nos. 1, 2 and 3, having referred their disputes as to their common properties to arbitration, the arbitrators made an award dividing the properties and allocating to each defendant certain specified items. The award, however, reserved to the co-parceners the right to re-partition the properties at the end of Sarvajith (1887-1888) when the 'profits and losses should be made equal and the said lands divided by the parties equally.' Plaintiff, having purchased a half *resam* out of first defendant's share, sued defendants, after the end of Sarvajith, for partition and delivery to him of his portion. "In the meantime some of the properties of first defendant were sold in Court-auction in execution of decree against the defendants, and were transferred latterly by the auction-purchaser to fourth defendant. The plaintiff did not implead the fourth defendant in his suit in the first instance, and by the time fourth defendant was added as a party, the claim as against her had become barred. The lower appellate Court dismissed the suit on the ground that first defendant by his alienation of portions of his properties had elected to forego his privilege of claiming a fresh division at the end of Sarvajith, and that plaintiff who stepped in his shoes had no better right. In second appeal to the High Court."

Held, (1) that the right of first defendant to claim re-division according to the award of the arbitrators was not lost either by voluntary

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

alienation of his properties to plaintiff or by their sale in Court auction, and that plaintiff's suit was sustainable;

(2) that the award could not be construed as a contract entered into by the co-parceners (a);

(3) that, in the plaintiff's suit for partition, it was necessary to implead fourth defendant and to bring in the properties sold in Court auction;

(4) that the failure to implead fourth defendant as a party had the effect of rendering the whole suit liable to be dismissed (b);

(5) that, as at the date when the fourth defendant was made a party, more than twelve years had elapsed from the end of Sarvajith and the claim against her had become barred, the suit was liable to be dismissed *in toto*, as relief could not be given to defendants Nos. 1 to 3 independently without joining the fourth defendant and including in the claim the lands bought by her. **Duri Bhagavanulu v. Tadpatri Veeravadambu**, 4 Ind. Cas. 392 = 7 M.L.T. 67 = 20 M.L.J. 29.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

References:—(a) 19 M. 290; 23 M. 593, 33 C. 881; 4 C.L.J. 162, R. (b) 14 A. 524; 7 B. 217, R.

(2) *Right of action—Beneficiary—Partition deed to which mother was no party—Agreement to invest money on mortgage for mother—Suit to recover money and for "further relief"—Maintainability—Proper relief to be given—Form of decree.*

K and A partitioned their family properties. Under the deed of partition entered into between them, K and A agreed to contribute Rs. 150 each and invest the same for the benefit of, and in the name of, their mother who was no party to the deed, and further had the amount charged on their shares. The mother sued the defendants, her grandsons by her son K, for the recovery of the money or "for such other relief as the Court may think fit."

Held, (1) that the mother can maintain the suit on the ground that she is the beneficiary (a) and (2) that the mother, though not entitled, to be paid the sum of money she asks for, is entitled, under the claim for further relief, to such relief as the nature of the case admits of.

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

She would be entitled to a decree, on production of a duly executed mortgage-deed by a third party, compelling the defendants 1 to 3 and the second plaintiff (her other son) to pay Rs. 150 each for investment on such mortgage. **Shuppu Amma and another v. K. Subramaniam and others**, 19 M.L.J. 799.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

References :—(a) 6 Bom. L.R. 394 and 29 A. 151, *F*.

(3)—*Joint family—Partition of some members—Presumption as to separation as to rest—Practice—Pleadings—Allegation as to exclusive title—No relief on tenancy-in-common.*

There is no presumption, when one co-parcener separates from the others, that the latter remain united. An agreement amongst the remaining co-parceners to remain united or to re-unite must be proved like any other fact (a).

Where, on the plaintiff's allegation of exclusive title to the suit properties, a plea of limitation is raised by the defendant, and made good by him, no relief can be given to the plaintiff on the basis of a tenancy-in-common (b). **Chidambaram Pillai v. Muthu Pillai**, 7 M.L.T. 95 = 5 Ind. cas. 764.

WHITE, C.J. and KRISHNASWAMI IYER, J.

References :—(a) 30 C. 725, *Appl.* (b) 28 A. 482, *R*.

(4) *Mitakshara—Mother's share on partition among sons—Stridhan of the mother—Heirs thereto.*

Held, that, according to the *Mitakshara*, the share which the mother in a joint Hindu family obtains after the death of the father, on partition of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs, and not upon the heirs of her husband. (a) This question was not decided by the Privy Council. **Deblmangal Prasad Singh v. Mahadeo Prasad Singh**, 7 A.L.J. 269 = 5 Ind. Cas. 208.

STANLEY, C.J., and BANERJI, J.

References :—(a) 24 A. 67; 4 A.L.J. 673, *F*. (b) 25 A. 468.

(5) *Mitakshara—Requisite for partition—Agreement to partition may be parol—*

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

Minority of co-parcener—Accounting by eldest male member—Subsequent conduct of parties—Documentary evidence—Cumulative effect of.

Instruments in writing executed by members of a joint Hindu family, providing that the joint family property should belong to and be enjoyed by the different members of the family in specified shares, have the effect, as to the property so dealt with, that there is a division of right; the status of the family is changed; the tenancy of the property severed and converted from something, to use the language of English law, like a joint tenancy into a tenancy in common. and the previously undivided family becomes, by operation of law, divided.

The agreement to partition the joint family property in interest and right need not be embodied in a deed or instrument in writing. It may be a parol agreement. It is not consistent with the existence of a joint Hindu family, that the eldest male and manager for the family, should treat one member as the owner of his share of the entire property, and account to that member for the income of the property on that basis.

Hence, when an application was presented by the members then constituting a Hindu joint family one of whom was a minor, defining the share to be enjoyed by each and action was taken in accordance with the said application and the whole course of their subsequent conduct as exhibited by their respective dealings with the property, was inconsistent with the continuance of the joint family; held, that the agreement contained in the petition was binding on the minor member, who had since become major, and that a partition had been effected.

Where documents are adduced in evidence to prove separation, it is not enough to consider whether each document is by itself sufficient to rebut the *prima facie* presumption that a family once admittedly a joint Hindu family had continued to be joint, but the cumulative effect of all the documents should be taken into account. **Musammatt Parbati v. Naunihal Singh**, 6 A.L.J. 597 (P.C.) = 5 M.L.T. 427 = 13 C.W.N. 983 = 10 C.L.J. 121 = 11 Bom. L.R. 878 = 31 A. 412 = 3 Ind. Cas. 195 = 19 M.L.J. 517.

LORD ATKINSON, LORD COLLINS, LORD GORELL and SIR ARTHUR WILSON.

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

- (6) *Suit for—Property, partible or impartible—Test—Mutt, definition of—Management of family charities—Succession—Natural heirs—Rule of primogeniture—Right of members of undivided family to participate.*

The Maharaja of Tanjore had given some properties to one Sethubhava Swamiar who was accepted by the Raja as his Guru and who had also established a Mutt. In a suit brought by one of the descendants of the Swamiar, his brothers contended that those properties, together with the rest which formed an accretion to that estate, were attached to the office of the Guru, and could not be separated therefrom, and were, therefore, impartible. But it was found that there was nothing in the 'Sanad,' or in the body of any document of title to show that the properties appertained to the office or the Mutt, that the grantees was not referred to in those documents as the Raja's Guru or even as the head of the Mutt, that the spiritual name of the Guru was not also given, and that the properties were being enjoyed by the Guru and his successors as if they were personal grants made to the Guru and his successors. It was, therefore, held that the properties could not be treated as endowments attached to the priestly office conferred for the performance of duty, but they were simple personal grants made to the grantee and his successors. Mutts are usually associations of Sanyasis or celibates devoted to Divine worship, who give *upadesam* or, instructions to deserving candidates. There are, also, Matams of which the members are allowed to marry. The house in which they live is also called mutt.

The right of management of the family properties devoted to charitable or religious uses descends to the natural heirs of the donee, and not according to the rule of primogeniture (a).

The managing member of an undivided family has the right to manage the family charities, and the other members of the family have no right to participate in the management, so long as they continue undivided (b). **Sri Sethurama Sawmiar v. Sri Merusawmiar**, 6 M.L.T. 319=20 M.L.J. 108=4 Ind. Cas. 76.

WALLIS and SANKARAN NAIR, JJ.

References:—(a) 27 M. 192; Hindu Law, Mayne, 439; 2 Morley's Digest, 146. (b) 32 M. 167.

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

- (7) *Specific Relief Act (I of 1877), S. 42 Proviso—"Further relief"—Defendant not in possession—Plaintiff cannot claim possession as "further relief"—Hindu Law—Partition—Members enjoying divided interests—Presumption of complete partition—Division of malvaram right—Division by metes and bounds unnecessary—Contract Act (IX of 1872), Ss. 38, 45, 165—Tender—Offer—Mortgage in favour of one member of an undivided Hindu family—Payment of entire mortgage money to one of several members after the family became divided—Mortgage not discharged in respect of the interests of other divided members.*

Where the defendant is not in possession, the plaintiff, in a declaratory suit, under S. 42 of the Specific Relief Act, is not entitled to further relief in the nature of possession, and is not bound, therefore, to ask for such relief against such defendant.

Where the share of the malvaram due to the members of a Hindu family is being enjoyed by them in pursuance of a partition in accordance with the interests of the divided members, the presumption of the law is that there was a complete division.

It is enough if the malvaram right has been divided amongst the sharers. It is not necessary that, in every case of divided enjoyment by division of the produce, there must necessarily be a further physical division by metes and bounds.

Where, after a member of an undivided Hindu family had taken a mortgage on behalf of the family, the family was divided and the mortgagor paid the mortgage debt to one of the divided members,

held, that such payment did not discharge the entire mortgage in which other members of the family had their several interests (a).

The last clause of S. 38 of the Contract Act, under which an offer can be made to one of several joint promisees, does not override the express provisions of S. 45 of the Act regulating the right to claim performance.

An offer of performance is not a discharge of obligation.

The consequence of a tender is merely that the promisor is not responsible for non-performance and that interest will cease to run from the date on which it was made.

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

The special rule contained in S. 165 of the Contract Act, relating to the validity of delivery by the bailee to one of several joint bailors, has not the force of a general principle of the law of contracts. **Ramaswamy, minor by his next friend Mookkayi alias Karuppayi v. Muniandi Servai**, 5 Ind. Cas. 343.

WHITE, C. J., and KRISHNASWAMI AIYAR, J.

References:—(a) 20 M. 461, *diss.*; 7 M. and W. 264; 8 D.P.C. 841; 10 L.J. Ex. 12; 4 Jur. 1064, not *approved*; 15 M. 26, *F.*; 27 B. 292; 34 C. 305; 5 C.L.J. 270; 22 Q.B.D. 537; 58 L.J. Q.B. 302; 60 L.T. 318; 37 W.R. 378, *R.*

(8) *Rights to wells and water—Joint family—Partition—Enjoyment of the rights.*

Under Hindu law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal; and after partition these must be enjoyed by the separated co-parceners by turn. **Govind Annaji Bodhani v. Trimbak Govind Dhaneshwar**, 12 Bom.L.R. 363 = 6 Ind. Cas. 521.

CHANDAVARKAR and KNIGHT, JJ.

(9) *Mitakshara — Joint-family — Father's power as managing member to refer a partition question to arbitration—Award—Whether sons bound.*

It is competent to the father of a joint Hindu family, in his capacity of managing member of the family, to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, would be binding on the sons. **Jagannath v. Kanhia Lal**, 6 Ind. Cas. 123.

STANLEY, C. J., and BANERJI, J.

Reference:—16 A. 231, *F.*

(10) *Partition—Presumption as to some of the members remaining joint—Re-union—Proof—Pleadings—Second appeal.*

There is no presumption that, when one co-parcener of a Hindu joint family separates from the others, the latter remain united.

Where it is necessary, in order to ascertain the share of an outgoing co-parcener, to fix the shares which the others would be entitled to, the separation of one might be said to be the virtual separation of all, and an agreement amongst the remaining co-parceners to remain united or to reunite, must be proved like any other fact.

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

The appellant in a second appeal cannot be allowed to rely upon the grounds of appeal abandoned before the lower appellate Court. **Parbati v. Maharaji Singh**, 6 Ind. Cas. 795.

STANLEY, C.J. and GRIFFIN, J.

(11) *Mitakshara—Partition—Mother's share on partition between sons—Mere severance of interest—Mother's right to share.*

Under the Mitakshara Law, on a partition being made among the sons, a mother is entitled to a share equal to that of a son, but only in cases where the property is actually divided by metes and bounds. A mere severance of interest, where no actual division of the property takes place, does not confer on the mother a right to a share (a). **Beti Kuar v. Janki Kuar**, 7 A.L.J. 980.

STANLEY, C.J. and BANERJI, J.

Reference:—(a) 31 Cal. 262 (P.C.), *D.*

(12) *Partition—Severance of interest—agreement to hold property in defined shares—Claim by mother—Reversionary heir brought upon the record as her representative—Mother's right not established—Dismissal of suit.*

Where two brothers agreed between themselves to hold their father's property in defined shares, the property ceased to bear the character of undivided property, although there was no actual partition. A severance of the joint nature of family property took place within the rule laid down in 17 M.I.A. 75 (a).

A died leaving two sons K and G, a daughter L and a widow D. K and G died leaving widows, K dying before G. After the death of G's widow, D sued the widow of K for possession on the ground that the brothers were separate and she inherited the property as G's heir. In the alternative she claimed a third share which she said she was entitled to on partition between K and G. D died pending the suit and the reversionary heir of G and L claimed the property. It was held that K and G were divided brothers. Held also that D had no right to succeed and the reversionary claim was bound to fail. **Jwala Prasad v. Janki Kuar**, 7 A.L.J. 975.

STANLEY, C.J., and BANERJI, J.

Reference:—(a) 17 M.I.A. 75, *R.*

(13) *Oral partition—Partition among co-widows—Registration—Transfer of Property Act.*

Hindu Law—(Continued).**—13 & 14.—Partition—(Continued).**

Partition amongst male members of a Hindu family may, after the Transfer of Property Act, be oral. There is no difference in principle where it is amongst co-widows. **Latchumammal v. Gangammal**, 8 M.L.T. 233.

BENSON and **KRISHNASWAMI AIYER**, JJ.

References:—13 M.L.J. 500, *F.*; 11 M. 304; 22 M. 522, *R.*

(14)—*Effect of admission as to nature of property—Burden of proof.*

In a suit for partition against the father and others, the father contended that there was no nucleus of ancestral property and that the property in dispute was self acquired. Plaintiff filed certain documents containing admissions by the father that a part of his property was ancestral.

Held that the burden is put upon the father to show that particular properties were acquired without the aid of the ancestral property, and that the admissions contained in the above documents were *prima facie* evidence of the existence of ancestral property. **Perumal Naick v. Perumal Naick**, 8 M.L.T. 298.

MILLER and **SANKARAN NAIR**, JJ.

(15) *Conveyance of specific items by one co-parcener—Suit by alienee of other co-parcener for partition of his share in specific items—Maintainability—Incapacity of one member to enforce partial partition—Stranger—Suit by, against members for partial partition—Maintainability.*

When certain items of family properties are conveyed by one of two co-parceners of a Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items (*a*).

A member of an undivided Hindu family cannot enforce a partial partition against the other members of the family.

A stranger purchasing the interest of one or more members of the family in certain items of family property cannot enforce a partition of these items only against the will of the other members, without suing for a general partition of the entire family property. **Ibarama**

Hindu Law—(Continued).**—13 & 14.—Partition—(Concluded).**

Rowthen v. Therumalai Muthuveera Thiruvankatasami Naick, 8 M.L.T. 269 (*F.B.*).

ARNOLD WHITE, C.J., **KRISHNASWAMI AIYAR** and **AYLING**, JJ.

References:—(a) 13 C.W.N. 816; 15 M. 234; 13 M.L.J. 477; 11 B.H.C.R. 75; 25 M. 690 (718); 23 M. 608; 19 M. 267; 5 C. 148 and 4 I.A. 247, *R.*

(16) *Suit family—Division—Status.*

Where two members of a Hindu family became divided so far as their money dealings were concerned, for thirteen years prior to suit resided in separate houses and messed separately, and where the lands belonging to them were not divided by metes and bounds but were cultivated jointly and the produce therefrom were divided equally and the kist due was paid equally, *held* that the parties became divided in status. **Palaniakkal v. Ramana Koundan**, 8 M.L.T. 288.

SANKARAN NAIR and **RAHIM**, JJ.

(17) *Suit for partial partition.*

Except under special circumstances, a suit for partial partition is not maintainable. **Kempa Reddy v. Venkatasami Reddy**, 15 M. C.C.R. 308.

ISMAY, C.J., and **CHANDRASEKHARA AIYAR**, J.

Reference:—25 B. 128, *Followed*.

(18) Mother's share on partition between sons is her Stridhan. See **ARBITRATION**, No. 1, 7 A.L.J. 69.

(19) Suit by one co-parcener against another for possession, whether effects separation. See **GUARDIAN AND MINOR**, No. 3, 23 P.R. 1910.

(20) Suit for partition—Necessary parties—Hindu wife if necessary party—Unknown person and his heirs made parties. See **PARTITION**, No. 8, 11 C.L.J. 580.

(21) True test of partition. See **HINDU LAW (INHERITANCE)**, No. 11, 7 Ind. Cas. 884.

(22) Promissory note—Allocation in partition—Want of endorsement—Right of person to whose share it falls to sue—Effect of partition list. See **PROMISSORY NOTE**, No. 8, 8 Ind. Cas. 33.

—15.—Religious Endowments.

(1) *Mutts—Their origin—Head of a mutt, position of—Trustee or a life-tenant—Income, power to spend—Observations in the course of judgment—Their application—Practice.*

Hindu Law—(Continued).**—15.—Religious Endowments—(Continued).**

Held, the head of a mutt cannot be regarded as a trustee of mutt endowments so as to make him accountable in a Court of Law for his manner of dealing with them, except in so far as it may be shown that any particular endowment was granted to him on trust (a).

(Origin of mutts and their endowments also considered).

Per Benson, O.C.J.—"It cannot be predicted of the head of a mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well-established usage and custom of the institution in respect thereto" (b).

"The general observations made in the course of a judgment must be applied with reference to the facts of the case in connection with which they were made, and also subject to limitations expressed in other parts of the judgment."

Per Wallis, J.—"If property be given to the head of a mutt for the time being for a specific charitable purpose, he will be a trustee for that purpose just as any one else would be in the same circumstances, and if it be the usage to devote any particular mutt property to any particular charitable purpose, that will be sufficient to raise a presumption that the property was granted for that purpose, and that the head of the mutt is a trustee in regard to it (c). But gifts made to the heads of mutts, without any mention of the purposes to which they were to be applied, cannot be considered to have been given upon trust for charitable purposes."

Per Sankaran Nair, J.—"If properties be found to have been entrusted to the head of a mutt for the purpose of carrying out a specified trust, then the Pandarasannadhi can be regarded as a trustee only so far as those properties are concerned, and he is bound to carry out the trusts. But in the absence of such proof, the properties of the mutt consisting of the gifts, purchase, etc., are not to be held as trust property."

"If a Pandarasannadhi cannot alienate the land and spend the income as he likes, it is not because he holds the property for the benefit of the public or any portion of the public or any other persons, but because the mutt is a

Hindu Law—(Continued).**—15.—Religious Endowments—(Concluded).**

permanent institution of which he is the head; and he has to pass the property to his successor. As to the income after the outlay necessary for the purposes of maintaining the mutt, he cannot be compelled by law to appropriate the surplus for any specific purpose, nor can he be required to spend anything out of it. He may accumulate the surplus and leave it to his successor." **Kailasam Pillai v. Nataraja Thambiran**, 7 M.L.T. 1 (F.B.) = 5 Ind. Cas. 4 = 19 M.L.J. 778.

BENSON, O.C.J., WALLIS and SANKARAN NAIR, JJ.

References:—(a) 11 M.I.A. 405, R.; 2 M. 175; 10 M. 375 and 27 M. 345. R. and *Expt.* (b) 11 M.I.A. 405, R. (c) Tudor's Charitable Trusts, 4th Ed., p. 160; 3 Ifare 131 and 1 H.L.C. 272; 9 Ves. 399; 10 Ves. 321; (1889) A.C. 309 and (1909) 1 Ch. 567, R.

(2) Debutter property—Nature of proof. See DEBUTTER PROPERTY, No. 1, 6 Ind. Cas. 26.

—16.—(Residence).

(1) *Maintenance—Widow—Husband leaving several houses—One house attached in execution of decree by creditor—Widow's right of residence in that house—Matters necessary to be proved—Onus of proof.*

Under the Hindu Law, before a widow could claim a right of residence in one of several houses of her husband, that has been attached in execution of a decree by her husband's creditor, she must affirmatively prove that the particular house is the only house belonging to her late husband which is suitable to her as a place of residence, and that none of the other dwelling houses belonging to his estate would meet her reasonable requirements. **Mussamat Rajji Bai v. Jesa Ram**, 102 P.R. 1910 (Civil).

RATTIGAN and WILLIAMS, JJ.

References:—84 P.R. 1888; 39 P.R. 1896, R.

(2) Widow's right of residence—Execution of decree for family debt—No right of widow to claim residence in family house. See HINDU LAW (DEBTS), No. 1, 152 P.W.R. 1909.

—17.—Re-union.

(1) *Re-united member—Status.*

The re-united brothers of a Hindu family are to be regarded as co-parceners with the right of survivorship *inter se*, and not as tenants-in-common.

Hindu Law—(Continued).**—17.—Re-union—(Continued).**

The son of a re-united brother would also have the status of a re-united member with his uncle. *Kelstraya v. Venkataramayya and others*, 19 M.L.J. 723.

SUBRAMANIA AIYAR, OFF. C.J. and
BENSON and BHASHYAM AIYANGAR,
JJ.

Reference :—19 C. 634, F.

(2) *Hindu Law—Partition—Minor brothers living with eldest brother of age—Re-union, evidence of—Junction of estate—Agreement to re-unite on behalf of minor, if valid.*

A partition of family property took place between three uterine and three step-brothers, and the property was divided into six different shares. Two of the uterine brothers were at that time infants, and they continued to live with their eldest brother. After some time he died, and his son, the plaintiff, continued to live with his two uncles. Afterwards the uncles died and the plaintiff claimed, title to their shares as their nearest relation, on the ground that, after the partition, there had been a re-union amongst the three uterine brothers, and that the plaintiff is entitled to succeed by survivorship as a member of that joint family in preference to the step-brothers.

Held, that, according to the Hindu Law, mere living together at one residence or carrying on a joint trade does not constitute a re-union after partition, but there must be a junction of estate.

Held, also, that an agreement to re-unite cannot be made on behalf of a person during his minority, and that, therefore, the mere fact that the two minor brothers lived with their eldest brothers would not, in itself, be sufficient to indicate an intention or agreement to re-unite (b).

Held, therefore, that the suit must fail. *Rashi Mendli v. Sundar Mendli*, 6 Ind. Cas. 441.

BRETT and SHARFUDDIN, JJ.

References :—(a) 7 W.R. 35, F. (b) 30 C. 725, (P. C.) ; 7 C.W.N. 642, F.

(3) *Re-union—Minor.*

A re-union to which a minor is a party is invalid, inasmuch as he is incapable of giving a valid consent thereto. *Lakkanna v. Basaya*, 15 M.C.C.R. 96.

NANJUNDAYYA and KRISHNA RAO, JJ.

Hindu Law—(Continued).**—17.—Re-union—(Concluded).**

(4) *Presumption as to re-union.* See HINDU LAW (PARTITION), No 10, 6 Ind. Cas. 795.

(5) *Hindu Khetris—Separation—Presumption of re-union.* See PARTNERSHIP, No 8, 142 P.W.R. 1910.

—18.—Reversioners.

(1) *Hindu widow—Sale to next reversioner of a portion of property—Validity—Conveyance of whole estate to reversioner in consideration of latter conveying back half absolutely—Validity.*

A Hindu widow can transfer by sale a portion of the property left to her to the then reversioner so as to confer on the latter an absolute estate in such portion (a).

Where it was alleged that a lady possessing the limited estate of a Hindu daughter sold the properties to the then reversioner, on the latter agreeing by way of consideration to convey half of the properties back absolutely to the lady, and that in pursuance of the agreement the reversioner re-conveyed half the properties to the lady ; *held*, that the conveyances must be shown to have formed parts of one and the same transaction to be open to attack on that ground (b). *Kanuram Deb v. Kashi Chandra Sharma Chowdur*, 14 C.W.N. 226 = 2 Ind. Cas. 660.

COXE and CHATTERJEE, JJ.

References :—(a) 22 C. 354 ; 10 C. 1102 and 19 C. 236, R.

(2) *Reversioner—Suit to set aside alienation by a widow—Burden of proof—Plaintiff to prove that he was the nearest one at widow's death—Pleadings—Insufficiency of evidence—Second Appeal, power to allow fresh evidence to be given—Sparingly used—Practice.*

A Hindu reversioner, suing to set aside an alienation made by a widow, must prove, not merely that he was a possible reversioner, but that he was one of the persons entitled to succeed as the nearest surviving reversioner at the time of the widow's death. If any nearer reversioner was alive at the death of the male owner he must be proved to have died at the time of the widow's death.

The power of permitting the production of fresh evidence is one which the High Court is bound, when sitting in second appeal, to use very sparingly, and only when it can be shown that the party, in whose favour the exercise

Hindu Law—(Continued).**—18.—Reversioners—(Concluded).**

of such power is invoked, has been misled by the action of the other parties to the case, or by some mistake on the part of the Court below, or by some other cause independent of any error on his own part. **Bhola Pandey v. Chandl Pandey**, 5 Ind. Cas. 666.

PIGGOTT, J.

(3) Daughter succeeding to father's estate—Performance of father's *shrad*—Gift on occasion of *shrad*—Whether can be impeached by reversioners. See HINDU LAW (ALIENATION), No. 9, 6 Ind. Cas. 240.

(4) Suit by reversioner against different transferees from Hindu widow—Misjoinder—Successive trial of issues. See MISJOINDER, No. 4, 6 Ind. Cas. 577.

(5) Agreement to hold property in defined shares—Severance of interest—Claim by mother—Reversionary heir brought upon the record as her representative—Mother's right not established—Dismissal of suit. See HINDU LAW (PARTITION), No. 12, 7 A.L.J. 975.

(6) Daughter's rights—Reversioners—Possession of intermediate female heirs—Limitation. See HINDU LAW (INHERITANCE), No. 9, 15 M.C.C.R. 99.

—19.—Self-acquisition.

(1) *Hindu Law—Joint family—A co-parcener acquiring a portion of the property with his own earnings—Self-acquisition.*

Certain family property was allotted to one branch of the family in virtue of a compromise. It was subsequently re-purchased by a member of another branch of the family, with his own money and without any detriment to the family funds. The latter did not intend by the purchase to merge the property in the joint property, and excluded other members from it.

Held, that the property became the self-acquisition of the acquirer and was not liable to division with other members, subject to a right of retaining a quarter share extra to the acquirer. **Bajaba Bajirao v. Trimbak Vishyanath**, 11 Bom. L.R. 1122=34 B. 106.

SCOTT, C.J. and BATCHELOR, J.

(2) *Hindu Law—Mitakshara—Partition—Joint family property—Gains of science—Astrology—Earnings made by unaided efforts without detriment to the family property—Not divisible.*

Where, in a joint Hindu family governed by the *Mitakshara*, it appeared that the plaintiff obtained, his elementary education in

Hindu Law—(Continued).**—19.—Self-acquisition—(Concluded).**

astrology from his father, but no money of the family was expended in that education, and that the plaintiff acquired the confidence of the public as an astrologer, and by his unaided efforts was able to amass a considerable sum of money without detriment to the family property, *held*, that this money was his self-acquisition and could not properly be regarded as belonging to the joint family.

Katyayana's definition of "acquisition through learning which is not participable" cited in the *Mitakshara* (I. 48) is not exhaustive but illustrative merely. **Durga Dat Joshi v. Ganesh Dat Joshi**, 7 A.L.J. 216=5 Ind. Cas. 400.

STANLEY, C.J. and BANERJI, J.

References :—20 All. 435 and 1 M. 252 (P.C.), *It.*

(3) Power of a Hindu over self-acquired property. See PARTNERSHIP, No. 8, 142 P. W.R. 1910.

—20.—Stridhan.

(1) *Stridhan—Property acquired by adverse possession—Code of Civil Procedure (Act XIV of 1882), S. 43.*

Property acquired by a female by adverse possession is her *Stridhan* and, as such, passes to her legal heirs (*a*).

A Hindu reversioner, during the life-time of the female in possession of some property, sued to have a deed of gift in respect of part of the property set aside. *Held* that a subsequent suit by him, after that female's death, for recovery of the possession of the property, was not barred by S. 43 of Act XIV of 1882. **Kanhari Ram v. Amri**, 7 A.L.J. 153=5 Ind. Cas. 207=71 A. 189.

STANLEY, C.J. and BANERJI, J.

Reference :—(a) 5 I.A. 1, F.

(2) *Succession to stridhanam of a woman dying without issue—Husband when preferential heir—General presumption as to the form of a Hindu marriage—Practice—Question of mixed law and fact, whether can be raised in second appeal—Review of judgment—Mistaken admission on a point of law, when constitutes a ground.*

Under the *Mitakshara* law, if a marriage has been performed in one of the approved forms, and if a woman dies leaving no issue behind

Hindu Law—(Continued).**—20.—Stridhan—(Concluded).**

her, her husband is the preferential heir to property inherited by her from her father, coming in after her issue, and before her parents and other relatives, but if it has been in the *Asura* form, her sister might be the preferential heir (a).

The general presumption in favour of a Hindu marriage (marriage among Brahmins or Sudras) is that it has been performed in one of the approved forms, until the contrary is alleged and proved (b).

A party will not be entitled to raise in second appeal what is not a pure question of law, but one of mixed law and fact. A mistaken admission on a point of law may constitute a good ground for review of judgment, if the mistake is a very gross and obvious one. **Govind v. Dawalat**, 6 N.L.R. 3=5 Ind. Cas. 426.

SKINNER, A.J.C.

References:—(a) 17 B. 758, *F.* (b) 11 Bom. L.R. 709 (716); 39 P.R. 1900; 25 C. 354 and 4 N.L.R. 31 (36), *R.*; and 8 P.H.C.R. 244, *D.*

(3) Mayukha—Stridhan—Anvadhya Stridhan—Succession.

Under the Law of Mayukha, when a Hindu woman dies possessed of Stridhan property called *anvadhya* (a gift subsequent to marriage) and the claimants to that property are her sons and daughters, these all become entitled to share the property equally as heirs, with this difference, however, as to daughters, that the unmarried have preference over the married. **Dayaldas Laldas v. Savitribai**, 12 Bom. L.R. 396=6 Ind. Cas. 530=34 B. 385.

SCOTT, C.J., CHANDAVARKAR and BATHCHELOR, J.J.

References:—9 Bom. 126; 3 Bom. L.R. 201, *F.*

(4) **Stridhan—Succession—Un-married daughters.** See CONSTRUCTION (OF DEEDS), No. 1, 37 C. 362.

(5) **Daughters—Property inherited from father—Stridhan—Survivorship.** See HINDU LAW (INHERITANCE), No. 3, 12 Bom. L.R. 487.

(6) **Ayantaka Stridhan—Succession.** See HINDU LAW (SUCCESSION), No. 11, 6 Ind. Cas. 534.

(7) **Kamatis of Bombay—Anvadhya Stridhan—Succession.** See HINDU LAW (INHERITANCE), No. 5, 12 Bom. L.R. 545.

Hindu Law—(Continued).**—21.—Succession.**

(1) **Sanyasi, property left by—Succession—Dasnami sanyasis—Chela's right to succeed—Biraja Home ceremony, if essential to valid appointment of chela—How and at what age performed—Period of probation—Mulmantras—"Yati," Mohunt if—Nomination of chela as successor or election by neighbouring Mohunts, if indispensable—Subordinate muth, if must be governed by rules of parent muth—Lapse of Mohunt's property on death to monastery, custom of—Proof—Champerty, transaction when void for—Void or voidable—Question of inadequacy of consideration or untrue recital if may be raised by stranger—Agreement with champertor not to compromise suit, if enforceable.**

A transfer by a person of a share of his claim with respect to property of which he is not in possession is valid and operative.

An agreement between the transferor and the transferee that it shall not be competent to the former to confess judgment in favour of the defendant or to enter into compromise or withdraw the claim in respect of the whole or any part of the subject-matter of the suit instituted for the recovery of the property is valid and should be given effect to.

In such a suit, if the transferor wants to withdraw, he may be permitted to do so, but the suit may proceed at the instance of the transferee.

Although the English Law of champerty does not apply in India, champerty or maintenance to be open to objection must have the qualities attributed to it by the English law, i.e., it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive is in the same sense necessary. To determine that, it is necessary to look at the substance and not merely the language of the instrument (b).

The test to be applied is whether the transaction is merely the acquisition of an interest in the subject of the litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or litigation, disturbing the peace of families and carried on from a corrupt or improper motive (c).

Hindu Law—(Continued).**—21.—Succession—(Continued).**

A fair agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered, ought not to be regarded as *per se* opposed to public policy. But agreements of this kind ought to be carefully watched (*d*).

The inadequacy or untrue recital of the consideration is a question between the assignor and the assignee, and would not of itself be sufficient to invalidate the transaction (*e*).

Held, on the evidence that according to the custom of the *dasnami* sanyasis, every aspirant for entrance into the order has to pass through a period of probation which may extend to months or even years and during which period it is open to the chela to revert to his natural family. It is not till the performance of the final ceremony of the Biraja Home, that the aspirant is irrevocably attached to the sect and completely severed from his family. It is, therefore, essential to entitle a chela to claim by inheritance the estate of his guru that the Biraja Home should have been duly performed.

It is not usual to whisper the mulmuntras into the ears of the novice at the time of the first initiation when it is still uncertain whether he will or will not return to the enjoyments of worldly life, though some mantras may be recited on such an occasion.

Quere,—whether the Biraja Home ceremony can be performed when the chela is under sixteen years of age: but unquestionably the rule is that the chela must have reached years of discretion so as to be able to realise for himself the full significance of the final Act of the renunciation of the world (*f*).

The chela of a Mohunt cannot claim to be the latter's heir under the rule which allows a "virtuous pupil" to succeed to a "Yati."

The ordinary rule is that among the sanyasis generally no chela has right as such to succeed to the property of his deceased guru; he must be nominated by his guru, such nomination being generally confirmed by the Mohunts of the order, or in default of such appointment, he must be elected by the Mohunts and principal persons of the sect in the neighbourhood.

But this is not a universal rule, and in some cases, according to custom, the principal chela succeeds as of right, even without such appointment of formal election; but apparently an

Hindu Law—(Continued).**—21.—Succession—(Continued).**

election or recognition by members of the sect is necessary (*g*).

When one muth is the offshoot of another, there is no fixed rule which regulates the relation between the two, and it cannot be said that the subordinate muth necessarily follows the customs of the parent one (*h*).

In order to establish a custom that on the death of the Mohunt his properties lapse to the muth and devolve on the spiritual head thereof, it is necessary to show, not only that in some instances the properties had so passed to the spiritual head, but also that this had taken place in the presence of a chela who would otherwise have been competent to take by inheritance. **Gossain Ramdhan Puri v. Gossain Dalmir Puri**, 14 C.W.N. 191 = 2 Ind. Cas. 385.

MOOKERJEE and CARNDUFF, JJ.

(2) Inheritance—Unchaste mother—Succession to son's property.

A Hindu mother, who has become unchaste after her husband's death, does not thereby lose her right to succeed to the property of her son. **Dal Singh v. Dini**, 7 A.L.J. 90 = 32 A. 155 = 5 Ind. Cas. 521.

KNOX and KARAMAT HUSSAIN, JJ.

(3) Custom, Khatri of Satgara town, Montgomery district—Burden of proof—Wajib-ul-arz—Riwaji-i-am—Entries in.

Held, that the parties to the suit, High caste non-agriculturist Khatri of Satgara town in Montgomery district, were, in matters of succession, bound by Hindu Law, and not by custom, and that the fact of record of custom in the *Wajib-ul-arz* of the village and the *Riwaji-i-am* was not sufficient to apply custom to the present case.

Held, also, that the case was not affected by the admission of applicability of custom made by one of the female parties to the case on a previous occasion. **Ganpat Rai v. Kesho Ram**, 181 P.L.R. 1908 = 34 P.R. 1909 = 169 P.W.R. 1908.

ROBERTSON and RATTIGAN, JJ.

(4) Hindu widows in Berar—Right to inherit—Special text—Widows postponed to males gotraja sapindas of same line named in text—Great-grandson of great-grandfather preferred to widow of son of great-grandfather.

Hindu Law—(Continued).**—21.—Succession—(Continued).**

Under the Mitakshara law, as interpreted and followed in western India, widows of *got-raja sapindas* in Berar are admitted as heirs, even though not named by any special text (a).

The widow is, however, postponed to male *gotraja sapindas* in the same line as herself, who are expressly named or whose case is provided for in the text (b).

So, in view of the order of succession as postulated in *placitum* 5 of S. 5, Chapter II of the Mitakshara, a great-grandson of the great grandfather, as one specially provided for, must come before the widow of a son of the great-grand father (c). **Bajana v. Dinkar**, 6 N.L.R. 39.

BIBIN KRISHNA BOSE, A.J.C.

References :—(a) 2 B. 388 (444) and 5 B. 110 (124 and 126) (P.C.), R. (b) West and Buhler's Digest, 3rd Ed. 132; (c) 16 B. 716; 9 Bom. L.R. 1149 and 19 B. 707, R.

(15) *Mitakshara school—Succession—Bhandus—Mother's sister's son and maternal uncle's son—Preference.*

Under the Mitakshara law, the mother's sister's son of a deceased Hindu should be preferred to the maternal uncle's son, as the text of *Vridha Satatapa* and *Smritis* have named the mother's sister's son before the maternal uncle's son and effect should be given to the order in which persons and things are named, unless the sense requires a different order.

The three classes of Bandhus, *Atma Bhandus*, *Pitri Bhandus*, and *Matri Bhandus*, succeed in the order in which they are named (a).

The Mitakshara pays no attention to the theory of funeral oblations (b), as it is expressly stated "wherever the term *sapinda* is used, there, directly or mediately connection with parts of one body is to be understood."

Though the Privy Council and the Madras High Court have occasionally adverted to considerations of the religious efficacy of oblations as a factor in determining the relative priority of competing claimants to succession (c), the distinct pronouncement of the Mitakshara as to propinquity being the sole test of succession, and the express statement of the order contained in the *Smriti Chandrika* and the *Saraswati Vilasa*, must be given effect to.

Hindu Law—(Continued).**—21.—Succession—(Continued).**

Whatever might have been the reason for naming only certain of the Bandhus, there can be no implication that they have all priority over others unnamed in the texts (d). **Appandal Yathiyar v. Baguball Mudaliar**, 7 M.L.T. 203 = 5 Ind. Cas. 280 = 20 M.L.J. 275.

SIR ARNOLD WHITE, C.J. and KRISHNASWAMY IYER J.

References :—(a) 16 M. 23; 19 M. 405, R. (b) 5 B. 110 (118, 121) (P.C.); 10 A. 223 (224, 226), R. (c) 13 M.I.A. 373 (392), R.; 16 M. 23 (30); 20 M. 342, 348: N.F.; 30 M. 406, R. (d) 22 W.R. 264; 5 B. 597, R.

(6) *Illegitimate son—Shudras—Collateral succession—Mitakshara—Limitation Act (XV of 1877), Art. 120—Suit by reversioners—Patilki Vatan—Suit for declaration.*

Among Shudras, governed by the Mitakshara, an illegitimate son is not entitled to succeed collaterally in the family of his father.

G, the holder of Patilki Vatan, died in 1893. He left him surviving his widow R. In 1899, the defendant, representing himself as the heir of G, got his name entered in the Collector's books as the next Vatandar. R died in 1903. The plaintiffs, the heirs of G, filed a suit in 1906, praying for a declaration that they were the heirs to the Vatan, and not the defendant. The lower Courts held that the claim was not barred under Art. 120 of the Limitation Act, 1887.—

Held, confirming the decree, that the plaintiff's right to sue for a declaration would not accrue until R's death, whose existence at any time between G's death and her own would have defeated the suit for a declaration by the plaintiffs, on the ground that she had a vested right as the nearest heir of the last Vatandar. **Ravji Mahadu Patil v. Shakuji Kaloji**, 12 Bom. L.R. 204 = 5 Ind. Cas. 964.

SCOTT, C.J. and BATCHELOR, J.

(7) *Succession to the management of a religious endowment as shikait—Usage of the institution—Ballavacharya Gosains.*

Where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs.

Hindu Law—(Continued),**—21.—Succession—(Continued).**

Semble.—Where the question as to succession to endowed property arises between rival claimants to the shebaitship, against another who is already in possession and capable of performing the functions of the office, not between the heirs of the dedicator, this ordinary rule of Hindu Law does not apply. **Mohan Lalji v. Madhusudan Lala**, 7 A.L.J. 430 = 6 Ind. Cas. 77.

RICHARDS and TUDBALL, JJ.

(8) *Succession to the property of a son of a re-united member—Survivorship.*

The contest was as to the succession to the son of a re-united member of the family, the widow claiming on the one hand, and, on the other, the brother of her husband's father, re-union having been effected between the brothers before the birth of the deceased.

Held, that the brother takes the property by survivorship.

Succession in a re-united family, governed by the Mitakshara law, is by survivorship, and the son of a re-united member is "reunited." **Samudrala Varaha Narasimha Charlu v. Samudrala Venkata Singaramma**, 6 M.L.T. 266 = 33 M. 165 = 3 Ind. Cas. 741.

WALLIS and MILLER, JJ.

References:—A.S. 70 of 1901, *F.*; 16 M. 440, *D.*; 10 M.L.A. 403, 406; 17 C. 33 (35), *R.*

(9) *Succession—Stridhan—Sister's daughter, whether heir—Ranjani prostitutes—Adoption of dancing girl—Custom—Immoral practices—Training of a girl as a prostitute—Nochi, meaning of—Oral will—Proof—Burden of proof.*

A sister's daughter is not heir to the *stridhan* of a Hindu female; still less can an illegitimate daughter of the sister of a deceased prostitute succeed to her estate as her heir.

Amongst prostitutes of *Ranjani* class, there is no custom as to the adoption of a girl in the absence of an issue.

A practice under which a prostitute, who has no daughter, may obtain a girl either from a member of her own caste or from outside, train her up as a prostitute, and leave her to succeed to her property, is an immoral practice.

A *nochi* is a girl whom a prostitute keeps and trains up with a view to her becoming a prostitute.

In the case of an oral Will, the *onus* lies very heavily on the person setting up the Will,

Hindu Law—(Continued).**—21.—Succession—(Continued).**

to prove not only the *fatum* of Will, but the very words used by testator. **The Secretary of State for India in Council v. Mussammat Shaman Tawalf**, 6 Ind. Cas. 210.

RICHARDS and TUDBALL, JJ.

(10) *Mitakshara School—Jibban Thakurs—Step-brother if may succeed equally with brother of whole blood—Special family custom contrary to Mitakshara—Proof—Wajib-ul-arz, entries in—Value as evidence of custom.*

Under the Mitakshara law, a brother of the whole blood is entitled to succeed to the estate of a deceased brother in preference to a step-brother, and, in the absence of evidence sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara law prevailed, the claim of the step-brother to an equal share was properly rejected.

There is no class of evidence which is more likely to vary in value according to circumstances than that of *Wajib-ul-arzes* (a).

Where, from internal evidence, it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing, rather than the ascertained fact of a well established custom.

Held—That the Court in India had properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. **Thakur Anant Singh v. Thakur Durga Singh**, 14 C. W.N. 770 (P.C.) = 7 A.L.J. 701 = 32 A. 363 = 12 C.L.J. 36 = 7 Bom. L.R. 504 = 8 M.L.T. 79 = 6 Ind. Cas. 787 = 20 M.L.J. 604 = 13 O.C. 163.

LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

References:—(a) 25 I.A. 161, 169; S.C. 2 C. W.N. 737 (1898); 36 I.A. 125; S.C. 13 C.W.N. 1073 (1909), *F.*

(11) *Dayabhaga—Succession—Ayautuka stridhan—Childless widow, property of—Step-brother—Husband's younger brother—Preference.*

Under the Dayabhaga Law, the younger brother of the husband of a childless widow is entitled to succeed to her *Ayautuka stridhan* property in preference to her step-brother. **Debi Prasanna Rai Chowdhury v. Harendra Nath Ghosh**, 6 Ind. Cas. 534.

MOOKERJEE and CARNDUFF, JJ.

Hindu Law—(Continued).**—21.—Succession—(Concluded).**

- (12) *Succession—Illegitimate son whether excluded by the widow.*

Under the Mitakshara system of Hindu Law, a widow neither excludes nor is she excluded by the illegitimate son of the last male owner. Each takes half of the estate where the last owner died leaving them alone and no legitimate issue. **Meenakshi Anni v. Appakutti**, 4 Ind. Cas. 209=7 M.L.T. 26=20 M.L.J. 359.

BENSON, C.J. and KRISHNASWAMY AYER, J.

References: —15 M. 307; 8 M. 557; 25 M. 419 at p. 521; 14 B. 282; 23 B. 257 at p. 265, R.; 10 M. 334; and Regular Appeal No. 86 of 1865, not Appr.

(12-a) *Succession to occupancy holding—Poor and rich daughters—Preference.* See ACT II of 1901 (AGRA TENANCY), No. 5, 7 A.L.J. 293.

(13) *Tarkhans of Amritsar city—Succession.* See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 9, 27 P.W.R. 1910.

(14) *Stridhan—Succession—Unmarried daughters.* See CONSTRUCTION (OF DEEDS), No. 1, 37 C. 362.

(15) *Effect of change of tenure on law of Succession.* See ACT V of 1882 (BHAGDARI), No. 1, 12 Bom. L.R. 573.

(16) *Succession to the Gadi of Mahant—Custom—Evidence—Burden of proof.* See RELIGIOUS ENDOWMENTS, No. 4, 6 Ind. Cas. 709.

—22.—Widow.

- (1) *Widow's estate—Gift—Consent of nearer reversioners—Suit by remote reversioners—Maintainability of.*

A gift by a Hindu widow, who succeeded to the separate estate of her deceased husband, of such estate, is not valid and does not create a title which cannot be impeached by the remote reversioner because it has been made with the consent of nearer reversioners. **Baktawar v. Bhagwana**, 7 A.L.J. 121=5 Ind. Cas. 270=32 A. 176.

STANLEY, C.J. and BANERJI, J.

References: —6 All. 116 (F.B.), F.; 30 All. I. P.C., D.

- (2) *Widow, alienation by—Reversioner's suit to set aside—Maintainability, when daughter is alive.*

In a suit by a reversioner to set aside alienations by a widow, the District Judge held the

Hindu Law—(Continued).**—22.—Widow—(Continued).**

plaintiff cannot maintain the suit, because the daughter (second defendant) was entitled to succeed after the widow's death in preference to plaintiff, and there was no collusion between the widow and the daughter.

Held that the suit was maintainable, as the nearer heir is a female and, as such, is entitled only to a limited estate. **Chidambara Reddiar v. Nallammal**, 7 M.L.T. 44=5 Ind. Cas. 161.

BENSON and RAHIM, JJ.

References: —6 C. 764, D.; 15 M. 422; 32 C. 62 (65), F.; 29 M. 390 (F.B.), D.

- (3) *Unsecured debts of the widow—Liability of reversioners to pay.*

Under the Hindu Law, an unsecured debt contracted by the widow is binding on the reversioners, if the creditor lends, for the necessary purposes of the estate, to the widow, as the representative of the estate.

No distinction can be drawn between the above case and the case where a charge is formally created on the estate. **Regulla Jogayya v. Ninushakami Venkatarathnamma**, 7 M.L.T. 112=5 Ind. Cas. 271.

MILLER and SANKARAN NAIR, JJ.

Reference: —1 M. 375, R.

- (1) *Hindu Law—Alienation—Alienation by widow—Necessity for alienation—Consent of reversioners to alienation—Rule applies to transactions for consideration, not to gifts—Rule does not apply to partial relinquishment by widow.*

The general principle, which prohibits a Hindu widow's alienations of immoveable property otherwise than for legal necessity, is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained (a).

The consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for a justifying cause, that is, for legal necessity (b).

The operation of the principle must, therefore, ordinarily be limited to transfers for consideration, and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for legal necessity.

The principle further does not apply to cases where the widow has made only a partial relinquishment of the estate. **Pitu Appa Nalwade v.**

Hindu Law—(Continued).**—22.—Widow—(Continued).**

Babaji Naru Mang, 11 Bom. L.R. 1291 = 34 B. 165.

SCOTT, C.J., and BATCHELOR, J.

References :—(a) (1907) 9 Bom. L.R. 1348, F. (b) (1900) 2 Bom. L.R. 820 = I.L.R. 25 Bom. 129, F.

- (5) *Widow's estate—Power of alienation—Gift of house to daughter at her Dviragaman or gowna ceremony—Ceremony connected with marriage but not essential to it—Deferred dowry—Reasonableness of gift—Pctent.*

The *dviragaman* ceremony (called *gowna* in Behar) is treated in works of authority as a ceremony of importance closely connected with marriage, though it cannot be suggested that a marriage ceremony is incomplete without it.

It is competent to a Hindu widow, governed by the Mitakshara law, to make a valid gift of a reasonable portion of the immoveable property of her husband, to her daughter, on the occasion of the daughter's *dviragaman* ceremony, and such gift is binding on the reversionary heirs of the husband.

Gifts made at the time of *dviragaman* ceremony may rightly be regarded as dowry deferred, and there is no substantial difference between such gifts and gifts made at the time of the marriage before the nuptial fire or when the bride is conducted from her father's house to her husband's.

The question, what portion it is reasonable to give to a daughter on the occasion of her marriage, has to be determined with reference to what would have been the share of the unmarried daughter, under the rules laid down in the Mitakshara, Chap. I, S. 7, paras. 5 to 14. **Churaman Sahu v. Gopi Sahu**, 13 C.W.N. 994 = 1 Ind. Cas. 945 = 10 C.L.J. 545 = 37 C. 1.

MOOKERJEE and CARNDUFF, JJ.

- (6) *Widow—Compromise—Relinquishment of right to execute decree, whether alienation—Suit to declare alienation inoperative beyond widow's lifetime—Limitation.*

Under a deed of compromise, executed on 2nd July, 1882, the first defendant's father was to give certain immoveable properties to M, the mother of the plaintiff and to the plaintiff, then a minor, and pay Rs. 2,500 annually to M and a lump sum of Rs. 57,000, to M and the plaintiff. On their part, M, the plaintiff, and their heirs were to relinquish all their rights under the decree in O.S. No. 5 of 1876. The

Hindu Law—(Continued).**—22.—Widow—(Continued).**

deed stated that M relinquished, on her own behalf and on behalf of her minor son, all rights and interest in the decree in O.S. No. 5 of 1876. She also certified satisfaction of the decree, while the 1st defendant withdrew the appeal preferred by him against that decree to the Privy Council. Plaintiff filed the present suit in 1903 and prayed *inter alia* for a declaration that the alienation was invalid and inoperative beyond M's lifetime, and for partition and recovery of a third share in the Zamindari.

Held, that there was no alienation by M of one third of the Zamindari. The effect of the compromise briefly is that for a consideration M agreed not to press her disputed claim to execute the decree and recover the property (a).

There was no admission of her right, no title derived from her, and the suit is barred by limitation. A compromise by a widow does not bind her reversioners, and property transferred thereunder does not amount to alienation by her. And possession by the transferee is not adverse to the widow. **Kambinayani Javvaji Timaji Amma Garu v. Kambinayani Javvaje Subbarayaji Nayanivaru**, 7 M.L.T. 340 = 20 M.L.J. 204.

MILLER and MUNRO, JJ.

References :—(a) 10 C.L.R. 337, *Disappr.*; 3 Beng.L.R. 362; 5 A. 532; 17 W.R. 12, *approved*; 6 C.L.R. 76, R.; 8 A. 365, *Expl.*

- (7) *Alienation by widow—Legal debt—Payment of exact amount of debt—Sale for more than that amount—Setting aside sale.*

A sale by a Hindu widow cannot be set aside upon payment of the amount which it was necessary for the widow to raise to pay off a legal debt, simply because the property sold was not sold for a sum which exactly covered that debt. **Felaram Roy v. Bagalanand Banerjee**, 6 Ind. Cas. 207 = 14 C.W.N. 895.

BRETT and SHARFUDDIN, JJ.

References :—1 B.L.R. 201; 9 W.R. 284, F.; 11 C.W.N. 474. (P.C.); 29 A. 331; 5 C.L.J. 344; 4 A.L.J. 232; 2 M.L.T. 145; 17 M.L.J. 233; 9 Bom. L.R. 591; 10 O.C. 117, D.

- (8) *Hindu widow, alienation by, without legal necessity—One suit to have several alienations declared invalid—Misjoinder of causes of action, if ground of appeal—Civil Procedure Code (Act XIV of 1882), S. 578—Civil Procedure Code (Act V of 1908), S. 99.*

Hindu Law—(Continued).**—22.—Widow—(Continued).**

The reversioner to a certain estate brought a suit for a declaration that the alienations made by the Hindu widow who held the estate were invalid. There were two sets of defendants. The first Court decreed the suit and on appeal by one set of defendants, the lower appellate Court dismissed the suit on the ground of misjoinder of several causes of action and of parties.

Held, that there was no misjoinder, and that, even if there was any, the defect was amply covered by S. 578, Civ. Pro. Code. 1882, which has the effect of preventing the defect from being made a ground of appeal. **Provabati Debi v. Rameswar Mandal**, 6 Ind. Cas. 248.

BRETT and SHARFUDDIN, JJ.

References:—36 C. 780; 3 Ind. Cas. 382; 13 C.W.N. 920; 10 C.L.J. 58; 6 A.L.J. 567; 5 M. L.T. 423; 11 Bom. L.R. 833; 19 M.L.J. 518; 93 P.R. 1909; 36 I.A. 103, F.

(9) *Widow's estate—Gift by a female to a daughter—Right of daughter's heir—Acceleration of estate.*

One N died, leaving a widow, the defendant, and a daughter Durga. The defendant made a gift of her husband's property in favour of her daughter. Durga died, leaving her husband as her heir. On a suit being brought by the husband, *held* that the effect of a gift by a Hindu widow, of the property left by her husband, in favour of her daughter, was to accelerate the daughter's estate, and amounted to relinquishment of the widow's right, and therefore the personal heir of the daughter could not maintain a suit for possession for the term of the widow's life (a).

Per Richards, J.—When a Hindu widow makes an alienation in favour of a stranger, the alienation holds good during her life-time. There is no reason why a gift in favour of the daughter should not be governed by the same principle. The case of relinquishment, however, stood on different principles. His Lordship doubted whether the gift was ever given effect to. **Rup Ram v. Rewati**, 7 A.L.J. 645 = 6 Ind. Cas. 541.

RICHARDS and TUDBALL, JJ.

Reference:—(a) 11 A. 253, R.

(10) *Widow—Saving income—Debt for religious purpose—Debt for acquiring property—Legal necessity—Purchase of property*

Hindu Law—(Continued).**—22.—Widow—(Continued).**

from income of estate—Presumption that purchased property is accretion to estate—Intention to sever purchase from estate—Widow's power of alienation over self-acquired property—Burden of proof.

A Hindu widow is not entitled to save the income of her husband's estate for her own benefit and at the same time incur debts chargeable on the estate for charitable and religious purpose.

A Hindu widow is not entitled to incur debt on the security of her husband's estate, in order to add to his property or to acquire property for her own benefit.

Where immoveable property is acquired by a Hindu widow out of the income obtained from her husband's estate, and there is no proof of any intention to sever the purchase from the estate, the presumption is that the lands acquired are accretions to the estate, and her power of alienating them is limited by legal necessity (a).

It has never been distinctly decided that a Hindu widow has absolute power of alienation over immoveable property acquired out of the income of her husband's estate, even if she does wish to deal with it as a separate estate.

A party who seeks to justify alienation by a Hindu widow of her self-acquired property must show either legal necessity or that it was the intention of the widow to treat such self-acquired property separately and distinctly from the property inherited. **Ramanand Singh v. Ram Saran Singh**, 7 Ind. Cas. 27.

BRETT and VINCENT, JJ.

References:—(a) 14 B.L.R. 159; 10 C. 324; 13 C.L.R. 418; 10 I.A. 150; 2 I.A. 256; 1 C. 104; 24 W.R. 168; 14 C. 387; 14 I.A. 63, *relied on*; 20 C. 433; 20 I.A. 12, D.

(11) *Widow—Compromise by—When binding on reversioners.*

Where a Hindu widow compromised a claim not binding on the inheritance, and no question of doubt was settled by the compromise.

Held, that the compromise will not be binding on the reversioners (a). **Perammal v. Ramanuja Naicken**, 8 M.L.T. 228.

ARNOLD WHITE, C.J., and KRISHNASWAMI IYER, J.

Reference:—(a) 30 M. 3, D.

(12) *Widow—Money paid for maintenance—Acquisitions made out of—Nature of estate—*

Hindu Law—(Continued).**—22.—Widow—(Continued).**

Suit on purchase from widow's reversioners
—Change of title—Reversioners treated as
heirs—Maintainability.

A plaintiff suing to recover property purchased by him from the reversioners of a widow cannot be allowed to change his case and base his title on a purchase from the same persons as heirs of the widow.

Property purchased by a widow out of money paid to her for maintenance is her absolute property (a). **Pethasari v. Sendamari Ayl**, 8 M.L.T. 284.

BENSON and KRISHNASWAMY IYER, JJ.

Reference:—(a) 28 M. 1, R.

(13) *Right of re-married widow to succeed to her first husband's property—S. 2, Act XV of 1856 (Widow Re-marriage)—Rights of widow and mother compared.*

In this case, the question was whether a widow, who validly re-marries according to her caste custom, continues after such re-marriage to be the wife of her first husband for purposes of inheritance. *Held*, that a woman who takes to herself another husband can scarcely lay claim to the title of a chaste wife *sadhvi* within the meaning of para. 39, S. 1, Ch. II of the *Mitakshara*.

S. 2, Act XV of 1856, enacted that the rights of the widow remarrying in her husband's property, by inheritance to him or to his lineal successors, would upon such remarriage cease as if she had then died. It would frustrate the object of the Legislature to hold that the rights thus lost would revive if, in the fortuitous sequence of events, the succession to the husband again opened out by reason of the next heir after the widow happening to be a female and that female dying in the life-time of the widow.

A widow's connection with the family of her husband is through and by means of her marriage. When that tie is dissolved, the connection is also dissolved and the legal consequences dependent on it can no longer come into existence. A mother stands on an altogether different footing. She succeeds her son because he is part of her body. This connection through body or blood cannot be put an end to by the mother re-marrying. She remains a mother despite re-marriage and succeeds as such

Hindu Law—(Continued).**—22.—Widow—(Continued).**

under S. 3 of Ch. II of the *Mitakshara*.
Laxman v. Gundaji, 6 N.L.R. 103.

BIPIN KRISHNA BOSE, A.J.C.

References:— 16 C.P.L.R. 99; 4 N.L.R. 20 (24); 28 M. 425; 17 B. 114 (118); 24 B. 89 (93); 19 C. 289 (295); 5 C.P.L.R. 85; 26 B. 388; 29 B. 91, R.

(14) *Alienation of life-interest by widow—Declaratory suit by reversioner to set aside alienation—Cause of action—Widow's powers.*

A widow may relinquish her own interest (a).

Where the utmost that a widow relinquished was her life-interest, and her relinquishment of that interest in no way affects the plaintiff's rights as reversioner, the plaintiff has no cause of action for a declaration that the alienation made by her is void except for her life. **Panda Venkamma v. Panda Pattaya**, 8 M.L.T. 320.

MUNRO and ABDUR RAHIM, JJ.

Reference:—(a) 10 C. 324 (332), R.

(14-a) *Alienation by widow not binding on reversioners—Validity of alienation during widowhood—Re-marriage of widow, effect of, on alienor's rights—Hindu Widow's Re-marriage Act (XV of 1856), S. 2.*

An alienation by a Hindu widow, which is not for purposes binding on the reversion, is only good during widow-hood and to the extent of her limited interest as widow. The alienation ceases to be binding on the reversioner on her re-marriage, the widow's life-interest also lapsing on that event. **Muthu Naicken v. Srinivasa Aiyangar**, 8 Ind. Cas. 269.

ABDUR RAHIM and KRISHNASWAMI
 AIYAR, JJ.

References:— 26 M. 143 at p. 155; 12 M.L.J. 197; 8 C.L.J. 542; 33 B. 88; 10 Bom. L.R. 1029; 1 Ind. Cas. 647, R.

(15) *Right of widowed daughter-in-law. See ACT II OF 1901 (AGRA TENANCY), No. 12, 7 A.L.J. 658.*

(16) *Alienation by widow without legal necessity—Acquisition of alienated property under the Land Acquisition Act—Right of reversioners to compensation money. See ACT I OF 1894 (LAND ACQUISITION), No. 10, 11 C.L.J. 533.*

(17) *Widow governed by Mitakshara law—Power to execute will regarding property inherited from father—Claim of devisee—Indian Succession Act, S. 46, Expl. 1—Hindu*

Hindu Law—(Continued).**—22.—Widow—(Concluded).**

Wills Act, S. 3, proviso 2—Whether gives power to Hindu widow to dispose of property by will. See HINDU LAW (WILL), No. 2, 6 N.L.R. 46.

(18) Hindu widow in Berar—Right to inherit. See HINDU LAW (SUCCESSION), No. 4, 6 N.L.R. 39.

(19) Widow's power to alienate husband's property for the benefit of her own soul. See HINDU LAW (ALIENATION), No. 2, 5 Ind. Cas. 283.

(20) Sale by a widow to satisfy her husband's debt barred by limitation, whether valid. See HINDU LAW (ALIENATION), No. 5, 7 M.L.T. 363.

(21) Suit by next reversioner—Appointment of permanent receiver—Gross mismanagement and malversation by widow—Surplus income paid to widow for her life. See RECEIVER, No. 5, 8 M.L.T. 189.

—23.—Will.

(1) *Bequest to trustees for establishment of image and worship of deity after testator's death, if valid.*

Held by the Full Bench.—The rule which requires that, for the validity of a gift, the relinquishment must be in favour of a sentient being, does not apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death. Such disposition is for a religious purpose and is valid under Hindu law (a).

Per Mookerjee, J.—It cannot be assumed that a Hindu deity is a judicial person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being.

In the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that, when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons. According to strict juridical notions, there can be no gift in favour of the Gods. When a dedication is made in favour of the deity, the owner is divested of his rights and the King is the custodian of all such property.

Hindu Law—(Continued).**—23.—Will—(Continued).**

Per Chatterjee, J.—A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality but the same deity, and properties previously vested in the lost or mutilated *Thakoor* becomes vested in the substituted *Thakoor*. **Bhupati Nath Smrititirtha v. Ram Lal Maitra**, 10 C.L.J. 355—3 Ind. Cas. 642=37 C. 128.

SIR LAWRENCE JENKINS, C.J., STEPHEN, MOOKERJEE, COXE and CHATTERJEE, JJ.

References:—(a) 25 C. 405=2 C.W.N. 295; 29 C. 260=6 C.W.N. 267; 30 C. 521=7 C.W.N. 121, *overruled*.

(2) *Hindu widow governed by Mitakshara law—Power to execute will regarding property inherited from her father—Claim of devisee—Stranger found in possession of property on the death of testatrix—Indian Succession Act, S. 46, Expl. I—Hindu Wills Act, S. 3, proviso 2—Whether gives power to Hindu widows to dispose of property by will.*

A Hindu widow governed by Mitakshara law cannot execute a will regarding any property she inherits in the usual course from her husband or her father (a).

So, the claim of a devisee of immoveable property, under the will of a Hindu widow who inherited the property from her father, must fail as against her father's heir or heirs, in whom the testator's right vests at the moment of her death, there being no estate left upon which the will can operate (b); and the devisee will not be entitled to oust a stranger found in possession of the property after the death of the testatrix.

Explanation 1 to S. 46, Indian Succession Act (1865), read with second proviso to S. 3, Hindu Wills Act, does not enable a Hindu widow to dispose by will of any property which she cannot alienate *inter vivos*. **Mukund v. Laxman**, 6 N.L.R. 46=5 Ind. Cas. 752.

DRAKE-BROCKMAN, J.C.

References:—(a) 3 W.R.C.R. 49; 17 B. 690 and 28 B. 453, F.; 25 C. 1; 34 C. 329 and 5 C. 776, R. & D. (b) 5 B. 48 (62), *Appl.*; 8 M.I.A. 529 (553), R. and *appl.*; 8 M. 290, R.; 32 C. 473, R.

Hindu Law—(Continued).**—23.—Will—(Continued).**

- (3) *Bequest to complete a temple and instal an idol—Validity of.*

A bequest for completing and building a temple and subsequent installation and maintenance of an idol is valid under the Hindu Law. **Mohar Singh v. Het Singh**, 7 A.L.J. 296 = 5 Ind. Cas. 584.

RICHARDS and TUDBALL, JJ.

Reference:—14 C.W.N. 18, F.

- (4) *Construction—Bequest in favour of two married daughters—Joint tenancy or tenancy in common.*

A Hindu absolutely bequeathed his property to his two daughters, who were married. One of the daughters died leaving a daughter, and the surviving legatee together with the husband of the deceased, mortgaged part of the property to a third party. *Held*, on a suit by the deceased daughter's daughter, that the two daughters got the property as tenants in common, and not as joint tenants, and on the death of one of them, the heir of the deceased succeeded to her rights, and that the property did not pass by right of survivorship to the other daughter (a). **Gopi v. Jaldhara**, 7 A.L.J. 941.

STANLEY, C.J., and GRIFFIN, J.

Reference:—(a) 23 I.A. 37, 44, F.

- (5) *Will, construction of—Hindu Law—Achariya Purusha, devise by—"Svikara nemanam," meaning of—Adoption—Will recognizing a person as heir, and directing legatee to perform spiritual functions—Devise to a persona designata—Declaration as to invalidity of adoption—Specific Relief Act (I of 1877), S. 42.*

A Hindu testator, who belonged to the class of *Achariya Purushas*, by his last will and testament made a "*Svikara nemanam*" of appellant. The will recited that the appellant was the testator's heir and was to perform the various religious and spiritual duties performed by the executant (who was an *Achariya Purusha*) and receive the honours and emoluments attached to the same:

Held, (1) that, apart from the question of the validity of the "*svikara nemanam*" (adoption) of the appellant, the Will was valid and enforceable as a devise to *persona designata*" (a).

(2) that, by the use of the words "*svikara nemanam*" in the Will, the testator meant to make a nomination subject to all its legal consequences.

Hindu Law—(Concluded).**—23.—Will—(Concluded).**

- (3) that, while passing a decree establishing appellant's rights under the Will, it was discretionary with the Court to make or not a declaration against adoption of the appellant (b). **Yenkatachariar v. Sadagopa Chariar**, 8 Ind. Cas. 517.

WHITE, C.J., and AYLING, J.

References:—(a) 3 I.A. 253; 26 W.R. 91, applied; 12 I.A. 72; 11 C. 463, R. (b) 29 M. 48, D.

- (5-a) Father's power over self-acquired property. See **WILL**, No. 3, 160 P.W.R. 1909.

(6) Construction—Bequest, when void for uncertainty—Expression of general charitable intention—Effect—"Sadavarat"—Direction in a will "to start a sadavarat for the needy"—Effect—Application of principles of English law in construction of will. See **WILL**, No. 6, 3 Sind. L.R. 185.

- (7) Maintenance allowed to widow by will—Effect of her unchastity—Construction of will. See **HINDU LAW (MAINTENANCE)**, No. 2, 12 Bom. L.R. 196.

- (8) Bequest to wife of son when married—whether valid—Present gift—Direction for accumulation. See **MORTGAGE (GENERAL)**, No. 49, 7 Ind. Cas. 921.

Hindu Widow Re-marriage Act.

See **ACT XV OF 1856.**

Hindu Wills Act.

See **ACT XXI, OF 1870.**

Hire and Purchase.

Contract of—Breach of—Damages. See **CONTRACT**, No. 10, 5 L.B.R. 201.

Holding.

Determination of character of—Presumption as to. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 7, 6 Ind. Cas. 362.

Holiday.

- (1) Hearing of case fixed for a date subsequently declared a holiday. See **REVISION**, No. 7, 13 O. C. 341.

Hundis.

- (1) How far provisions of Negotiable Instruments Act applicable to hundis written in oriental language—Presentment of, for payment within reasonable time—Effect of failure—Discharge—"Reasonable time," what is. See **PLEADINGS**, No. 1, 6 N.L.R. 33.

Handis—(Concluded).

(2) See NEGOTIABLE INSTRUMENTS, No. 1, 25 P.W.R. 1910.

(3) See NEGOTIABLE INSTRUMENT.

Husband and Wife.

Fictitious sale by husband in favour of wife—Mortgage-deed by wife attested by husband—Private sale by wife to mortgagee—Subsequent sale in execution of decree against husband—Rights of the two purchasers. See TRANSFER OF PROPERTY ACT, No. 11, 7 A.L.J. 67.

Idol.

(1) Right to require idol to be stopped in front of plaintiff's house. See CIV. PRO. CODE (1862), No. 3-a, 5 Ind. Cas. 76.

(2) Bequest to complete a temple and instal an—Validity. See HINDU LAW (WILL), No. 3, 7 A.L.J. 296.

(3) Suit for removal of—Limitation—Nature of suit. See LIMITATION ACT (1877), No. 48, 7 Ind. Cas. 475.

Ignorantia juris non excusat.

(1) Presumption—Mahomedan Law—Hanafi School. See MAHOMEDAN LAW (MARRIAGE), No. 3, 7 Ind. Cas. 820.

Illness.

Unreasonable expenses incurred on, of life-tenant—Legality. See CUSTOMS (PUNJAB—ALIENATION), No. 10, 71 P.W.R. 1910.

Immoveable property.

(1) Suit for profits of—Jurisdiction. See ACT IX OF 1937 (PROVL. S.C. COURTS), No. 16, 8 Ind. Cas. 270.

Impartible Raj.

Impartible Raj—Properties granted for maintenance as "Hak babuni" with right of reversion to grantor on failure of male issue—Grant under a sapurdnama and a warasatnama executed by last surviving maintenance-holder—Suit for recovery of properties in failure of male issue by the holder of impartible Raj—Genuineness of the deeds.

The Raja of Basti sued for the recovery of possession of a number of villages forming part of his Raj. The Raja rested his case on a custom, by which a portion of the property was given to the brothers of the ruling Raja who are called "Babus," as "Hak Babuni" or maintenance, and by which, on failure of male issues of such brothers, the property reverted to the Raj.

Impartible Raj—(Concluded).

Plaintiff also claimed to be entitled to the properties by virtue of a *Sapurdnama* (deed of assignment) executed by C, a nephew of a former Raja, in favour of the then Ruling Raja, and also by virtue of a *warasatnama* or will executed by the widow of C, in favour of plaintiff's father.

Held that the *sapurdnama* and *warasatnama* were genuine documents, and that the whole of the property in question passed to the plaintiff. **Imdad Ahmed v. Raja Pateshri Partab Narain Singh and another**, 7 M.L.T. 414 (P.C.) : 12 Bom. L.R. 419 : 32 A. 241 : 14 C. W.N. 842.

LORD MACNAGHTEN, LORD COLLINS,
SIR ARTHUR WILSON and MR. AMENN
ALI.

Improvements.

Right to claim value for, when arises—Improvements by life-tenant or purchaser from him. See WILL, No. 9, 6 Ind. Cas. 141.

Inam.

(1) *Inam—Grant of right to collect revenue—Tank, if ownership of, also granted—Enfranchisement of Inam, Effect of—Settlement by Inam Commissioner—Cess paid under fear of distraint, if can be recovered—Rights of Government.*

Where an inam, granted in 1826, of the right to collect the revenue, was enfranchised in 1871 by the Inam Commissioner, and a quit-rent of one-fourth of the average annual income was fixed, after taking into account the second crop charge collected by the *Inamdar* on an average extent of 14 acres of Nanjah and 36 acres of Punjab land ;

held, that this amounted to an engagement by which the Government undertook not to take more than one-fourth of the income derived from the various sources taken into account, one of them being the charge collected from the ryots for irrigation known as *faisal jasti*, *tirva jasti*, on the average area, then chargeable with those payments.

When a man pays an illegal cess under threat, by the officers of Government, that, if it is not paid, it would be collected by distress and sale of his property, the payment is not voluntary, and he can recover the money back, though the threat does not amount to coercion (a).

Inam—(Continued).

Where an Inam is granted of the right to collect the revenue of certain lands covered thereby, what passes by implication is an undertaking on the part of Government not to refuse to ryots (holding *Nanja* lands) that quantity of water necessary to enable them to irrigate those lands and so to pay the revenue, which they had paid before the grant, to Government.

Where there is no proof of any engagement between the Inamdar and the Government, by which the former is entitled to a definite share of the water in a certain tank, the Government has a right, by virtue of Act VIII of 1865, to levy a cess for water supplied for irrigation, over and above what was customarily distributed to the ryots.

A *covle* granting a right to collect the revenue of certain lands does not convey the property in a tank, unless it is expressly stated. **Lutchimee Doss v. Secretary of State**, 6 M. L. T. 242 = 19 M. L. J. 470 = 32 M. 456 = 3 Ind. Cas. 456.

WHITE, C. J., and MILLER, J.

Reference :—(a) 25 M. 548, R.

(1-a) *Inam title-deeds—What is conveyed by—Permissive possession—Limitation.*

Where the defendant's predecessors-in-title obtained Inam title-deeds for the lands in dispute in 1868 and continued in possession ever since 1860 according to the Inam register, and where it was found that the deceased widow of whom the plaintiff is the reversioner held possession till 1903, it was held that the evidence of the widow's continued possession cannot be accepted as a rule without some explanation of the Inam deeds and Inam register. But where it was found that the predecessors-in-title of the defendants were let into possession by the widow some time subsequent to 1949 and did not acquire possession or title under the Inam title-deeds, held, that the Inam title-deeds conveyed nothing to the defendants.

No question of limitation can arise, because the defendants were let into possession by the widow and not by the hostile act of a third party. **Emani Subblah v. Yenkata Lakshmi pathi**, 8 M. L. T. 167 = 7 Ind. Cas. 530.

BENSON and SANKARAN NAIR, JJ.

(2) *Inam—Lands granted for support of mosque—Division and management in shares by Khatibs and Kazi—Alienability by them—Attachability in execution of their debts—Non-joinder—Plea taken for the first time on appeal—Dismissal—Proper course.*

Inam—(Concluded).

Where lands are granted in inam for the support of a mosque, the fact that the Kazi and Khatibs divided the property and managed it in shares cannot make it the property of the managers to be alienated by them at their pleasure. The Inam is inalienable, and the sale in execution of a decree against one of the khatibs cannot be upheld against the mosque (a).

Where non-joinder of certain other Khatibs was raised for the first time in appeal, the proper course which the appellate Judge should have adopted was to order the joinder of the other Khatibs and a fresh trial. **Kaji Mahomed Shrif Sahib v. Eusuff Shrif Sahib**, 7 M. L. T. 349 = 5 Ind. Cas. 455.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) 6 Bom 596 and 15 M. L. J. 10, D.

(3) Inam lands in or outside a Zamindari—Right of Inamdars to eject. See EJECTMENT, No. 1, 7 M. L. T. 365.

(4) Suit for ejectment by inamdar—Right to eject—Onus of proof—Absence of proof or allegation of grant of *kudivaram* right—Presumption. See LANDLORD AND TENANT, No. 27, 20 M. L. J. 526.

(5) See BERAR INAM RULES, No. 1, 6 N. L. R. 72.

(6) Presumption as regards—Burden of proof. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 2-a, 8 M. L. T. 376.

Incorporeal rights.

(1) *Incorporeal rights—Water course—Right not completed by prescription—Trespasser—Possessory suit against—Maintainability.*

If the plaintiff was in possession of land for less than the statutory period, he would be entitled to protect that possession against any one but the true owner. Incorporeal rights are, in many cases, capable of possession just as much as rights to corporeal hereditaments, and the above principle applies to the protection of an incorporeal right, e.g., a right to water course as in the present case, by the person in the enjoyment of the right as against a trespasser. **Kondappa Rajam Naidu v. Dwarakonda Suryanarayana**, 7 M. L. T. 352 = 6 Ind. Cas. 266.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(1851) 5 Ex. Rep. 792 ; (1860) 4 H. & N. 153 ; 5 M. L. J. 24 and 19 A. 153, R.

Indemnity.

Obligation of principal to indemnify agent under Contract Act, S. 222—Obligation not expressed in writing but imposed by law, whether to be treated as in writing. See **PRINCIPAL AND AGENT**, No. 5, 8 M.L.T. 194.

Injunction.**(1) Decree—Form of injunction.**

Where the plaintiffs had the exclusive right to sing or recite, the proper form of decree would be an injunction restraining defendants from interfering with the plaintiffs in their singing and reciting. **K. Seeshadri Aiyangar v. Arayar Srinivasa Charlar**, 7 Ind. Cas. 558.

WALLIS and KRISHNASWAMI AIYAR, JJ.

(1-a) Specific Relief Act (I of 1877), S. 54—Perpetual injunction—Breach of obligation.

The plaintiff sued for a perpetual injunction that the defendant be restrained from taking *choordhrana* dues from him and also from using force of any kind.

Held, that such injunction could not be granted. Perpetual injunction could be granted to prevent the breach of an obligation whether express or implied, and not to prevent a multiplicity of suits and the further harassment of the plaintiff in connection therewith. **Gur Pershad v. Khuda Baksh**, 8 Ind. Cas. 687.

KNOX and GRIFFIN, JJ.

(2) Distinction between ejectment and—English and Indian Law—Duty of Courts in India. See **CO-SHARERS**, No. 4, 11 C.L.J. 189.

(3) Suit for, dismissed—Defendant's death pending appeal—Abatement—Representative's right to costs. See **CIV. PRO. CODE** (1882), No. 173, 7 M.L.T. 195.

(4) Private individual persisting in public nuisance—Grant of mandatory. See **ACT III OF 1888 (CITY OF BOMBAY MUNICIPALITY)**, No. 3, 12 Bom. L.R. 274.

(5) Injunction—Breach—Civ. Pro. Code, (1882), S. 260. See **CIV. PRO. CODE** (1882), No. 128, 7 M.L.T. 227.

(6) Infringement of trade mark—Action for—Variation of. See **TRADE MARK**, No. 2, 37 C. 204.

(7) Person out of possession—Right to ask merely for. See **DECLARATORY SUIT**, No. 4, 7 M.L.T. 311.

(8) Breach of contract—When injunction is proper remedy. See **SPECIFIC RELIEF ACT**, No. 35, 8 M.L.T. 149.

Injunction—(Concluded).

(9) Wrongful sale in execution—Temporary injunction, grant of. See **CIV. PRO. CODE** (1908), No. 142, 7 A.L.J. 932.

(10) Exclusive occupation of land by one co-sharer—Right to. See **CO-SHARERS**, No. 7, 7 Ind. Cas. 124.

(11) Object of temporary—When temporary mandatory injunction can be granted. See **CIV. PRO. CODE (MYSORE)**, No. 24, 15 M.C.C.R. 206.

(12) Suit for permanent—Second suit for possession barred. See **CIV. PRO. CODE** (1882), No. 14, 8 Ind. Cas. 9

(13) Restraining under raiyat from building pucca house—suit for. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 21-a, 8 Ind. Cas. 65.

Insanity.

See **LUNACY**.

Insolvency Act (1848) (11 Vic. Ch. 21).

(1) Ss. 7, 27, 48 and 49—Discharge of insolvent—Earnings or salary of insolvent—Vesting in the Official Assignee—Execution of decree by plaintiff having notice of his debt being included in the Schedule—Costs.

After bankruptcy and before discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. And for this purpose there is no difference between personal earnings and salary. So the salary of an officer vest in the Official Assignee, but the latter cannot get any of it until the Court makes an order under S. 27 (a).

Held also, that the plaintiff, who execute decree against the insolvent subsequent to his having notice of his debt being included in the Insolvent's Schedule is liable, under S. 49, for the costs incurred by the insolvent by reason of such proceedings. **Ranganatha Row v. Anandachariar**, 8 M.L.T. 202—7 Ind. Cas. 801.

MILLER, J.

References:—(a) 19 B. 232 and *in re Roberts* (1900), 1 Q.B.D. 122, *R.*

(1-a) Ss. 9 and 73—Revocation of adjudication on the petition of a person aggrieved—“Person aggrieved”—Assignee by deed of the property of an insolvent may be a “person aggrieved.”

The Commissioner sitting in the Insolvency Court can annul an adjudication on the application of any person aggrieved.

Insolvency Act (1888) (11 Ylc. Ch. 21)—(Ctd.).

An assignee by deed of the property of an insolvent may be a "person aggrieved," under S. 73 of the Indian Insolvent Act, who is entitled to come in and object to an order of adjudication. **Haji Jackeria Haji Ahmed v. R.D. Sethna**, 12 Bom. L. R. 27=5 Ind. Cas. 618.

SCOTT, C.J. and BATCHELOR, J.

- (3) Ss. 19, 41—*Insolvency Rules, R. 131,—Right of Official Assignee to retain commission without order of Court—Long practice—Order directing not to draw commission pending orders of Court—Validity.*

Held, that, on a true construction of S. 19, Insolvency Act, 1848, and R. 131 (3) of the Insolvency Rules, 1905, an order which (after declaring a dividend) directs the Official Assignee to deliver into Court the statement of account prescribed by S. 41, Insolvency Act, 1848, and R. 94 of the Insolvency Rules, 1905, and further directs that all questions arising on account and as to the payment of the Official Assignee shall be reserved, and that the Official Assignee shall not draw any commission in respect of the amount to be distributed as dividend under the order in question till these questions have been decided, is proper and valid (a).

The present practice, which has for a long period prevailed, under which the Official Assignee has drawn or retained, without the order of Court, the commission to which he is entitled out of the estate of the insolvent, is wrong. *In re Messrs. Arbuthnot & Co.*, 7 M. L.T. 290=5 Ind. Cas. 727.

WHITE, C.J., and MUNRO, J.

Reference:—(a) 8 M. 79, *Expl.*

- (3) S. 24—*Voluntary conveyance—Fraudulent preference—Burden of proof.*

In this case the plaintiffs sued on a mortgage by deposit of title-deeds to secure the amount of a promissory note alleged to have been executed on the 10th of August by defendants 1 to 4, who absconded on the 12th August, and against whom a petition for adjudication was presented on the 13th.

Held, that the *onus* of showing consideration for the mortgage was on the plaintiffs, and also that the mortgage was created before the date of insolvency; but that, assuming these things in favour of the plaintiffs, it lay in the first instance on the contesting defendant to show that the mortgage was void under the Act as a voluntary settlement, though not very much would be required to turn the scale.

Insolvency Act (1888) (11 Ylc. Ch. 21)—(Ctd.).

Prima facie a transfer to secure past debts on the eve of insolvency is void as a voluntary preference.

S. 24 of the Act only requires that the dominant motive should be shown to be to prefer one creditor to another. **Venkatakrisna Chetti v. Lakshminarasimham**, 8 M.L.T. 335.

WALLIS, J.

- (4) S. 26—"Property" whether includes money. See **INSOLVENT**, No. 3, 7 M.L.T. 258.

- (5) S. 39—*Set off—English and Indian Law—Claim in respect of notes discounted before insolvency and since dishonoured, whether may be set off—General lien of Bankers for general balance of accounts—S. 171, Contract Act.*

Under Ss. 39 and 40 of the Indian Insolvency Act, anything may be set off in India which can be set off in England under the Bankruptcy law in force for the time being (a). Mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. So, claims in respect of bills and notes discounted for the insolvent before insolvency, but dishonoured by the makers after insolvency, may be set off under S. 39 (b).

Under S. 171 of the Contract Act, a lien in favour of the Bankers is only for the general balance of account. *In the matter of Canthom*, 33 M. 53=5 Ind. Cas. 845.

WALLIS, J.

References:—(a) 1 M.I.A. 87, *F.* (b) *Alsager v. Currie*, 12 M. and W. 751, *F.*; 1 M.I.A. 97, *R.* and *expl.*; 19 C. 146, *not F.*; *Rose v. Hart*, 2 Sim. L.C. (9th Ed.), 324; 8 Taunt 499, *R.*

- (6) S. 49—*Applicability.* See **INSOLVENT**, No. 5-a, 8 Ind. Cas. 152.

Insolvency Act (11 and 12 Ylc. C. 108).

- (1) Ss. 39, 40—*Mutual credit—Set-off—Act XV of 1882 (Presy. S.C.C.), S. 70, Payment under, effect.*

In August, 1906, the insolvents entered into a contract with A that he was to do shipping work for two years, that he was to receive an advance of Rs. 2,000 for which he was to execute two pro-notes in favour of the insolvents. The advance was received and the notes were executed. Two decrees were obtained against A on the two pro-notes. The first decree was

Insolvency Act (11 and 12 Vic. C. 108)
—(Continued).

passed contingent upon the opinion of the High Court, and A deposited the amount of the decree and costs in Court under S. 70, Presidency Small Cause Courts Act.

The decree-holders were declared insolvents and the vesting order was made on the 30th Nov., 1906. A had on that date a claim against the insolvents for certain sums due to him for work done, and for damages for breach of contract, which after the date of the vesting order matured into a decree on 12th Feb., 1909. A applied for an order that the amount of the decree he had obtained against the insolvents should be set-off against the amount of the two decrees obtained against him on the two pro-notes. The Commissioner disallowed the set-off as regards one of the decrees, on the ground that, as the Official Assignee had obtained an order for payment out to him of the amount of this decree, and the money had been paid to him, and there was nothing to set-off, and this order was made pending the application for set-off to the Commissioner in insolvency.

Per C.J.—Held for the purpose of S. 39 of the Insolvency Act the line is to be drawn at the date of the vesting order. On that date, both the decrees were unsatisfied, since the money in deposit in Court by way of security under S. 70, Presy. S.C.C. Act, was, at the date of the vesting order, A's money. There is no distinction between the two decrees.

Per Krishnaswamy Iyer, J.—If S. 39 of the Insolvency Act applies, no distinction can be made between the two decrees. The payment of the Small Cause Judge pending the application to the Insolvency Court would clearly be illegal, and the Official Assignee would be liable to refund the money received by him, to be set-off against the decree to which the Insolvent's estate was liable.

The time at which the right of set-off is to be determined is the date of the vesting order (a).

The mere payment by the judgment-debtor into Court, under S. 70 of the Presidency Small Cause Courts Act, as a condition of the reference to the High Court, has not the effect of making the money so paid the property of the decree-holder (b).

Though a claim for unliquidated damages by or against the insolvent cannot be set-off under the provision as to mutual credit in S. 39, still, under S. 40 of the Insolvency Act, which

Insolvency Act (11 and 12 Vic. C. 108)—
—(Concluded).

makes the provisions of other statutes, hereafter to be passed, applicable, coupled with S. 38 of the English Act of 1883 which provides that there shall be a set-off in respect of mutual dealings, unliquidated damages may be proved against the insolvent's estate (c).

Mutual credit is a wider term than mutual debt (d), but not so wide as mutual dealings. **Chengalvaraya Mudaly v. Official Assignee of Madras**, 7 M.L.T. 207 = 5 Ind. Cas. 379.

ARNOLD WHITE, C.J. and KRISHNASWAMY IYER, J.

References:—(a) 18 Q.B.D. 459, 470; (1895) 2 Q.B. 618 (622), R. (b) 29 M. 232; 25 A. 179; 13 W.R. 29; 12 M.I.A. 65, R. (c) 19 L.J. C.P. 103; 15 C.B.N.S. 847; 15 Fq. 30; 8 Q.B.D. 147; 9 C.C. 484; 9 Q.B.D. 113; 2 M. 15; 13 B.L.R. Appx. 2, R.

(2) S. 73—"Any person who shall think himself aggrieved" who is—Appeal by Official Assignee, whether maintainable.

R held a fixed deposit receipt from A & Co. The amount with interest fell due on 9th October 1906, and on the 18th October, R demanded payment, and A & Co. suspended payment on the 26th. R applied to the Official Assignee for the full amount, which was refused, and the Commissioner in Insolvency passed an order as prayed for, and the Official Assignee preferred this appeal.

Held that the Official Assignee is a "person aggrieved" by the order appealed against, since he was brought before the Court to submit to a decision that he was bound to pay a certain sum to R, and the decision was against him. The Official Assignee was therefore entitled to appeal under S. 73 of the Insolvency Act (a). **Official Assignee of Madras v. Ramachandra Iyer**, 7 M.L.T. 214 = 33 M. 194 = 5 Ind. Cas. 974.

MUNRO and ABDUR RAHIM, JJ.

References:—(a) 11 Ch. D. 56; 19 Q.B.D. 174; 14 Ch. D. 465, 458; (1894) 2 Q.B. 805; 19 Q.B.D. 174, R. and appl.

Insolvent Act (46 and 47 Vic. C. 52).

Ss. 7, 27—Exemption from attachment of insolvent's salary after deducting amount payable per mensem to Official Assignee—Exemption on footing of necessities.

When an Insolvency Court, acting under the provisions of the Indian Insolvent Act, directs the insolvent to pay a portion of his salary per

Insolvent Act (46 and 47 Vic. C. 52)—(Old.).

mensum to the Official Assignee, the remainder of his salary is to be regarded on the same footing as necessaries which are exempted from attachment.

A Court cannot, therefore, in execution of a decree against the insolvent, direct the attachment of any portion of his salary remaining over after payment to the Official Assignee of the amount ordered to be said. **Maung Glay v. Odeyappa**, 8 Ind. Cas. 438.

LOWIS, J.

Insolvent.

- (1) *Insolvency—Money remitted for particular purpose—Insolvency subsequent to remittance—Duty to return remittance.*

If a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the money must either apply it for the purpose for which it was sent or return it. In such cases the remittance is held in a fiduciary capacity. **Official Assignee v. The Oriental Government Security Life Assurance Co.**, 7 M.L.T. 109 = 5 Ind. Cas. 200 = 33 M. 150.

MUNRO and ABDUR RAHIM, JJ.

Reference :—9 Ch. A. 561 (568), F.

- (2) *Insolvency jurisdiction—Conflict—Order in insolvency of the Bombay High Court subsequent to order of a Court in the Punjab—Punjab properties if vest in Official Assignee of Bombay—11 and 12 Vic., c. 21—Punjab Laws Act (IV of 1872), S. 27.*

Under S. 27 of the Punjab Laws Act, what is entrusted to the Local Courts is merely administration of the property of the insolvent within the Punjab. No transfer of property takes place under the Act, either in favour of the Court or its Receiver.

A vesting order passed by the Bombay High Court under 11 and 12 Victoria, C. 21, vesting the property of the debtor in the Official Assignee of Bombay, and passed subsequently to an order in insolvency passed by the Insolvency Court at Amritsar, had the effect of vesting the insolvent's property in the Punjab in the Official Assignee. **The Official Assignee, Bombay v. The Registrar, Small Cause Court, Amritsar**, 14 C.W.N. 569 (P.C.) = 7 A. L. J. 357 = 12 Bom. L.R. 395 = 68 P.W.R. 1910 = 7 M.L.T. 417 = 11 C.L.J. 443 = 45 P.R. 1910 = 11 C.L.J. 443.

LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, LORD SHAW, and SIR ARTHUR WILSON.

Insolvent—(Continued).

- (3) *Insolvency—Interim order of attachment of insolvent's property made prior to, and the final order after vesting order—Title of Official Assignee—Order for payment out made with notice to the Official Assignee, who withdrew his objection—Whether order precludes him from putting forward his claim on behalf of the estate—Waiver—Insolvent Act (11 and 12 Vic. Ch. 21), S. 26—Property whether includes money.*

A judgment-creditor obtained an interim order of attachment of certain moneys owing to the insolvent, and, pending the same and prior to confirmation thereof, the vesting order was made. The moneys were paid into Court, and on an application by the judgment-creditor, notice was sent to the Official Assignee, who appeared, and on his withdrawing his objection, an order was made for payment out to the judgment-creditor, and the moneys were paid, and satisfaction of the decree was entered up.

Held that, even if the order for attachment is made absolute before the vesting order, if a contest arises between the creditor who has obtained the order for attachment and the Official Assignee, the title of the Official Assignee must prevail—a *fortiori* in this case.

Held that the consent of the Official Assignee was nothing more than that the money, instead of remaining in Court, should be paid over to the judgment-creditor, without prejudice to the right of the Official Assignee to establish his claim by legal proceedings; and it does not amount to a consent to an adjudication against him, which would preclude him from putting forward the claim of the estate on any future occasion (a).

Per *Krishnaswami Iyer, J.*—"All that can be said of the Official Assignee's conduct is, that he must be taken to have stated to the Court that he left the matter in the hands of the Court, and not that he misled the Court to make the order."

Held also that the Official Assignee is not the representative of the judgment-debtor, and his appearance before the Court was not in order, and so, notwithstanding his appearance on notice given to him, and his subsequent withdrawal of the objections, the order may be treated as passed behind his back. The term "property" in S. 26 of the Insolvent Act (11 and 12 Vic. C. 21) includes money (b). *In the*

Insolvent—(Continued).

matter of B. Chengalroya Chetty v. The Official Assignee, 7 M.L.T. 258.

ARNOLD WHITE, C.J. and KRISHNASWAMY IYER, J.

References:—(a) 1877 L.R. 2 Q.B. 73 (85), *D.* (b) 3 C. 434, *F.*

(4) *Trust—Appointment of members of a Banking firm as trustees of a fund, to be invested in their own Bank, and the interest accruing therefrom to be utilized according to directions—Insolvency of the Bank—Whether the trustees are entitled to the whole amount from the assets.*

One V executed a trust deed, appointing the members of a Banking firm as trustees of a fund, and directed them to invest the same in their own names in their own Bank, and apply the interest accruing therefrom in a certain manner. The terms "trustee or trustees" were to include the member or members for the time being of the Banking firm. The deed also authorised the trustees to appoint new trustees under certain contingencies. The Bank failed, and the question was whether the trustees were entitled to recover the whole sum or had only a right of proof against the assets of the firm.

Held that the settlor regarded the body of trustees and the Banking firm as two distinct and separate entities, and the payment to the trustees and their investment with the Banking firm as two distinct transactions;

That, when the trustees, according to the direction of the settlor, invested the money in their own firm, their liability as trustees was reduced in the same manner as if they had not been members of the firm;

That, on the investment being made, the money became the money of the Bank, which it was entitled to use as its own, that the relationship between the Bank and the trustees was merely that of debtor and creditor, and that, on the failure of the Bank, the trustees would rank with the general body of creditors and be entitled to no preference. **The Official Assignee of Madras v. Krishnaaswami Naidu**, 7 M.L.T. 266 = 5 Ind. Cas. 331 = 33 M. 151.

MUNRO and ABDUR RAHIM, JJ.

References:—32 M. 68; 7 M.L.T. 214; 4 Ch. D. 246, *R.*

(5) *Effect of insolvency—Discharge of debt—Adjudication in foreign territory—Effect—Vesting of property.*

Insolvent—(Concluded).

Insolvency does not by itself operate as a discharge in all jurisdictions (a).

Immoveable property in British India does not vest in the trustee in Bankruptcy upon an adjudication in a foreign country, e.g., Griqualand (b). **Rangasawmy Padayachi v. Narayanasawmy Padayachi**, 8 M.L.T. 120.

BENSON and KRISHNASAMY AIYAR, JJ.

References:—(a) 1 Knapp 267 = 12 F.R. 320; 23 M. 453 (472). *R.* (b) 16 M. 85, *R.*

(5-a) *Insolvency Act (11 and 12 Vic. Ch. 21), S. 49—Suit for declaration—Insolvency of defendant after institution of suit—Maintainability of suit.*

Where plaintiff sued for a declaration that the house in dispute was liable to attachment in execution of his decree against defendant, and the defendant was adjudged an insolvent after the institution of the suit.

Held, that the insolvency of the defendant was no bar to the continuance of the suit, and that the provisions of S. 49 (11 and 12 Vic. Ch. 21) did not apply. **Srinivasachariar v. Ramanujachariar**, 8 Ind. Cas. 152.

MUNRO and SANKARAN NAIR, JJ.

(6) *Insolvency of Banker—Direction by customer to purchase Government promissory notes, and consequent promise by Bank so to do—Failure to purchase—Effect—Banker whether a trustee for the money. See BANKER and CUSTOMER, No. 1, 7 M.L.T. 151.*

(7)—See ACT III OF 1907 (PROVINCIAL INSOLVENCY).

(8) *Discharge of—Order not expressly made—Appeal—Revision—Right to surplus in the hands of—Receiver. See CIV. PRO. CODE (1882), No. 172, 26 P.L.R. 1910.*

Instalment decree.

(1) *Waiver—Decree payable by instalment—Amounts paid under specified instalments—Amounts taken out by decree-holder—Effect of same—Omission to sue—Acceptance of overdue instalments—Civil Procedure Code (Act V of 1908), S. 100—Second appeal—Question of law—Waiver, mixed question of law and fact—Allowable to be raised in second appeal—Pleadings.*

A decree payable by instalments provided that, if default was made in the payment of any instalment, the decree-holder would be entitled to realise the whole sum with interest. On the occasion of every deposit made by the

Instalment decree—(Concluded).

judgment-debtors, it was expressly stated that the deposit was made on account of a specified instalment, and the sum was taken out by the decree-holder :

Held, that it is not open to the decree-holder subsequently to turn round and contend that the payments were made only on account and in part satisfaction of the decree (a).

Although mere omission to sue may not constitute waiver, the acceptance of an overdue instalment by a creditor may constitute a waiver of his right to recover the entire debt due on account of the default, but the fact that he has done so may not prejudice his right to declare the whole debt to be due on a subsequent occurrence of a similar default in the payment of interest (b).

Even in a second appeal the Court is entitled to hold that there had been a waiver, for it is a mixed question of law and fact that is involved. **Easin Khan v. Abdul Wahab Sikdar**, 6 Ind. Cas. 138.

MOOKERJEE and TEUNON, J.J.

References :—(a) 27 B. 1, F. (b) 21 C. 542 ; 31 C. 297 ; 1 Ind. Cas. 49 ; 9 C.L.J. 226 ; 36 C. 394 ; 13 C.W.N. 1004, F.

(2) Instalment decree, when may be passed—. See CIV. PRO. CODE (1908), No. 116, 11 C.L.J. 431.

Insurance.

(1) *Marine—Goods insured—Goods shipped from one place to another—Delivery to consignee, what constitutes—Loss which occurs in respect of goods, when not recoverable—Contract Act, S. 73—Damage not sustained in the usual course of things—Absence of knowledge that damage was likely to result—Party added as defendant after the period within which suit can be brought—Relief claimed against him, whether not barred—Limitation Act (1877), S. 22—C. P. C. (1882), S. 32.*

Where a policy of Marine Insurance, under which the goods are insured, declares that it includes all risks from the time of leaving the warehouse until safely delivered into consignee's warehouse or godown, it was held, that the goods, on being placed in the uncleared warehouse, are delivered into consignee's warehouse within the meaning of the policy, and any loss which occurs in respect of the goods thereafter cannot be recovered on the policy. Under S. 73, Contract Act, no compensation

Insurance—(Continued).

can be recovered in respect of any damage, if it does not occur in the usual course of things, as a result of the negligence of parties, or if the parties never knew that it was likely to result from it.

If, in a suit, a person is added as a defendant after the period within which the suit can be brought and relief is claimed against him, such a claim will be time-barred. **Chelaram v. The Baden Marine Insurance Co.**, 3 Sind. L.R. 191=4 Ind. Cas. 1160.

CROUCH, J.C.

(2) *Policy of fire—What is—Compensation for actual loss—Breach of warranty, effect of—Distinction between warranty and mere representation—Materiality, test of.*

A policy of insurance against fire is really a contract of indemnity to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against when that peril has happened, and so the contract is only a contract to pay the value of that loss which the insured may have actually sustained by reason of the fire (a). In a case of fire insurance, if the description of the property insured amounts to a warranty, on the faith of which the policy is granted, any breach thereof will avoid the contract (b). But where the statement is a representation merely, in order that any error appearing in it may avoid the policy, it must be shown to have been material.

In the case of warranty, materiality or immateriality signifies nothing. But in the case of a mere representation, materiality is essential (c).

If the description be substantially correct, and a more accurate statement would not have varied the premium, the error is not material (d). **Fire Insurance Company v. Hansraj**, 6 N.L.R. 89=6 Ind. Cas. 933.

BIPIN KRISHNA BOSE, A.J.C.

References :—(a) **Castellain v. Preston** (1883); 52 L.J.Q.L. 366 (370), F. (b) **Sillen v. Thornton** (97 R.R. 808), R. (c) **New Castle Fire Insurance Company v. Mac Morran and Company** (15 R.R. 67), *In re Universal non Tariff Fire Insurance Company* (1875); 44 L.J. Ch. 761 ; **Stokes v. Cox** (1857), 26 L.J. Ex. 113; **Thompson v. Hopper** (27 L.J. Q.B. 441, R). (d) **Bates v. Henitt** (1867), 36 L.J.Q.B. 282 (285) and **Smith's Mercantile Law**, 11th Ed., p. 567, R.

Insurance—(Continued).

(3) *Insurance policy—Deposit of the policy as security for debt—No notice of the deposit to the Insurance Company—Subsequent assignment of policy to another creditor who had no notice of the deposit—Legal estate vested in the second creditor—Priority of him over the first creditor who had only equitable charge.*

By way of security for advances made by him from time to time, the plaintiff obtained from one D a deposit of a policy of D's life; but the plaintiff gave no notice of it to the Insurance Company. Defendant No. 2, another creditor of D, who was not aware of the above transaction, took on the 13th August, 1909 from D an assignment of the policy as security for debts which D owed to him. The policy was not delivered to defendant No. 2 because D, pretended that he could not find it. An application was then made to the Insurance Company for a duplicate copy of the policy; but the Company intimated that D should sign an indemnity bond before the duplicate could be issued. Before, however, the indemnity bond could be signed, D died. The plaintiff sued the Insurance Company to recover the money due under the policy. The defendant No. 2 claimed that he had a legal estate in the policy in priority to the claim of the plaintiff.

Held, (1) that the execution of the assignment gave the defendant No. 2, a legal estate without the documents; the execution of the indemnity bonds was only required to enable him to obtain duplicate policies from the Company; and that in no way affected the legal estate already vested in him by the assignment;

(2) that he had, in the absence of notice of plaintiff's transaction, a prior claim to the plaintiff, who had only an equitable charge on the policy of which no notice was given to the Company.

The owner of a legal estate has priority over an equitable mortgagee, unless it can be shown that he has had notice of the prior equitable charge or that there were circumstances which put him on notice to enquire whether there was any such prior charge. A person who gets in a legal estate without getting documents of title is in ordinary cases bound to enquire of the mortgagor or assignor what has become of the documents: but, if proper enquiry is made and a reasonable answer is given, then, the person

Insurance—(Concluded).

obtaining a legal estate is not required to do anything further. **Vishvanath P. Vaidya v. The London and Lancashire Life Assurance Company**, 12 Bom. L.R. 717.

MACLEOD, J.

Interest.

(1) *Interest—Whether allowable prior to date of plaint.*

No interest is allowable prior to suit. Interest ought to be allowed subsequent thereto. **K. Gopalasamy Chettiar v. Ramier and others**, 7 M.L.T. 108=5 Ind. Cas. 817.

BENSON and ABDUR RAHIM, J.J.

Reference :—31 M. 25, R.

(2) *Mortgage—Interest—Compound and post diem—Notice—Costs.*

(1) Post diem interest by a way of damages can and should be allowed on mortgage-money.

(2) Compound interest at the agreed rate should not be disallowed; where the rate of interest is moderate and the contracting parties belong to the trading class.

(3) Where a just demand has been resisted by a defendant for a considerable time after receiving notice of the claim, the plaintiff is entitled to get full costs. **Naklu Mal v. Phagu Shah**, 56 P.W.R. 1910=6 Ind. Cas. 664.

SHAH DIN, J.

Reference :—19 A. 39 (P.C.), F.

(3) *Interest after the due date—(General covenant for payment of interest.*

Where there is a separate covenant for payment of interest independent of the covenant for payment of the principal sum at a certain date, *held*, that, under the former covenant, interest is payable after the date fixed for payment of the principal. **Narayana Prasad and others v. Divan**, 13 O.C. 125.

CHAMIER, J.

(4) —after decree—Discretion of Court—Interference by appellate Court. See REGISTRATION ACT, 1877, No. 21, 5 Ind. Cas. 127.

(5) Right of decree-holder to get, up to when. See EXECUTION OF DECREE, No. 3, 5 Ind. Cas. 139.

(6) Calculation of, on mortgage. See MORTGAGE (GENERAL), No. 14, 7 M.L.T. 194.

(7) Express agreement not to pay—Court's discretion to award. See ACT XXXII OF 1889 (INTEREST), No. 1, 5 Ind. Cas. 285.

Interest—(Concluded).

(8) Undue influence—Rate of interest reduced. See CONTRACT ACT, No. 5, 5 Ind. Cas. 486.

(9) —at bond rate up to what period may be allowed. See MORTGAGE (GENERAL), No. 18, 5 Ind. Cas. 654.

(10) High rate of—Effect—Presumption of undue influence. See CONTRACT ACT, No. 10, 7 A.L.J. 658.

(11)—at contractual rate when not to be interfered with. See CONTRACT ACT, No. 8, 6 Ind. Cas. 572.

(12) On dower debt—When allowable. See MAHOMEDAN LAW (DOWER), No. 6, 7 A.L.J. 1025.

(13) Rate of, after suit. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

(14) Payment without intimation that it is for—Effect. See LIMITATION ACT (1877), No. 32, 7 Ind. Cas. 7.

(15) Contract rate of—Interference by Court. See MORTGAGE (GENERAL), No. 35, 14 C.W.N. 1093.

(16) Stipulation to pay—Evidence to prove whether it was monthly or annual—Admissibility. See EVIDENCE ACT, No. 27, 14 C.W.N. 1100.

(17) Pre-emptor whether bound to pay. See PRE-EMPTION, No. 39, 54 P.L.R. 1910.

(18) Limitations on mortgagee's right to sue for. See MORTGAGE (GENERAL), No. 45, 12 Bom. L.R. 992.

(19) Transfer of arrears of rent—Interest whether passes to transferee. See STAMP ACT, No. 6, 7 Ind. Cas. 582.

(20) Interest not awarded by lower Court—Power of appellate Court to allow. See MESNE PROFITS, No. 3, 8 M.L.T. 366.

(21) Right of mortgagee to claim interest, according to Mortgage deed. See MORTGAGE (GENERAL), No. 50, 8 M.L.T. 409.

(22) Many debts—Payment of interest without specification—Effect—Limitation. See EVIDENCE ACT, No. 6, 8 Ind. Cas. 81.

Interest Act.

See ACT XXXII OF 1839.

Interlocutory application.

(1) Transfer of—Jurisdiction—Notice to opposite party. See CIV. PRO. CODE (1908), No. 24, 8 M.L.T. 374.

Interlocutory order.

(1) Revision—Interlocutory order—Preliminary finding of Court as to valuation for the purposes of Court-fee and Jurisdiction—Course of appeal—Punjab Courts Act (XVIII of 1884) (as amended), S. 70 (a) and (b).

Held, that a preliminary finding of a Court of the first instance as to valuation, both for the purposes of jurisdiction and Court-fee, is an interlocutory order, which can afterwards be questioned in appeal from the final decree of the Court, but is, consequently, not subject to revision. **Syed Nawazish Ali v. Muhammad Bakhsh**, 43 P.W.R. 1910=6 Ind. Cas. 647.

JOHNSTONE, J.

References:—64 P.R. 1905, F.; 60 P.R. 1897; 51 P.R. 1899; 77 P.R. 1909=125 P.W.R. 1909, D.

(2) Erroneous decision in an—Ground of appeal—Appeal against final decree. See CIV. PRO. CODE (1882), No. 227, 6 Ind. Cas. 239.

(3) Revision of. See REVISION, No. 1, 72 P.W.R. 1910.

(4) High Court's power of revision. See CIV. PRO. CODE (1908), No. 70, 6 Ind. Cas. 574.

(5) Revision of—High Court's powers. See ACT I OF 1894 (LAND ACQUISITION), No. 6, 12 C.L.J. 505.

(6) High Court's power of interference with. See CIV. PRO. CODE, (1908), No. 99, 12 C.L.J. 537.

(7) Whether an, is a "judgment." See LETTERS PATENT (MADRAS), No. 3, 8 M.L.T. 453.

Interpleader.

Two kabuliats given by tenant to two parties—Suit by tenant to get rid of one—Not maintainable. See CIV. PRO. CODE (1882), No. 194, 5 Ind. Cas. 517.

Intestate.

(1) Suit for share of property of—Limitation. See LIMITATION ACT (1877), No. 75, 7 Ind. Cas. 704.

Inventory.

Preparation of—Court's power to direct taking of. See CIV. PRO. CODE (1908), No. 70, 6 Ind. Cas. 574.

Irrigation.

(1) Irrigation-works—Duty of Government to maintain—Deficiency of water-supply owing to non-repair—Loss to ryot in consequence—Suit against Government whether lies. See WATER, No. 1, 7 M.L.T. 397.

(2) See WATER CESS.

Irrigation Cess Act.

See ACT VII OF 1865 (MADRAS).

Islands.

Islands in the sea—Waste land—Title of the Crown, presumption as to—Suit for possession of land—Proof of possession for twenty years by claimant—Onus on the Crown to prove subsisting title—Adverse possession, proof of, if necessary. See CROWN, No. 1, 7 M.L.T. 128.

Issues.

- (1) *Case to be decided on issues—Where plaintiff's title was assumed case not to be dismissed—Declaration—Damages.*

The defendant Municipality, deeming it necessary to repair the bank of a tank belonging to the plaintiff, had undertaken this repair and, therefore, used the soil of a certain pathway of which the plaintiff claimed to be the owner. The plaintiff sued for a declaration of her title to the land of the footway and for compensation. The defence was, not that the pathway was vested in the defendant, but that what it did was justified by its statutory powers.

The first Court declared the plaintiff's title and gave him a decree for one rupee as damages. The lower appellate Court confirmed the decree for damage, but made the declaration of the plaintiff's title subject to a public right of way.

On appeal to the High Court, *Brett, J.*, dismissed the suit on the ground that the pathway was a road and vested in the defendant. *Held* that the case could only be decided on the issues on which the parties went to trial, that on the issues, it was assumed that the plaintiff was entitled to the pathway, that, therefore, the suit could not be dismissed, and that the proper decree would be to confirm the decree for damage given by the first Court, without any declaration. **Kamal Kamini Debi v. Howrah Municipality**, 6 Ind. Cas. 446.

JENKINS, C.J., and DOSS, J.

- (2) Findings sufficient—Remission of, unnecessary. See ACT II OF 1901 (AGRA TENANCY), No. 6, 6 Ind. Cas. 499.

Jains.

- (1) *Jain Agarwalla—Adoption of married person as son—Validity—Custom—Hindu Law—Mitakshara—Question of fact—Vaults of decision as precedent.*

Agarwalla Jains, who belong to one of the twice-born classes of Hindus, are governed by

Jains—(Concluded).

the ordinary Hindu Law (for the purpose of the present case, the Mitakshara law), unless and until a custom to the contrary is established.

The question in this case was whether the defendant was validly adopted, being already married at the time he was taken in adoption as the son to a member of the Jain Agarwalla community.

Held—That, strictly speaking, the question was a pure question of fact determinable upon the evidence given in the case;

that the High Court was right in finding upon the evidence adduced, (the parties having had sufficient opportunity of producing whatever evidence they desired to produce) that the custom pleaded, *viz.*, that "among the Jains adoption is no religious ceremony, and under law or custom there is no restriction of age or marriage among them," was proved.

The fact, however, that the evidence in this case was limited to a comparatively small number of centres of Jain population, would make the present case an unsatisfactory precedent, if, in any future instance, fuller evidence regarding the custom should be forthcoming. **Lala Rupchand v. Jambu Parshad**, 14 C.W. N. 545 (P.C.) = 7 A.L.J. 349 = 12 Bom. L.R. 402 = 11 C.L.J. 454 = 6 Ind. Cas. 272.

LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER A.J.

Jalkar.

Attachment of, by Criminal Court—Suit for possession. See POSSESSION, No. 5, 6 Ind. Cas. 806.

—See FISHERY.

Jats.

Status of. See CUSTOMS (PUNJAB—MARRIAGE), No. 1, 79 P.R. 1910.

Joint promisors.

Suit and decree against one—Whether bars suit against another—S. 43, C.P.C. See CIV. PRO. CODE (1882), No. 42, 7 M.L.T. 373.

Judgment.

(1) Relevancy of, not *inter partes*—Former suit by mortgagee to enforce his rights—Subsequent suit by his sons and reversioners to protect their interests—Diametrically opposite findings in two cases illegal—Duty of Judge. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 139 P.W.R. 1909.

Judgment—(Concluded).

(2) Observations in the course of a—, their application. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 7 M.L.T. 1 (F.B.).

(3)—in appeal not in conformity with S. 574, C.P.C.—Order of remand in second appeal. See **CIV. PRO. CODE**, 1882, No. 218, 7 M.L.T. 120.

(4)—of Small Cause Court—What it ought to contain. See **ACT IX OF 1887 (PROVL. S.C. COURT)**, No. 1, 7 M.L.T. 306.

(5)—how far operates as estoppel. See **RES JUDICATA**, No. 7, 11 C.L.J. 461.

(6) Contents of, of appellate Court. See **CIV. PRO. CODE (MYSORE)**, No. 15, 15 M.C. C.R. 61.

(7) Order of single High Court Judge—"Dismissed with costs"—Whether amounts to judgment—Appeal. See **LETTERS PATENT**, No. 3, 8 M.L.T. 288.

(8) Contents of judgment of appellate Court. See **CIV. PRO. CODE (1882)**, No. 79, 7 Ind. Cas. 421.

(9)—how far operates as estoppel. See **ESTOPPEL**, No. 3, 7 Ind. Cas. 781.

(10)—written by predecessor but not pronounced—Delivery of different judgment by successor—Validity. See **CIV. PRO. CODE (1908)**, No. 113, 7 A.L.J. 1189.

(11)—of appellate Court—What it should contain. See **CIV. PRO. CODE (1882)**, No. 138, 8 M.L.T. 380.

(12) See **FOREIGN JUDGMENT**.

(13) Meaning of—Order refusing to frame an issue, whether a. See **LETTERS PATENT (MADRAS)**, No. 3, 8 M.L.T. 453.

Jungle.

Waste and jungle land—Disputed boundary—Burden of proof. See **BOUNDARY**, No. 3, 7 Ind. Cas. 165.

Jurisdiction.

1.—(GENERAL).

2.—(OF CIVIL COURTS).

3.—(OF CIVIL AND REV. COURTS).

4.—(OF HIGH COURTS).

5.—(OF RENT COURTS).

5-a.—(OF REVENUE COURTS).

6.—(OF SMALL CAUSE COURTS).

—1.—General.

(1) *Jurisdiction—Order of excommunication passed in Cochin state—Cause of action in Cochin—Defendant residing in British India—Suit for defamation whether maintainable in British India.*

Jurisdiction—(Continued).**—1.—General—(Continued).**

The first defendant under the orders of the Maharaja of Cochin held an enquiry into the conduct of a Brahmin woman who was charged with adultery, and as a result thereof the Maharaja put certain persons, found to have committed adultery, out of caste, and the plaintiff was one of them. The second defendant is the Kariasthan of the Triparyar Dovanom which is in British India, and owns properties also in British India. He delivered the proceedings to his subordinate P at the Devasom Office situated in Cochin, so that the latter might prohibit the persons named, one of them being the plaintiff, from entering the temple. The real publication was in the Devasom Office in Cochin and not in British India, though the plaint alleged that the publication was in British India. Both the lower Courts dismissed the suit on the ground that the cause of action arose in Cochin.

Held, that, as the second defendant was residing in British India, the British Indian Court had jurisdiction to entertain the suit as against him, though the cause of action arose in Cochin. **Poyhath Mannoth Govindan Nan v. Pattachamarth Manakkal Jedavedan Namboodri**, 7 M.L.T. 42=5 Ind. Cas. 513.

BENSON, O.C.J., and SANKARAN NAIR, J.

(2) *Jurisdiction—Fraud—Setting aside decree of another Court.*

Every Court possesses inherent jurisdiction to prevent abuse of its process. Therefore, every Court has jurisdiction to vacate its own decree if it was obtained by fraud.

Also, an action lies in one Court to set aside the decree of another Court on the ground that it was obtained by fraud, if the first mentioned Court has otherwise jurisdiction, in accordance with the provisions of the Civ. Pro. Code, to entertain the suit, *e.g.*, if the perpetration of the fraud was done, that is, the cause of action arose, within its jurisdiction, or if the defendant ordinarily resides or personally works for gain within its jurisdiction, and so forth. **Abdul Haque Chowdhury v. Abdul Hafez**, 5 Ind. Cas. 648=14 C.W.N. 695=11 C.L.J. 636.

CASPERSZ and DOSS, JJ.

References:—5 W.R. Act X, 20; B.L.R. Sup. Vol. 379; 11 C.W.N. 579, F.; 29 A. 418; 4 A.L.J. 392; A.W.N. (1907), 112, dissented from.

Jurisdiction—(Continued).

—1.—General—(Continued).

- (3) *Jurisdiction*—*Suit for money due on contract*—*Place of suit*—*Performance of contract*—*Construction of contract*—*Commercial usage*—*Duty of debtor to seek out his creditor*.

A suit to enforce payment of money due under a written contract executed in the Punjab, from a defendant residing in the Punjab, is not cognizable by the Karachi Court, where there is no evidence to prove that the money was agreed to be paid in Karachi.

A commercial contract must be construed by commercial usage. Where the evidence on the record shows that it is the practice for the creditor to make the demand on his debtor, the general rule that a debtor is bound to seek out his creditor will not have the effect of making the debt payable at the creditor's place of business. **Hemandas Thakur Das v. Devishah Din Dayal**, 6 Ind. Cas. 111.

CROUCH, A.J.C.

- (4) *Jurisdiction*—*District Judge*—*Remand of appeal by High Court*—*Transfer of appeal to Sub-Judge, whether legal objection taken for the first time in High Court, whether entertainable*.

A second appeal from the decree of a District Judge was remanded by the High Court. When the case went before the District Judge, who was the successor of the Judge who had originally heard the appeal, he transferred it to the Sub-Judge who heard the appeal without any objection :

Held, that the District Judge had jurisdiction to transfer the case to the Sub-Judge.

Held, further, that, the appellants not having taken any exception to the hearing of the appeal by the Sub-Judge, it is not open to them to take the objection in second appeal. **Provata Chandra Das v. Miajan**, 6 Ind. Cas. 384.

MOOKERJEE and CARNDUFF, JJ.

References :—1 Ind. Cas. 913 ; 36 C. 193 ; 5 C.L.J. 611, R.

- (5) *Jurisdiction*—*Civil Court*—*Value of property*—*Value mentioned in plaint*—*Trial in Court which would have no jurisdiction if the value was correct*—*Parties raising no objection to trial*—*In appeal jurisdiction cannot be questioned*—*Evidence Act (1 of 1872), S. 58*.

Jurisdiction—(Continued).

—1.—General—(Continued).

The plaintiffs filed a suit in the Court of the First Class Subordinate Judge for partition of a certain property. In the plaint the market value of the property stated was such as to make the suit triable only by the First Class Subordinate Judge. The Judge, however, made over the trial of the suit to the Joint Subordinate Judge at Thana, who had no jurisdiction to try it, if the property was correctly valued in the plaint. Neither party raised any objection on the ground of jurisdiction, and no issue was raised relating to it. The trial proceeded on merits and the Subordinate Judge passed a decree for partition in favour of plaintiffs. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market values stated in the plaint. The objection having been overruled, they appealed to the High Court

Held, that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in S. 58, Evidence Act, came into operation and prevented the result of the statement of the market value in the plaint.

The market value stated in the plaint *prima facie* determines the jurisdiction. It is not conclusive and binding on the plaintiff so as to estop him from disputing its correctness or seeking its amendment merely because he has stated it in the plaint. When the trial commences, it is open to the defendant, if he is so minded, to rely on the statement in the plaint and dispute the jurisdiction of the Court. If he does not, and allows the trial to go on, he cannot subsequently dispute the jurisdiction.

As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. The law does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained. **Jose Antonio Barreto v. Francisco Antonio Rodrigues**, 12 Bom. L.R. 712.

CHANDAVARKAR and HEATON, JJ.

Jurisdiction—(Continued).**—1.—General—(Continued).**

- (6) *Court having no jurisdiction—Effect—Decision of question of law or fact.*

Held, that, if a Court has no jurisdiction, its proceedings are *coram non iudice*, and no question either of law or fact can be decided except that of jurisdiction.

So where the defendant pleaded that the Court had no jurisdiction to hear the case, but the Court, without disposing of this plea, dismissed the suit as barred by limitation,

held, that, the Court was bound to determine first of all that it had jurisdiction and then could proceed farther. **Abdul Haq v. Niaz Ahmad**, 104 P.W.R. 1910=83 P.R. 1910=82 P.L.R. 1910=7 Ind. Cas. 718.

ARTHUR REID, C.J.

- (7) *Order of High Court calling for findings from the Subordinate Judge of Tuticorin—Local area in which suit arose transferred to Ramnad District—Effect of transfer on jurisdiction.*

In this case, since the order calling for findings from the Subordinate Judge of Tuticorin was made by the High Court, the local area in which the suit arose was transferred to the Ramnad District, and the question was whether the effect of such transfer is by operation of law to divest the Subordinate Judge of Tuticorin of jurisdiction to return the findings and to confer such jurisdiction on the Ramnad Court.

Held that the question is not only one of considerable difficulty, but also likely to arise frequently, and might with advantage be dealt with by express legislative provision (a). **Alagappa Mudaliar v. Thiagaraja Mudaliyar**, 8 M.L.T. 299.

WALLIS and KRISHNASWAMI IYER, JJ.

Reference :—(a) 30 M. 537, R.

- (8) *Relief about surplus in the hands of the mortgagee—Jurisdiction determined by the amount of mortgage money only.* See MORTGAGE (REDEMPTION), No. 3, 13 O.C. 92.

- (9) *Burden of proving.* See FOREIGN JUDGMENT, No. 1, 165 P.W.R. 1909.

- (10) *Suit for possession of immovable property situate in several districts and based on different causes of action—Jurisdiction.* See CIV. PRO. CODE (1908), No. 20, 12 P.W.R. 1910.

- (11) *Valuation of suit—Execution of decree—Deficiency made good—Appeal—Jurisdiction.* See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM), No. 2, 7 A.L.J. 203.

Jurisdiction—(Continued).**—1.—General—(Continued).**

- (12) *Place where performance completed—Completion of sale of unascertained goods.* See CIV. PRO. CODE (1882), No. 24, 3 Sind L.R. 156.

- (13) *Insolvency jurisdiction—Conflict—Order passed by Bombay High Court subsequent to order of a Court in the Punjab—Effect.* See INSOLVENT, No. 2, 14 C.W.N. 569.

- (14) *Pending proceedings without jurisdiction—Transfer to Court having jurisdiction.* See ACT XV OF 1882 (PRESY. S. C. COURTS), No. 2, 14 C.W.N. 662.

- (15) *Jurisdiction, want of, to try suit—Proper course.* See SMALL CAUSE COURT, No. 1, 7 M.L.T. 350.

- (16) *Valuation of suit for purpose of—.* See VALUATION OF SUIT, No. 1, 41 P.R. 1910.

- (17) *Suit to set aside adoption—Valuation—Suit for restitution of conjugal rights—Jurisdiction of Munsiff.* See VALUATION OF SUIT, No. 2, 6 Ind. Cas. 636.

- (18) *Claim decided by wrong Court—Effect.* See JURISDICTION OF REVENUE COURTS, No. 1, 52 P.R. 1910.

- (19) *-in copyright cases.* See ACT XX OF 1847 (COPYRIGHT), No. 1, 7 A.L.J. 923.

- (20) *Suit for redemption of mortgage and profits valued at less than Rs. 1,000—Decree for over Rs. 1,000, Bengal Act XII of 1887, S. 19—Jurisdiction.* See REGULATION, XV OF 1793, No. 1, 7 A.L.J. 963.

- (21) *Set-off—Jurisdiction.* See CIV. PRO. CODE (MYSORE), No. 6, 15 M.C.C.R. 116.

- (22) *Jurisdiction of Court in respect of property outside jurisdiction—Auxiliary Court.* See ACT III OF 1907 (PROVL. INSOLVENCY), No. 10, 7 Ind. Cas. 765.

- (23) *Leave to omit remedies or split causes of action—Pecuniary jurisdiction of Court.* See CIV. PRO. CODE (1882), No. 48, 7 A.L.J. 1201.

- (24) *Usurpation of, by Court below—Appeal—Inconsistent pleadings.* See EXECUTION OF DECREE, No. 22-a, 8 Ind. Cas. 261.

- (25) *Objection to jurisdiction—Defendant not contesting case on merits—Appeal.* See BUDDHIST LAW (ECCLESIASTICAL), No. 1, 17 B.R. (1910), 2nd Qr., 35.

Jurisdiction—(Continued).**—1.—General—(Concluded).**

(26) Right decision—Defect of jurisdiction—Revision whether lies. See *LANDLORD AND TENANT*, No. 53-a, 8 Ind. Cas. 733.

(27) Amount when exceeds Court's pecuniary jurisdiction—Course to follow. See *MESNE PROFITS*, No. 6, 8 Ind. Cas. 34.

—2.—Of Civil Courts.

(1) *Karnam, suit to recover office of—Agraharam village—Jurisdiction of Civil Courts—Madras Act IV of 1864 and Madras Act III of 1895, S. 3, cl. 1, 2, 3—Applicability.*

Madras Act IV of 1864 and Madras Act III of 1895, S. 3, cl. 1, have no application to suits for the recovery of the office of Karnam in an Agraharam village and of the emoluments attached to that office.

The Agraharam is a proprietary estate according to the provision in S. 4, Act III of 1895, read with S. 4 of Act II of 1894, and the suit is governed by cl. (3), S. 3, Act III of 1895, and the Civil Court has no jurisdiction to try the suit.

By 'other hereditary villages' occurring in cl. 3, S. 3, Act III of 1895, must be understood, not necessarily the offices of a different description, but offices other than those in the localities dealt with by cls. (1) and (2). This construction will not exclude the office of Karnam or Village Accountant from 'the other hereditary village offices' in cl. (3). *Audirazu Yeerayya v. Audirazu Sangayya*, 20 M.L.J. 281 = 7 M.L.T. 404 = 5 Ind. Cas. 1004.

BENSON and KRISHNASWAMI IYER, JJ.

(2) Transfer of decree to District Munsiff's Court for execution—Pecuniary limits of District Munsiff's jurisdiction for purposes of execution. See *CIV. PRO. CODE* (1882), No. 89, 5 Ind. Cas. 155.

(2-a)—See *GOLDEN TEMPLE, AMRITSAR*, No. 1, 100 P.W.R. 1909.

(3)—under the Divorce Act—Duty of Court. See *ACT IV OF 1869 (DIVORCE)*, No. 1, 7 A.L.J. 193.

(4)—in matters of Municipal assessment. See *ACT III OF 1884 (BENGAL MUNICIPAL)*, No. 3, 14 C.W.N. 437.

(5) Suits relating to emoluments of office of Village carpenter—Jurisdiction. See *ACT III OF 1895 (MADRAS HEREDITARY VILLAGE OFFICES)*, No. 1, 7 M.L.T. 198.

(6)—to entertain claim by a proprietor of land to hold it free from revenue—Ss. 74, 132,

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Concluded).**

and 152, Central Provinces Land Revenue Act—Payment of revenue, under compulsion of law, by person interested in the payment—Right of reimbursement—Jurisdiction to entertain the suit. See *CENTRAL PROVINCES LAND REVENUE ACT*, No. 3, 6 N.L.R. 27.

(7) Re-hearing of an application—Jurisdiction of Courts. See *CIV. PRO. CODE* (1908), No. 112, 37 C. 259.

(8) Discretion exercised by Municipal Committee, when can be interfered with by Civil Courts. See *MUNICIPALITIES*, No. 1, 6 N.L.R. 53.

(9) Jurisdiction of Munsiff to investigate when the claim exceeds pecuniary limit of jurisdiction. See *LANDLORD AND TENANT*, No. 21, 6 Ind. Cas. 131.

(10) Mortgage debt—Decision of Special Judge—Maintainability of fresh suit. See *ACT I OF 1903 (BUNDELKAND ENCUMBERED ESTATES)*, No. 1, 6 Ind. Cas. 164.

(11) Fixed ratetenancy—Jurisdiction of Civil Court to declare title—. See *ACT II OF 1901 (AGRA TENANCY)*, No. 12, 7 A.L.J. 658.

(12) Transfer of decree passed by Civil Court for execution to a Rent Court. See *EXECUTION OF DECREE*, No. 17, 13 O.C. 119.

(13) Partition among joint tenants—Jurisdiction. See *RES JUDICATA*, No. 11, 7 A.L.J. 918.

(14) Partition of estate by Deputy Commissioner—Control of Civil Courts. See *CIV. PRO. CODE (MYSORE)*, No. 17, 15 M.C.C.R. 139.

(15) Title, suit for—Jurisdiction. See *ACT VIII OF 1876 (BENGAL ESTATES PARTITION)*, No. 1, 37 C. 662.

(16) Suit to correct or alter entries in record-of-rights—Suit for other reliefs—Jurisdiction. See *ACT VIII OF 1885 (BENGAL TENANCY)*, No. 43, 7 Ind. Cas. 340.

(17)—See *ACT III OF 1901 (U. P. LAND REVENUE)*, No. 13, 7 A.L.J. 1156.

—3.—Of Civil and Rev. Courts.

(1) *Suit by landlord for possession of land held by a deceased occupancy tenant, from a mortgagee of his occupancy rights—Cognizable by Civil Court—Punjab Tenancy Act (XVI of 1887), Ss. 59 (4), 100.*

Where an occupancy tenant having mortgaged his occupancy rights died without heirs, and the landlords brought the suit for possession,

Jurisdiction—(Continued).**—3.—Of Civil and Rev. Courts—(Contd.).**

Held that the suit was one for possession of land which was mortgaged by the occupancy tenant, on the ground that the occupancy rights, and consequently the mortgage rights, have been extinguished by the death without heirs of the occupancy tenant, and was cognisable by Civil Court (a). **Qadu v. Buland Khan and others**, 9 P.R. 1910 = 7 P.W.R. 1910 = 7 Ind. Cas. 255 = 9 P.L.R. 1910.

SCOTT-SMITH, J.

Reference : —88 P.R. 1894, D.

(2) *Jurisdiction:—Suit by occupancy tenants objecting to the correctness of an entry in the Record of Rights—Relating to enhancement of rent—Punjab Tenancy Act, XVI of 1887, Ss. 5 and 100—Punjab Land Revenue Act, XVII of 1887, S. 45.*

Held, that a suit by occupancy tenants for a declaration under S. 45 of the Punjab Land Revenue Act, that they, as occupancy tenants under S. 5 of Act XVI of 1887, are not liable to pay the enhanced rent according to a fresh entry in the Record of Rights and that such entry is wrong, is cognizable by a Civil and not a Revenue Court (a). **Rahmun v. Hasham**, 103 P.W.R. 1910 = 73 P.R. 1910 = 7 Ind. Cas. 717 = 144 P.L.R. 1910.

ARTHUR REID, C.J.

References :—(a) C. 25 P.R. 1889, F.; C. 89 P.R. 1895, Diss. from.

(3) *Jurisdiction, exclusive of Revenue Courts—Suit for declaration in Civil Court that a decree of Revenue Court is void for irregularity—Maintainability of.*

A suit cannot be maintained in the Civil Court for a declaration that the decree of the Revenue Court, in a matter in which that Court has exclusive jurisdiction, is void and ineffectual on the ground that the proceedings of that Court were contrary to law (a). **Uman Shankar v. Bhagwan Din**, 7 A.L.J. 1064.

BANERJI, J.

Reference :—(a) 21 A.W.N. 49, F.

(4) *Mortgage—Usufructuary—Expropriatory tenancy—Collusive relinquishment by the mortgagor tenant, effect of, on mortgagee—Ejectment of mortgagee—Revenue Court jurisdiction—Suit for declaration that relinquishment was collusive—Civil or Revenue Court's jurisdiction.*

A suit for the declaration that a compromise entered into between the zamindar and the

Jurisdiction—(Continued).**—3.—Of Civil and Rev. Courts—(Contd.).**

original ex-proprietary tenants for the relinquishment of the holding, was collusive, and not binding upon the mortgagee from the tenants, would lie in a Civil Court.

A Revenue Court has no jurisdiction to eject a mortgagee from an ex-proprietary tenant, and if the ex-proprietary tenant, during the subsistence of the mortgage with possession, relinquishes his holding to the prejudice of his mortgagee, his relinquishment, so far as the mortgagee with possession is concerned, is inoperative. **Ramdhari Rai v. Ramdhari Rai**, 2 Ind. Cas. 456 = 7 A.L.J. 305.

KARAMAT HUSSAIN, J.

Reference :—A.W.N. 1904, p. 170, R.

(5) *Bengal Estates Partition Act (V of 1897, B.C.). Ss. 51, 52, 55, 58, 119—Civil Procedure Code (Act, XIV of 1882), Ss. 520, 521—Partition 'by Revenue authorities—Jurisdiction of Civil Court to set aside.*

A Civil Court has no jurisdiction to set aside a partition made by the Revenue authorities, on the ground of a defect in, or erroneous exercise of, jurisdiction, without any issue of fraud or wrongful loss caused to the parties by reason of such error. **Girwardhary Singh v. Bachu Singh**, 5 Ind. Cas. 454.

HOLMWOOD and CHATTERJEE, JJ.

References :—17 C. 590; 17 I.A. 40; 9 A. 191 (P.C.); 13 I.A. 134, R.

(6) *Jurisdiction—Suit to set aside decree of Revenue Court—Matters within exclusive jurisdiction of Revenue Court.*

A Civil Court has no power to interfere with decrees of the Revenue Court, which have been passed in matters exclusively within the jurisdiction of the latter Court. **Chiranjil Lal v. Kehri Singh**, 7 A.L.J. 810 = 6 Ind. Cas. 891.

STANLEY, C.J., and GRIFFIN, J.

References :—S.A. 883 of 1905; 20 A. 237, R.

(6-a) *Partition—Revenue free land—Revenue and Civil Court—Jurisdiction.*

A suit for the partition of a revenue-free plot and for the union of the same into a separate mahal can be entertained only by a Revenue Court. **Musammatt Hajara Bibi v. Lala Lal Chand**, 8 Ind. Cas. 149.

KNOX and GRIFFIN, JJ.

References :—10 A. 5, F; A.W.N. (1905), 197, D.

(6-b) *Rent-free grant—Proprietary title—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 13, 6 Ind. Cas. 425.*

Jurisdiction—(Continued).**—3.—Of Civil and Rev. Courts—(Concl'd.).**

(7) Under-proprietors—Illegal ejectment. See ACT XXII OF 1886 (ODDH RENT), No. 4, 13 O.C. 188.

(8) Mortgagor and mortgagee—Relationship of landlord and tenant—Suit by mortgagee for possession—Jurisdiction. See LANDLORD AND TENANT, No. 30, 110 P.W.R. 1910.

(9) Suit for possession of land. Jurisdiction. See ACT III OF 1895 (MADRAS HEREDITARY VILLAGE OFFICES), No. 5, 5 Ind. Cas. 136.

(10) Partition of Shamilat land. See SHAMILAT, No. 3, 3 P.L.R. 1910.

(11) Suit for ejectment in Revenue Court—Class of tenancy determined—Subsequent suit in Civil Court—Not maintainable. See ACT II OF 1901 (AGRA TENANCY), No. 16, 7 A.L.J. 555.

(12) Partition proceedings completed—Maintainability of civil suit to disturb decision in those proceedings. See ACT III OF 1901 (U.P. LAND REVENUE), Nos. 11 and 12, 6 Ind. Cas. 688 and 6 Ind. Cas. 697.

(13) Alienation of occupancy rights by tenant—Alienation declared void at the instance of landlord—Tenant's right to recover possession from landlord—Jurisdiction. See LANDLORD AND TENANT, No. 53-a, 8 Ind. Cas. 733.

—4.—Of High Courts.

(1) *Jurisdiction—Practice—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of Law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rule—Principal and Agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), S. 93—Sale—Tender.*

The Bombay United Rice Merchants Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay.

Jurisdiction—(Continued).**—4.—Of High Courts—(Continued).**

By these rules a Sub-Committee was nominated to decide all disputes which may arise as to contracts and do all other business relating to contracts. It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association, and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and, on the last day of the *vaida*, should fix the *vaida* rate (i.e., the market rate of the day), on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in Bombay, who were members, to purchase rice for them and on the 24th November, 1906, these agents bought from the defendants 1,340 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud, 1963 (i.e., from the 18th November, 1906, to 30th November, 1906). The contract which was in the printed form framed under the rules as above mentioned contained the following clause: "This contract is made subject to the rules of the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that, in setting the *vaida* rate, the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association, calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice, a general meeting of the Association was held on the 30th November, 1906, at which after discussion a special Sub-Committee was appointed to fix the rate, consisting only of three persons one of whom was not a member of the standing Sub-Committee, and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the

Jurisdiction—(Continued).**—4.—Of High Courts—(Continued).**

rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee, and the other because he was interested in fixing a low rate, and they contended that for these reasons, *inter alia*, they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for, and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November, 1906. The sum claimed as damages was less than Rs. 1,000.

The defendants pleaded :—

(1) That, having regard to S. 15 of the Civil Procedure Code (XIV of 1882) and S. 18 of the Presidency Small Cause Courts Act (XV of 1882), the suit was not maintainable in the High Court.

(2) That certain alleged partners of the plaintiffs not being parties to the suit, it should be dismissed for non-joinder.

(3) That, having regard to the rules, of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law, at all events, until they had exhausted the remedies provided by the rules.

(4) That the plaintiffs were bound by the *voida* rate fixed by the Sub-Committee appointed by the Association.

Held, (1) That the High Court has jurisdiction and that the suit should proceed, subject to the provisions as to costs, contained in S. 22 of the Presidency Small Cause Courts Act (XV of 1882).

(2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder.

(3) That the plaintiffs were entitled to sue at law, notwithstanding the provisions contained in the rules of the association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other.

(4) That, at the meeting of the Association held on the 30th November, 1906, the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *voida* rate, and that they were therefore bound by the rate then fixed.

Jurisdiction—(Continued).**—4.—Of High Courts—(Concluded).**

Any stipulation, that the award of an arbitrator shall be accepted as final, restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void.

The effect of S. 28 of the Indian Contract Act (IX of 1872), S. 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899), and of the Civil Procedure Code dealing with arbitration, is, that a person may not contract himself out of his right to have recourse to Courts of law, but that, in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts. **Mulji Taj. Singh v. Ransi Devraj**, 11 Bom. L.R. 273 -- 34 B. 13 = 3 Ind. Cas. 837.

BEAMAN, J.

(2) *Retrial—Setting aside order of discharge—Presidency Magistrate—Criminal Procedure Code (Act V of 1898). Ss. 243, 437, 439—Charter Act (24 and 25 Vic. S. 104, S. 15).*

The High Court has full power under the Criminal Procedure Code to set aside an order of discharge passed by a Presidency Magistrate and to order a further inquiry (a).

Interference under S. 15 of the Charter Act is limited to cases where there is an error that affects jurisdiction, either a want of jurisdiction or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction (b). **Malik Pratap Singh v. Khan Mahomed**, 11 C.L.J. 50 = 13 C.W.N. 1221 = 3 Ind. Cas. 861 = 10 Cr. L.J. 385 = 36 C. 994.

COXE and RYVES, JJ.

References :—(a) 15 C. 608 ; 26 C. 746 ; 27 B. 84, F. ; 6 C.L.J. 705 ; 33 C. 1882 ; 27 C. 126, *Dissented from*. (b) 1 All. 101 ; 26 C. 74, F.

(3)—to grant probate and letters of administration—Original side of High Court—Property not situate within jurisdiction. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 11, 37 C. 224.

(4) Reference of question of Court fee—Jurisdiction of Division Bench to hear. See COURT FEES ACT, No. 3, 7 A.L.J. 842.

(5) Application for sanction to sell *wakf* property—Jurisdiction—Procedure. See MAHOMEDAN LAW (WAKF), No. 6, 7 Ind. Cas. 33.

Jurisdiction—(Continued).**—3.—Of Rent Courts.**

Payments on account of maintenance—Suit in Rent Court—Jurisdiction. See OUDH TALUKDAR, No. 1, 7 A.L.J. 41.

—5-a.—Of Revenue Courts.

Punjab Tenancy Act (XVI of 1887), S. 77

(3) (S)—*Suit against co-sharer for share of sale-proceeds of trees growing in joint holding—Jurisdiction of Revenue Courts—Denial of plaintiff's title by defendant, effect of—Claim decided by wrong Court—Effect.*

A suit brought against a co-sharer, for a share of the sale-proceeds of certain trees growing in joint holding, falls under cl. K of S. 77 (3) of the Tenancy Act, and the Revenue Courts alone have jurisdiction to deal with such a claim (a). The mere fact that the defendant in such a case denies the plaintiff's title as a co-sharer cannot affect the question of jurisdiction.

Where a decree has been passed in respect of a claim by a Court having no jurisdiction, the decree shall be set aside, and the plaint shall be ordered to be registered in the proper Court (b). **Sultan v. Sher Muhammad**, 52 P.R. 1910 6 Ind. Cas. 939.

RATTIGAN, J.

References :—(a). 25 P.R. 1909, *l'.* and 119 P.R. 894, *R.* (b) 25 P.R. 1909, *R.*

(2) *Punjab Tenancy Act (XVI of 1887), S. 77*

(3) (h)—*Suit for possession by landlord against transferee from occupancy tenant after tenant's death.*

A suit by the landlord of an occupancy holding to dispossess a transferee from the occupancy tenant after the occupancy tenant's death is exclusively cognizable by a Revenue Court.

The application of S. 77 (3) (h) is not expressly confined to cases in which the transfer is bad *ab initio*; the language used is wide enough to equally cover cases in which the right to dispossess has occurred on the happening of an event subsequent to the transfer. **Chhangu v. Muhommed Baksh**, 8 Ind. Cas. 666.

KENSINGTON and RATTIGAN, JJ.

References :—9 P.R. 1910; 7 P.W.R. 1910; 9 P.L.R. 1910; 5 Ind. Cas. 255, *overruled*, 88 P.R. 1894, *followed*.

(3) See ACT I OF 1908 (MADRAS ESTATES LAND), No. 1, 8 M.L.T. 287.

(4) Recorded co-sharer—Question of title—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 23. 6 Ind. Cas. 703.

Jurisdiction—(Concluded).**—6.—Of Small Cause Courts.**

(1) *Suit for recovering share in the produce of immoveable property is cognizable by the Court of Small Causes—Practice—Procedure—Civil Procedure Code (V of 1908), S. 1.*

A suit for recovering a share in the produce of immoveable property lawfully collected by the defendant is not a suit for possession of immoveable property or for recovery of interest in such property, but it is a suit for moneys had and received to the plaintiff's use, and, as such, it is cognizable by the Court of Small Causes. **Maharana Shri Davlatsinghji v. Khachar Hamir Mon**, 11 Bom. L.R. 1330 = 34 B. 171 = 4 Ind. Cas. 830.

SCOTT, C.J. and HEATON, J.

Reference :—17 Bom. 42, *F'.*

(2) *Small Cause Court—Jurisdiction—Suit for 'hittalu' kandaya—Revenue Manual, R. 23—Civ. Pro. Code, S. 37—Recognised agents.*

A suit, which is neither for enhancement nor for abatement of rent, but merely one for recovery of "kandayam" or rent newly levied, is cognizable by a Court of Small Causes.

An agent appointed under r. 23 printed at page 228 of the Mysore Revenue Manual is not a recognised agent within the meaning of S. 37 of the Civ. Pro. Code, and he has, therefore, no power to sue on behalf of his co-sharers. **Nagaraajaya v. Janardanlangar**, 15 M.C.C.R. 150.

KRISHNA RAO and SETLUR, JJ.

(3) Suit for damages for cutting trees—Defendant alleging non existence of trees. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 15, 5 Ind. Cas. 322.

(4) Malicious prosecution—Suit for damages—Jurisdiction—Judge invested with Small Cause jurisdiction trying suit under his ordinary jurisdiction—Appeal. See MALICIOUS PROSECUTION, No. 3, 15 M.C.C.R. 154.

(5) See SMALL CAUSE COURT.

Khanadamad.

Appointment of future—Validity. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 6, 2 P.R. 1910.

Kharach-i-pandan.

See MAHOMEDAN LAW (GENERAL), No. 1, 14 C.W.N. 865.

Kolls.

Status of. See CUSTOMS (PUNJAB—MARHAGE), No. 1, 79 P.R. 1910.

Kosalaj.

—attached to one house but overhanging the ground of adjoining house—Rights of owners of both houses. See EASEMENT, No. 5, 8 M.L.T. 122.

Kuri.

See CHIT FUND, No. 1, 8 Ind. Cas. 510.

Laches.

(1) Meaning of. See CO-SHARERS, No. 8, 7 Ind. Cas. 772.

Lakhiraj.

Presumption as to land being—. See REGULATION XXV OF 1802 (MADRAS), No. 1, 20 M.L.J. 728.

Lambardar and Co-sharer.

(1) *Central Provinces Tenancy Act (IX of 1898), S. 61, cl. (2)*—*Central Provinces Land Revenue Act (XVIII of 1881), S. 4 cl. (11), 138*—Lambardar,—Right of lambardar to sue alone for ejectment of a trespasser.

Although a lambardar represents the body of co-sharers in their dealings with Government for certain purposes, he is not alone entitled to bring a suit to eject a trespasser. **Nilmoni Guntia v. Jogendra Guntia**, 6 Ind. Cas. 389.

BRETT and SHARFUDDIN, JJ.

Reference:—13 C.P.L.R. 113, R.

(2) *Rights of lambardar—Lease of timber bearing common land—Wajib-ul-arz—Construction.*

A lambardar has no authority to ordinarily grant leases of timber-bearing common land of the village to lessees, for the purpose of having the timber cut and converted into charcoal.

Where a *Wahji-ul-arz* provided that each co-sharer managed the *parti* land in his *patti*, and the lambardar the *shamilat*, held, that the lambardar had no power to lease the timber-bearing common land and authorise the lessee to cut the timber. **Jagannath Prasad v. Rustam Ali**, 7 A.L.J. 827=7 Ind. Cas. 98.

STANLEY, C.J. and GRIFFIN, J.

(3) *Agra Tenancy Act (II of 1901), S. 159—Lambardar—Remuneration, rights to—U. P. Land Revenue Act (III of 1901), Ss. 144, 234*—Lambardar's remuneration not dependent on the collection and payment of revenue alone—Interest on lambardari dues not allowed.

Lambardar and Co-sharer—(Concluded).

Under S. 159 of the Agra Tenancy Act, 1901, a lambardar is entitled to sue a co-sharer for the recovery of his remuneration.

A lambardar is entitled to his remuneration even though the co-sharer has himself paid the revenue into the Government treasury.

A lambardar is not entitled to interest on his fees. **Bhoj Raj v. Srigopal**, 7 Ind. Cas. 647.

BANERJI, J.

(4) Effect of S. 90, Trusts Act. See ACT II OF 1882 (TRUSTS), No. 3, 6 N.L.R. 12.

Land Acquisition Act.

See ACT I OF 1894.

Land Acquisition Regulation (Mysore).

Part III—Incorrectness of award—Burden of proof.

Where there is a reference to the Court under Part III of the Regulation, the burden of proving the incorrectness of the Deputy Commissioner's award lies on the objector.

In assessing the amount of compensation payable when land is acquired, the probable use to which such land might be put is an element to be taken into consideration; but the burden of proving "probability" lies on the applicant. **Yeerabhadrapa Chetty v. The Deputy Commissioner of the Bangalore District**, 15 M.C.C.R. 77.

STANLEY ISMAY, C.J. and NANJUNDAYYA, J.

Landlord and Tenant.

(1) *Agreement—Stipulation to recognise tenancy—Existence of right—Effect of agreement.*

Where the plaintiffs, in taking settlement of certain lands from Government, expressly stipulated that they would be bound to recognise the rights of the intermediate holders, subordinate holders, raiyats and others as recorded in the settlement papers.

Held, they were bound to recognise rights so recorded, even if such rights were incorrectly recorded and had no real existence. **Chandramoni Mohanti v. Manmatha Nath Mitter**, 11 C.L.J. 68=5 Ind. Cas. 301.

BANERJEE and PERCITTER, JJ.

(2) *Enhancement of rent—Improvement—Onus—Bengal Tenancy Act (VIII of 1885), S. 29.*

Landlord and Tenant—(Continued).

Where a landlord sues for enhancement at a rate more than that indicated in S. 29, cl. (c) on the ground of improvement, it is incumbent on him to shew that the improvement has been effected and that it exists and substantially produces its estimated effect in respect of the holding. **Rama Nath Hudati v. Jote Kumar Mukherji**, 11 C.L.J. 1=2 Ind. Cas. 660.

JENKINS, C.J., and MOOKERJEE, J.

- (3) *Lease-deed—Possession of lands leased—Entire extent not put in possession of lessee—Proportionate reduction of rent for lands not given possession of—Payment of whole rent under protest, whether a voluntary payment—Recovery of.*

A tenant was not put in possession of all the lands included in the lease, but as the lease contained a condition, according to which if, the full rent were not paid in any year, the tenant could be evicted from the whole land, and the lease forfeited, the tenant paid under protest the full amount due as rent for three years. *Held*, the payment of the whole rent, in view of the threat held out by this condition, could not be regarded as a voluntary payment, and that the tenant would be entitled to recover the amount so paid. **Ghanta Ramanna v. G. Narayanasamy Naidu Garu, Receiver, Naidadavole Estate**, 7 M.L.T. 52 = 5 Ind. Cas. 712.

MILLER and SANKARAN NAIR, JJ.

- (4) *Parties—Objection as to defect of parties—Failure of plaintiff's attempt to defeat objection—Prayer in second appeal to join party, not to be allowed—Landlord and tenant—Rent, suspension of—Substantial interference by landlord with tenant's enjoyment.*

An objection as to defect of parties in a rent suit was taken in the written statement and was pressed throughout the litigation. The plaintiff tried his best to defeat the objection on the allegation that the person named by the defendant was not interested in the share of the tenure in respect of which rent was claimed. Upon the facts found he failed to establish that case.

Held, that, in second appeal, the plaintiff could not be permitted to turn round, to make a new case, and to have that person joined as a party defendant, and that his suit must fail.

When a landlord interferes substantially with the enjoyment by the tenant of the demised

Landlord and Tenant—(Continued).

property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction. Therefore, where the landlord interferes to any appreciable extent with the collection of rent by a tenure-holder under him, he is not entitled to get any rent from the tenure-holder. **Rassawari Chowdhurani v. Rajah Sir Sourendra Mohun Tagore**, 5 Ind. Cas. 105 = 11 C.L.J. 601.

MOOKERJEE and TRUNON, JJ.

*References:—*15 W.R. 230; 21 C. 296; 5 C.W.N. 353, *Rel. on*; 28 C. 188; 13 W.R. 338; 34 C. 191; 2 Ind. Cas. 123; 13 C.W.N. 702; 9 C.L.J. 585; 2 Ind. Cas. 169, 36 C. 556; 9 C.L.J. 578; 13 C.W.N. 853; 4 Ind. Cas. 63; 9 C.L.J. 595; 9 C.W.N. 871, *R.*

- (5) *Landlord and tenant—Suit for ejectment—Denial of landlord's title—Forfeiture.*

Where the defendant in a suit for rent by the plaintiff, his landlord, had denied his title and claimed to hold under a third party.

Held that in a suit by the landlord for ejectment of the defendant as a trespasser, the defendant was debarred from pleading his tenancy and claiming to hold possession on that ground. **Sheik Miadhar v. Rajani Kanta Ray**, 14 C.W.N. 339 = 5 Ind. Cas. 708.

CHITTY and RICHARDSON, JJ.

*References:—*2 C.W.N. 755; 6 C.W.N. 575; 3 C.L.J. 201; I.L.R. 34 C. 922, *F.*; 9 C.W.N. 928, *D.*

- (6) *Suit for possession on declaration of title—Non-transferable holding, transfer of, by tenant—Non-recognition of transfer by landlord—Surrender of holding by old tenant acceptance of, by landlord—Settlement of holding with new tenant—Transfer, if an incumbrance—Bengal Tenancy Act (VIII of 1884), S. 85, Sub-Ss. (6) and (7) "Incumbrance," meaning of.*

Where a non-transferable holding or a portion of it is sold, the limitation of the interest of the transferor, so far as the portion transferred is concerned, amounts to an absolute extinction of his right in that land, as between himself and the new tenants with whom the landlord, on accepting a surrender from the old tenant, the transferor, settles the holding.

The transfer is not a limitation of the tenant's interest, but a complete extinction of his interest in the portion transferred and does not come within the meaning of the word

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"incumbrance" as used in S. 86, Sub-Sections (6) and (7) of the Bengal Tenancy Act (VIII of 1885). **Tomizuddin Khan v. Khoda Nawaz Khan**, 11 C.L.J. 16 = 14 C.W.N. 229.

CASPERSZ and DOSS, JJ.

Reference :—3 C.W.N. 13, R. and Expl.

(7) *Substantial interference by landlord with enjoyment of holding by tenant—Tenant, when entitled to suspension of rent—Bona fide interference, what is.*

Where there is substantial interference by the landlord with the tenant's enjoyment of his tenure, even though there is no complete eviction, the tenant is entitled to suspension of rent for the period during which there was such interference (a).

J purchased in auction a *durputni* with power to annul incumbrances, and served notice to quit on the *seputnidars* who refused to yield possession. On J, attempting to take forcible possession, criminal proceedings ensued as a result of which the *seputni* was attached under S. 14C, Cr.P.C., on the 3rd October, 1902. The land attached was subsequently let out to *ijaradar* who paid rent to the *putnidar* and deposited certain sums as *ijara* rent in the Collectorate. Some of these sums deposited were withdrawn by J as *durputnidar*. In 1906 the *seputnidars* obtained a decree establishing their *seputni* title and in pursuance of that decree withdrew some of the *ijara* rent that was deposited in the Collectorate. In a suit for rent by J against the *seputnidars* for the period during which the property was under attachment :

Held—That the circumstances constituted substantial interference by the landlord with the tenant's enjoyment of his tenure such as disentitled him to recover rent for that period.

Held—on the facts of the case, that it was not such *bona fide* interference without prejudice to the tenant as would entitle the landlord to receive rent (b). **Mahomed Jeaully Mean v. Sukheanessa Bibi**, 14 C.W.N. 446 = 5 Ind. Cas. 382.

CASPERSZ and DOSS, JJ.

References :—(a) 13 W.R. 338; 24 C. 296; 28 C. 138; 5 C.W.N. 353, *discussed*. (b) 12 M.I.A. 244, D.

(8) *Valuation of suit by landlord for possession of immoveable property against tenant—S. 7, cl. XI (c). Court Fees Act and Suits Valuation Act, S. 8.*

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Under S. 7, cl. XI (c), Court Fees Act, a suit by landlord for the recovery of immoveable property from a tenant, including a tenant holding over after the determination of a tenancy, is valued according to the amount of the rent payable for the year next before suit, and the value for the purpose of jurisdiction will be the same under S. 8 of the Suits Valuation Act. **Ram Chand v. Ram Sukh Das**, 27 P.R. 1910 = 30 P.W.R. 910 = 5 Ind. Cas. 910.

REID, C.J.

References :—50 P.R. 1896, F.; 15 A. 63 and 72 P.R. 1899, R.

(9) *Denial of landlord's title by tenant—Notice to quit—Whether tenant entitled to such notice.*

In the case of a tenancy terminable by notice to quit, the tenant, by denying the landlord's title before the suit, forfeits or is held to waive his right to the notice.

An allegation of right by purchase before suit in his written statement is evidence of denial of landlord's title before suit. **Mayan Thariyakath Kathiyakuth Umma v. Ithikamparambil Kuthussa**, 7 M.I.T. 173 = 20 M.L.J. 415.

MILLER and SANKARAN NAIR, JJ

References :—17 M. 218, F.; 4 Ad. and El. 784 and 10 B. and C. 816, R.

(10) *Title of stranger to half the holding set up—Maintainability of the plea—Failure to decide—Proper course—Revision.*

C executed a lease in favour of V and in V's name. In a suit by V against C, C set up the title of K in respect of half the premises held by him on lease.

Held, on revision, that, by the mere fact that the lease was in the name of V, C was not precluded from setting up the title of K to half the premises ;

and that the lower Court ought to have given a finding on the plea, and the suit was accordingly remanded to the lower Court. **Chidambaram Velar v. Velu Pillai**, 7 M.L.T. 177 = 5 Ind. Cas. 926.

MILLER, J.

Reference :—31 M. 461, R.

(11) *Landlord and Tenant—Adimayavana tenure—Denial of landlord's title by one of the tenants whether works forfeiture in respect of other tenants—Representative capacity—Agency.*

Landlord and Tenant—(Continued).

The family of defendants held the lands, in suit on *Adimayavana* tenure granted by predecessors of the plaintiff. The first defendant having asserted that it was her *jeem*, the plaintiff sued to recover the property :

Held, that the denial, by first defendant, who was not managing member of the family of defendants nor the agent of the other defendants, of the landlord's title, did not work a forfeiture as regards the other tenants, and that plaintiff was not entitled to recover on the ground that the tenure had been forfeited. **Imbichi Kandan v. Kozhikot Kozhake Kovilagath Yiyathen Sree Devi alias Yalia Thamburath Avergal**, 4 Ind. Cas. 875.

BENSON and SANKARAN NAIR, JJ.

- (12) *Occupancy tenant—Trees planted by tenant in village land—Right to sell—Consent of Zemindar—Custom.*

As a general rule, a tenant, who plants trees in the village land, not included in his occupancy holding, with the consent of the *zemindar*, cannot sell them without the permission of the *zemindar*.

The property in trees growing in a tenant's holding is by the general law vested in the *zemindar*, and, in the absence of special custom, the tenant is not entitled to cut down and sell such trees (a).

The fact that a few sales of trees have taken place without the consent of the landlord is not sufficient to establish a custom (b). **Jugdip Narain Singh v. Jokhan Ahir**, 5 Ind. Cas. 256.

JOHN STANLEY, C.J., and PIGGOT, J.

References:—(a) A.W.N. (1899) 73; 21 A. 297; 10 A. 159, F. (b) 30 A. 311; A.W.N. (1908) 112; 5 C.L.J. 456; 4 M.L.T. 169, F.

- (13) *Co-sharer taking kabuliyat in respect of his share—Rent decree, execution purchase under—Priority of title—Purchaser under mortgage decree against holding—Bengal Tenancy Act (VIII of 1855), S. 3, cl. (9) and Sch. III Art. 3—"Holding"—Special limitation—Dispossession by auction-purchaser, not incapacity of landlord.*

P held 7 bighas of jote at a jamma of Rs. 9. The defendants, who were 4 annas landlords, took from P a *kabuliyat* in respect of one fourth of the land, the boundaries given being those of the 7 bighas :

Held, that the defendants must be considered as fractional co-sharers, and not the 16 annas

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landlords in relation to P; that, when they obtained a decree for arrears of rent against P and purchased the one-fourth of the land in execution, they did not acquire an indefeasible interest in the land, so as to have a priority of title against the plaintiffs, who were purchasers in execution of a decree on a mortgage prior to the defendant's purchase (a).

Held, also, that, as the defendants disposed the plaintiffs, not in their capacity of landlords but as auction-purchasers, they could not claim the aid of Art. 3, Sch. III of the Bengal Tenancy Act and the benefit of the special limitation of two years (b).

Held, further, that the defendants were not entitled to raise the question of the transferability of the holding, and to plead that plaintiffs had purchased nothing (c). **Sarat Chandra Chatterjee v. Iswar Chandra Shaha**, 5 Ind. Cas. 397.

CHATTERJEE, J.

References:—(a) 1 C.W.N. 521; 25 C. 97; 2 C.W.N. 44; 25 C. 917; 2 C.W.N. 690 and 2 C.L.J. 10, R. (b) 2 C.W.N. 175; 6 C.W.N. 333; 5 C.L.J. 650; 11 C.L.J. 20; 14 C.W.N. 71; 5 Ind. Cas. 39, R. (c) 4 C.W.N. 679; 6 C.W.N. 624; 11 C.W.N. 76; 11 C.L.J. 20; 14 C.W.N. 71; 5 Ind. Cas. 39, R.

- (14) *Mulgeni tenant—Right to cut down trees—Occupancy tenant and lessee—Relative positions of—Transfer of Property Act, applicability of.*

Though the Transfer of Property Act does not apply to agricultural leases, the Court is entitled to act upon the analogy of the Act (a).

A mulgeni tenant is not entitled to cut down trees (jack trees which are both timber and fruit trees), and the landlord is entitled to damages therefor.

An occupancy tenant is not a lessee. And whatever rule of law may be applied with reference to the rights of an occupancy tenant to the trees on his holding, it has no application to the case of a lessee for a term or in perpetuity. There is no question of injury to the reversion in the former case, which is one of divided ownership. **Gangamma v. Bhommakka**, 7 M.L.T. 231—5 Ind. Cas. 437.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

References:—(a) 24 M. 47 (56), R. (b) 10 W.R. 419, D.; 30 M. 155; 21 W.R. 344 (346); 8 A. 467 (475), R.

Landlord and Tenant—(Continued).**(15) Building by tenant on cultivable land—Injunction.**

Cultivable *nangal* land does not become converted into a building site by the fact that it has not been cultivated as *nangal* for 30 years, and a tenant can be restrained by an injunction from building thereon. **Meera Mohideen Rowthan v. Dubash Kadur**, 7 M.L.T. 223 6 Ind. Cas. 286.

BENSON, O.C.J., and KRISHNASWAMI IYER, J.

(16) Denial of landlord's title prior to suit—Notice to quit—Necessity to give.

Where a tenant set up title in himself and denied the landlord's title before suit, *held*, that the tenant was not entitled to notice to quit. **Murugesu Mudaly v. Subraya Gramany and another**, 7 M.L.T. 241.

WHITE, C.J., and KRISHNASWAMI IYER, J.

(17) Occupancy right not found—Presumption—Notice to quit—Landlord's right to eject.

Where occupancy right has not been found, the tenancy must be presumed to be one from year to year.

A landlord is entitled to eject, after giving due notice to quit. **Grandrapu Sivayya v. Koppineni Venkatratnam**, 7 M.L.T. 350.

BENSON and KRISHNASWAMI IYER, J.J.
Reference:—15 M. 95, D.

(18) Occupancy rights—Succession—Survivorship—Recognition by landlord of right as heir of deceased tenant.

When a person acquires a right of tenancy and joins with him his wife's brother's son in cultivation, on the latter's death, his agnates do not succeed to the holding as his heirs, for it was not acquired by their and the deceased's common ancestor. They do not acquire the right by the landlord's recognising it against the surviving tenant who was joint with the deceased. **Sardar Ali v. Muhammad Ali**, 23 P.L.R. 1910=6 Ind. Cas. 499.

REID, C. J.

References:—159 P.R. 1879; 109 P.R. 1894 (F.B.); 4 P.R. 1880, R.; 76 P.R. 1907 S.C. 32 P.L.R. 1908, D.

(19) Lease—Breach of condition—Forfeiture—Determination of lease—Acceptance of rent after suit—Whether operates as a waiver of forfeiture—Suit against tenant withdrawn with liberty to bring fresh suit, effect of—Transfer of Property Act (IV of 1882), S. 111.**Landlord and Tenant—(Continued).**

Acceptance of rent by the landlord from the tenant, after the institution of a suit for eviction, does not operate as a waiver of the forfeiture condition in the lease entitling the landlord to resume possession on breach of stipulations therein.

The institution of a suit by the landlord to evict the tenant, which he withdraws with liberty to institute a fresh suit, is a determination of the tenancy under S. 111 of the Transfer of Property Act. **Mazhoor Padukudi Perundatta Yasudevan Nambudri v. Pudi-yapurayil Paramban Moideen**, 6 Ind. Cas. 264.

SANKARAN NAIR and ABDUR RAHIM, JJ.

(20) Rent, suit for—Partial eviction—Suspension of rent—Tenant recovering possession and mesne profits—Reclamation lease—Mesne profits, assessment.

Where the tenant has been dispossessed of part of the lands leased to him, by a third party to whom the landlord had given a lease of the same land and assisted him in the dispossession, the landlord is precluded from suing the tenant for rent of the period of such dispossession, even though the tenant has recovered a decree for possession and mesne profits (a).

In respect of lands from which the tenants were evicted, the landlord may look for payment of rent to the trespassers whom he induced into the lands, and they may be entitled, if they have actually paid him rent, to claim a deduction from the mesne profits payable to the tenants.

The doctrine of suspension of the entire rent by reason of even a partial eviction, does recognize the position that the landlord may properly be deprived of the whole rent, even though the tenant has been in occupation of a portion of the lands of the tenancy. This doctrine may be applied in the case of reclamation leases. **Chandrakant Das v. Rama Nath Barman**, 11 C.L.J. 591=6 Ind. Cas. 478.

MOOKERJI and CARNDUFF, JJ.

(21) Covenant to pay rent without deduction—Tenant's right to deduct expenses of repairs—Transfer of Property Act (IV of 1882), S. 108, cl. (f)—Expenses of repairs in nature of payment, not set-off—Jurisdiction of Munsiff to investigate when the claim exceeds pecuniary limit of jurisdiction.

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A covenant by a tenant to pay rent without deduction cannot be construed as a contract between landlord and tenant to exclude the tenant's right to deduct the expenses of repairs of the demised premises.

When, under clause (f) of S. 108, Transfer of Property Act, the lessee makes a deduction of the expenses of repairs from the rent as it accrues due, the deduction is really in the nature of a payment to the landlord, and does not bear the character of a set-off.

Therefore, where, in a Munsiff's Court, in a rent suit, the tenant claimed a deduction of such expenses: *Held*, that the Court had jurisdiction to investigate into the matter, though the amount exceeded its pecuniary jurisdiction. **Katic Graham v. The Colonial Government of British Guiana**, 6 Ind. Cas. 131.

MOOKERJEE and TEUNON, JJ.

(22) *Tenant's failure to accept patta—Right of summary suit—Pendency of proceedings before Collector and Civil Courts—Rate of rent on suspense—Arrears when due—Limitation—Attachment for amount larger than due—Effect.*

Where a tenant does not accept the Patta tendered to him, the land-holder is entitled to proceed by summary suit before the Collector to enforce acceptance of the patta, and in such a suit, it is for the Collector to settle the terms of the tenancy.

So long as proceedings are pending before the Collector and on appeal from him before the Civil Courts, the rate of rent is in suspense, and therefore no arrears of rent can be said to have been due within the meaning of the Limitation Act.

An attachment, though made for a larger amount than actually due, is good for the amount actually due. **Karnam Venkata-krishna Pillai v. Appanna Muthialu Reddi**, 7 M.L.T. 429.

SANKARAN NAIR and KRISHNASWAMI AIYAR, JJ.

(23) *Suit for rent—Purchaser from tenant—Deposit of entire claim—Purchaser has no right to deposit—Plaintiff not compellable to accept payment from stranger.*

In a suit for rent, the amount of the entire claim was deposited by a stranger to the suit who alleged that he had purchased the tenancy from the defendant, but he did not apply to be

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placed on the record. The Court directed the plaintiff to take the money in satisfaction of his claim and dismissed the suit :

Held, that the alleged purchaser had no *locus standi* in the matter, and the plaintiff could not be compelled to accept payment of rent from a person who was not a party to the suit. **Sarajendra Krishna Deb v. Sannyasi Charan Ghosh**, 6 Ind. Cas. 357.

MOOKERJEE and CARNDUFF, JJ.

(24) *Suit for rent against some of joint tenants—Maintainability.*

It is quite competent to a landlord to maintain a suit for rent against some of several joint tenants. **Rameswar Singh v. Jaideb Jha**, 6 Ind. Cas. 387.

CHATTERJEE and VINCENT, JJ.

Reference :—11 C.W.N. 1036, F.

(25) *Qabuliat to pay haq-i-chaha-rum at the time of sale—Construction—Amla, meaning of—Buildings.*

A qabuliat contained the following terms :—
“ *Bawqat farokht ya kisitarah ke intiqal karne ya munhadim karne amla ke kuq-chaharum zamindari ham moqir wa hamare qaim moqan bila uzer ada karnege.* ”

Held, that the word “ *amla* ” meant buildings erected on the site, and that the zamindar was entitled to one-fourth of the price of the house sold and not only to one-fourth price of the materials of the house, as his *haq-i-chaharum*. **Ram Das v. Mirza Jamaluddin Ahmad Khan Sahib**, 6 Ind. Cas. 399.

GRIFFIN, J.

(26) *Custom—Alienation—Transfer of right of residence on the site by tenant—Evidence of custom.*

In order to prove the existence of a custom entitling a tenant to transfer his right of residence on a site, several deeds of transfer were produced, without showing the circumstances under which those transfers were made: *Held*, that the evidence was totally insufficient to establish the custom set up. **Mohammad Yilayat Ali Khan v. Mohammad Liyaqat Ali Khan**, 6 Ind. Cas. 580.

BANERJI and TUDBALL, JJ.

References :—30 A. 311; A.W.N. (1908) 112; 5 A.L.J. 456; 4 M.L.T. 169, R.

(27) *Suit for ejectment—Right to eject—Onus of proof—Inam—Absence of allegation or*

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proof of grant of kudivaram right—Presumption—Stipulation by tenant not to enter land without fresh cowle—Effect—Right of occupancy.

In a suit for ejection by an inamdar, the onus lies on the plaintiff to prove that he is entitled to eject the defendants.

Where it is neither alleged nor proved that the lands themselves were given to his vendor as Inam, or, in other words, that the *kudivaram* or any portion of it was granted to him as Inam, no presumption arises that the predecessors in title of the defendants derived their title to the *kudivaram* from the Inamdars.

A stipulation by the ryot that he will not touch the land without first obtaining cowle is merely an undertaking on his part that he will not commence to cultivate in the ensuing year without first obtaining a cowle, and is perfectly consistent with a right of occupancy on his part. **Suri Venkata Subbaraya Sastri v. Darappareddi Kristnalya**, 20 M.L.J. 526-7 Ind. Cas. 358.

BHASHYAM AIYANGAR and MOORE, JJ.

(28) *Tahzinni—Nature of the tenure—Tenant denying his landlord's title—Such denial operates as a ground for forfeiture of the tenancy—Pleadings—Appellate Court deciding case on a point not raised in the pleadings, but inconsistent with such plea—Material irregularity—Revision.*

Held, (1) that a tenant repudiating his landlord's right and setting up an adverse title can be ejected, irrespective of the period during which he may have been in possession; and that a lease of *tahzinni*, though it is in the nature of a permanent lease, is liable to forfeiture under the Transfer of Property Act, if the tenant denies the title of the landlord (a).

(2) That the Appellate Court was not right in going into a question not raised in the pleadings. Defendant pleaded that both the site and the building descended to him from his ancestors, a plea quite inconsistent with the ground taken by the Divisional Judge in deciding the case, *viz.*, that plaintiff could not eject defendant, although he was his tenant denying his title, his representative in title having allowed defendant's representative to build on the land, and must, therefore, be considered to have made a permanent grant of the land subject only to his right to realize a fair rent.

(3) An appellate Court commits material irregularity, within the meaning of S. 70

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(1) (a) of Act XVIII of 1884 as amended, if it misapplies the law relating to the case and decides it on a point not raised in appeal. **Sayad Jalal Din v. Ramzan**, 80 P.W.R. 1910.

ANDERSON, J.

References :—(a) C. 19 P.R. 1875. D.; 12 W. R. 495; 23 W.R. 399; 8 C. 960 not F.; 8 C.L. R. 150, F.; 24 C. 440, R.

(29) *When one of the landlords is competent to sue for whole or a part of rent or enhance it.*

When a landlord sues for the entire rent of a building, but it is found that he is entitled only to a share of the rent, the suit must be dismissed, unless his co-sharer landlords are made parties to it, or an arrangement is proved between the landlords and the tenant that the latter should pay each landlord his proportionate share of the entire rent (a).

No general hard and fast rule can be laid down that one of the co-sharer landlords cannot sue for the enhancement of his share of the rent, but this is a question for determination of the Court according to the circumstances of each case (b). **Ruldu Ram v. Aya Ram**, 82 P.W.R. 1910=7 Ind. Cas. 351.

SCOTT-SMITH, J.

References :—(a) 31 C. 707, F. (b) 5 C. 574, Diss. from.

(30) *Jurisdiction of Civil or Revenue Court—Incompetency of mortgagee to sue for possession of mortgaged land in Civil Court where relationship of landlord and tenant has been created—His remedy where Financial Commissioner has already decided to the contrary—Terms creating relationship of landlord and tenant—Construction of mortgage-deed.*

Held that :—

1. Where, under the terms of a mortgage-deed of land, proprietary possession is transferred to the mortgagee, while the cultivating possession has been retained by the mortgagor, the relationship of landlord and tenant is created thereby between them. It is not necessary to place the mortgagor in the position of a tenant that there should have been formal surrender of possession of the property to the mortgagee, and a re-transfer of it to the mortgagor, nor is it necessary that there should be two deeds or agreements.

Conditions to the following effect among terms of a mortgage-deed are of the above description.

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A.—(1) The mortgaged land shall remain in the possession of the mortgagee, but cultivating possession thereof shall be retained by the mortgagor.

(2) In lieu of interest due on the mortgage money the mortgagor shall pay to the mortgagee a certain sum per year on account of profits (*mumafa*) out of the value of produce. In the event of default being made in the payment of the annual profits, the unpaid amount of the profits shall be added to the principal mortgage-money and interest on the total amount shall be paid at 13 annas per cent. per mensem.

B.—The possession of the mortgaged estate has been delivered to the mortgagee from the date of the mortgage, but the mortgagor shall cultivate the same on behalf of the mortgagee and pay the Government revenue and other expenses by way of *Sarvai*. He (the mortgagor) shall also pay to the mortgagee a certain sum per year as profits (*mumafa*) (a).

Where the Financial Commissioner decides on revision that relationship of landlord and tenant has not been created between the mortgagee and the mortgagor and consequently dismisses the ejectment suit, and the Chief Court also disallows the mortgagee's claim for possession of the land holding the decision of the Financial Commissioner is erroneous, it is both impracticable and illegal to proceed under the provisions of S. 100 of the Punjab Tenancy Act, 1887. The only remedy left to the mortgagee in such a case is to move the Financial Commissioner to review his order. **Chokha v. Fateh Muhammad**, 110 P.W.R. 1910 = 150 P.L.R. 1910.

SHAH DIN and CHEVIS, JJ.

Reference :—(a) (C. 46 P.R. 1894, F.B.), F.

(31) *Encroachment by tenant—Proof of creation of tenants before encroachment, necessary.*

The doctrine of encroachment by a tenant upon the adjoining land of his landlord can have no application, unless it is established that the tenancy was created first and the encroachment made afterwards. **Bankim Chandra Chatterjee v. Akhoy Kumar Banerjee**, 7 Ind. Cas. 41.

MOOKERJEE and CARNDUFF, JJ.

(32) *Landlord and tenant—Wajib-ul-arz—Construction—Groves planted by tenant—Right to cut and sell timber.*

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Where the *Wajib-ul-arz* of a village recited that the cultivators who planted the groves had a right to cut the timber in any way they pleased.

Held, that they had the right also to sell the timber. **Muhammad Taki v. Shandar**, 7 Ind. Cas. 212.

STANLEY, C.J., and GRIFFIN, J.

(33) *Unauthorized use of water from landlord's tank—Contract—Water cess, liability for—Liability for damages in the absence of contract.*

If a tenant uses water from his landlord's tank for irrigating his land, without the permission of the landlord, the tenant, even if there is no contract express or implied, is liable in damages to the landlord as a trespasser. In such a case, it is immaterial that water was not sufficient for him to raise a crop. **Sree Rajah Yenkata Rangaya Appa Row Bahadur, Zamindar of Nuzvid v. Tadepalle Jagannadham**, 7 Ind. Cas. 230.

SANKARAN NAIR, J.

(34) *Ejectment—Cause of action—Denial of landlord's title—Punjab Courts Act (XVIII of 1884), as amended, S. 70 (1) (a)—Revision—Civil cases—Material irregularity—Lower Appellate Court ignoring vital facts.*

When it appeared that the lower appellate Court had ignored vital facts in deciding an appeal, the Chief Court admitted revision against the decree passed on appeal by the lower appellate Court.

The denial of the landlord's title by the tenant is a sufficient cause of action for his ejectment. **Muhammad Bakhsh v. Faiz Bakhsh**, 35 P.L.R. 1910.

JOHNSTONE, J.

(35) *What amounts to adverse possession by tenant.*

So far as this Presidency is concerned, it would seem to be well settled that a person, who has lawfully come into possession as tenant from year to year or a term of years, cannot, by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire by limitation title as owner or any other title inconsistent with that under which he was let into possession.

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But if, after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner of such limited estate as he might prescribe for.

A disclaimer of the lessor's title by the 'lessee' may be a ground of forfeiture, but it does not in itself make the statute of Limitations run against the lessor (a).

The landlord is not bound to exercise his option and repudiate the tenancy, but, if he does, even though he does not succeed in evicting the parties in possession, it is doubtful whether he should be allowed to set up a subsisting tenancy as a ground for preventing the acquisition by prescription of a limited interest (b). **Raja of Venkatagiri v. Mukku Narasayya**, 8 M.L.T. 258.

WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 25 M. 507 (511); 26 M. 535; 11 F.R. 769, R.; 18 B. 507; 27 B. 515; 21 B. 391; 21 B. 509; 14 C. 323; 35 C. 470; 27 C. 156, Cons. (b) 25 M. 507; 24 M. 216, R.

(36) *Land described in cowle as mamool wet—Suit to recover from landlord water cess paid to Government—Rights of tenant.*

Plaintiff in this case, having paid water cess, claimed it from the defendant, on the ground that the defendant treated the land as mamool wet in the cowle he granted. Defendant did not admit that there was any provision for indemnity, nor did he authorise plaintiff to take government water on his responsibility. Held that plaintiff had no cause of action and that the suit must fail. **Sashamma Garu v. Purushothamma Somayajulu**, 8 M.L.T. 296.

ABDUR RAHIM and KRISHNASWAMI IYER, JJ.

(37) *Right of tenant to produce of waste land—Right of zamindar to cultivate that land—Resistance by tenant.*

Defendants in 1864 sold their *zemindari* rights to the plaintiffs in certain villages. The consideration for the sale, as specified in a proceeding of the Settlement Officer, dated 29th July, 1810, was "an annual allowance of Rs. 50 *Zemindari* dues, things of spontaneous growth and privilege in respect of the land under cultivation of the vendor and his family." The *Zemindars* leased the barren lands to other persons. Defendants resisted the lessee in taking possession. On a suit by the plaintiffs for declaration that they had a right to bring

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the waste land under cultivation, held that, under the order referred to, the defendants had no right to insist upon the land continuing to be waste land for ever, but that they had a right to enjoy the produce of the land so long as it continued to be barren. **Girraj Singh v. Thakuria**, 7 A.L.J. 1165.

STANLEY, C.J., and BANERJEE, J.

(38) *Lease by tenant for 5 years—Portion of holding—Bengal Tenancy Act (VIII of 1885), S. 85—Abandonment and surrender—Right of tenant's lessee.*

If a tenant leases out a portion of his holding in *ijara* for five years and the lessee is put in possession of that portion and there is nothing to show that the lessor intended to abandon the holding, the lease granted to the lessee is one which the lessor was within his rights in granting, and the lessee is entitled to recover possession from the landlord who had ejected him from the land (a). **Mahomed Tagu v. Choa Lal**, 7 Ind. Cas. 750.

BRETT and VINCENT, JJ.

References:—(a) 10 C.W.N. 499; 3 C.L.J. 222, D.

(39) *Holding over, effect of—Rent kept in abeyance in kabilyat—Omission to specify reason—Oral evidence, admissibility of, to prove reason—Evidence Act (I of 1872), S. 92 and proviso (2).*

Where a tenant holds over upon the expiration of the term of his lease and pays rents, the tenancy is renewed upon the same conditions as those contained in the expired lease (a).

Therefore, the mere circumstance that the term of a lease has expired does not entitle the tenant to contend successfully that he has been absolved from the obligation which he may have undertaken at that time.

If a lease the rent was stated to be a certain sum, but a deduction on account of rent in suspense was allowed and a lesser sum was actually payable. The plaintiff sued upon the lease and alleged that the deduction was allowed because a quantity of land was not at that time fit for cultivation, but that there was an oral agreement to the effect that the rent in suspense would be revived as soon as the quality of the land improved.

Held, that under proviso 2, S. 92, of the Evidence Act, the oral agreement could be proved, because the lease omitted to specify the

Landlord and Tenant—(Continued).

reasons for which the rent was kept in suspense and the period during which it was to continue in abeyance, and that the plaintiff might establish that the contingency upon which the rent was agreed to be revived had happened (b). **Satish Chandra Basu Malik v. Kamini Mohan Goswami**, 7 Ind. Cas. 721.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—(a) 28 C. 227, *Rel.* (b) 11 C. 486; 12 C.L.R. 163 and 9 C.L.R. 301, *R.*

(40) Arrears when become due—Limitation—
Art. 110, Limitation Act (1877)—S. 14,
VIII of 1865 (Madras Rent Recovery).

A tenant sued the landlord in the Civil Court for declaration that the landlord is not entitled to alter the terms of the previous pattahs, and obtained a judgment on appeal in the High Court on 7th August, 1902. In the meantime the landlord sued the tenant in the Revenue Court in 1902 for enforcement of the pattah under S. 9, Act VIII of 1935, and got a judgment on 21st May, 1901. *Held* that the starting point for limitation for a suit for rent was the judgment of the Revenue Court.

A landlord cannot get his rent until he has tendered a pattah which the tenant has accepted or with regard to which the Courts have held that he is bound to accept it; and limitation cannot begin to run against him at a date anterior to the date when he can enforce his claim for rent. **Syed Ghulam Ghouse Sha Sahib Kadri v. Shunmugam Pillai**, 8 M.L.T. 345.

WHITE, C.J.

*References:—*27 M. 143, *R.*; 29 M. 556, *D.*

(41) Burden of proof—Tenant in possession of some land of zemindar—Land not contiguous to holding—Encroachment.

The mere fact that the defendants hold some lands as tenants under the plaintiffs, is not sufficient to throw upon the plaintiffs the burden of showing that, in respect of any other land in the zemindari which the defendants may be found to be in possession of and which is not contiguous to the admitted holding of the defendants, they have no right as tenants. The burden of proof in a case like this lies upon the defendants. **Sheodeni Roy v. Chowdhury Chatoorbhuj Roy**, 12 C.L.J. 376.

NORRIS and BANERJI, JJ.

References:—(1878) 20 W.R. 421; (1882) 11 C.L.R. 476; (1883) 12 C.L.R. 457.

Landlord and Tenant—(Continued).

(42) Lease—Occupancy right, presumption of—Kudimiras, meaning of.

Where a Collector leased all the temple lands in a village to tenants in 1831, and there was nothing to show how the temple acquired the lands, and the tenants claimed permanent occupancy rights;

Held (1) that, the lease to tenants being proved, the presumption was that they came into possession after that date as assignees,

(2) that, there was no presumption of occupancy rights in the tenant's favour, and it was for them to show that they were the representatives-in-title of tenants, who, by length of possession or assertion of occupancy rights, may be presumed to have been occupancy tenants.

(3) that the expression 'kudimiras,' occurring in a deed of lease, may be taken as indicating the existence of occupancy rights in tenants. **Mahomed Meera Levvai Marakkayar v. Ramalingam Pillay**, 8 M.L.T. 430=8 Ind. Cas. 158.

MUNRO and KRISHNASWAMI IYER, JJ.

(43) Contract for fixed money rent—Consideration—Enhancement of rent—Sanction of Collector.

It is open to the landlord and the tenant to substitute a fixed money rent payable by the tenant in lieu of a fluctuating *varam*.

Such a contract is enforceable, even though the effect of it is that the rent is enhanced without the Collector's sanction. **Yerlagadda v. Mallikarjuna Ramaswami**, 8 M.L.T. 436=7 Ind. Cas. 897.

MILLER and KRISHNASWAMI IYER, JJ.

(44) Notice to quit—Partial entry by landlord—His right to fresh notice.

Where a tenant gave notice that he would quit and deliver possession on the last day of a month, and failed to deliver possession on that day, the landlord becomes entitled to a fresh notice or a month's rent.

The fact of landlord's getting partial possession or of his re-entry after tenant's departure does not affect his right to notice or rent. **Niadar Mal v. Mr. E.N. Wiwin**, 94 P.R. 1910.

WILLIAMS, J.

(45) Terms of pattah—Levy of double assessment for encroachment on porambores not comprised in the holding.

A pattah issued by a landlord to his tenant, containing the terms of the tenancy as regards

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a particular holding, should not make provision for a case of trespass upon other land not included in the holding.

The Court struck out a clause in the *pattah* providing for double assessment on *porambokes* encroached upon, which were not a part of the holding leased. **Rayapati v. Yerigada Mallikarajuna**, 7 Ind. Cas. 897.

MILLER and KRISHNASWAMY AIYAR, JJ.

(46) *Lease—Suit for rent—Recital in lease as to exclusive right of lessor in the entire property demised—Right of tenant to plead title of portion in others—Estoppel.*

In a suit for rent, the tenant pleaded that a moiety of the property leased belonged to the lessor's brother, and that he was not liable to the lessor for the entire rent claimed :

Held, that the tenant was not precluded from putting forth such a plea though the lessor's name appeared as the sole owner in the instrument of lease, and that, on the finding that a moiety of the property belonged to the lessor's brother, the plaintiff was entitled to only half the rent claimed. **Chidambara Yelar v. Yelu Pillai**, 7 Ind. Cas. 874.

MILLER, J.

Reference :—31 M. 461, R.

(47) *Jurisdiction—Remand by District Judge—Appeal after remand heard by Sub-Judge—Sub-Judge cannot go behind remand order—Procedure—Contingency not provided by Legislature—Inherent power of Court—C.P.C. (Act V of 1901), S. 851—Estoppel—Tenant's defence that plaintiff is benamidar is not entitled to sue for rent, if permissible.*

An appeal was remanded by the District Judge. A decree was made by the first Court after remand and an appeal was heard by the Sub-Judge against that decree :

Held, that, the Sub-Judge was not competent to go behind the remand order.

Where a contingency happens which has not been anticipated by the framers of the C.P.C., and, therefore, no provision has been expressly made in that behalf, the Court has inherent power to adopt such procedure as would do substantial justice and shorten needless litigation.

In cases where the doctrine of estoppel does not come into play, it is open to the tenant defendant to urge that the plaintiff, as *benamidar* for the beneficial owner, is not entitled to claim rent from him.

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The defendant was a tenant under A. The plaintiff claimed to intervene and to receive rent from the defendant on the ground that an intermediate tenure had been created in his favour by A :

Held, that the defendant was entitled to question the title of the plaintiff and to assert that the plaintiff was *benamidar* for another person and was not entitled to sue for rent. **Rahimunnessa Bibee v. Mahadeb Das**, 7 Ind. Cas. 846.

MOOKERJEE and SHARF-UD-DIN, JJ.

(48) *Right of suit—Suit for rent against some of joint tenants—Liability of tenants, whether joint—Liability of heirs of tenant—Contract Act (IX of 1872), S. 43.*

Joint tenants are not always jointly and severally liable for the whole rent, and any one or more of them cannot be sued by the landlord at his discretion and rendered liable for the whole rent (a).

Even if it be assumed that one of several joint tenants is liable for the whole rent, it does not follow that, when land is let out by A to B, upon the death of B, every one of his heirs is liable for the whole rent. **Kashi Kinkar Sen v. Satyendra Nath Bhadro**, 7 Ind. Cas. 840.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 11 C.W.N. 1026 ; 6 Ind. Cas. 387, commented on.

(49) *Partial eviction by landlord—Suspension of whole rent—Lease of different parcels on distinct rents—Tenancy for aggregate rent payable in instalments—Effect of eviction from some parcels.*

Where there has been a partial eviction of the tenant by reason of the interference by the landlord with the enjoyment of a substantial portion of the lands of the tenancy, the entire rent is suspended during the whole period for which the eviction has continued in operation (a).

Where, in a lease of several parcels of land, a distinct rent is stated against each parcel, and then one indivisible tenancy is created for an aggregate rent which is made expressly payable in certain different instalments : the lease does not include substantially a separate demise of distinct parcels of land for different rents.

In such a case, if the tenant is evicted from some of the parcels by the landlord, the whole

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rent is suspended. *Sarip Jan Bibi v. Aftab-ud-din*, 8 Ind. Cas. 30.

MOOKERJEE and SHARF-UD-DIN, JJ.

References:—(a) 5 Ind. Cas. 105; 11 C.L.J. 601; 6 Ind. Cas. 478; 11 C.L.J. 591, *Rel.*

(50) *Landlord and Tenant—Amalnamah; construction of—Tenant or Licensee—Present demise—Amalnamah for reclamation of waste land—Ejectment—Bengal Tenancy Act (VIII of 1885), Ss. 10, 89, 155, 178, Sub-Sec. (1) cl. (c).*

An *amalnamah*, neither stamped nor registered, recited that, in anticipation of the execution of a proper *mourasi mukarari* lease of waste land, the plaintiff had agreed to place the defendant in possession of the land, that, out of the total sum of Rs. 2,000 payable as premium, Rs. 500 would be paid at a certain time, and the remainder by equal instalments in two years; that, in default of the payment of the bonus, the *amalnamah* should stand cancelled; that for two years the land was to be held rent-free, and after that at a progressive rent; and that, in the event of failure to cultivate the land in the next two years, the grantor would be at liberty to re-enter:

Held, that there was a present demise and not merely an agreement to demise, and the possession of the defendant was that of a tenant.

Whether there was a present demise, or merely an agreement to make a demise in future, must depend upon the paramount intention of the parties (a).

The proviso to S. 178 does not exclude the operation of S. 155 of the Bengal Tenancy Act.

Therefore, a landlord is not entitled to take possession of the premises by force or to sue and recover possession without fulfilment of the conditions prescribed by S. 155, that is, without serving a notice under that section. *Champaklatika Mitra v. Nafar Chandra*, 8 Ind. Cas. 44.

MOOKERJEE and SHARF-UD-DIN, JJ.

Reference:—(a) 10 B. 101, *R.*

(51) *Evidence Act (I of 1872), S. 92—Oral evidence—Alteration of terms of registered lease—Conduct of parties—Payment of reduced rent—Evidence, whether admissible—Declaratory decree—Landlord's title in jeopardy from aggression of neighbouring zamindar—Controversy between two sets of tenants, whether gives right to declaratory decree.*

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Oral evidence is not admissible to prove a verbal surrender and abatement of rent of a holding held under a registered lease, nor is the conduct of the parties, for instance, payment of rent at a reduced rate, admissible to prove the same (a).

It is open to a landlord, where his title is in jeopardy from the aggression of a neighbouring zamindar and may be damaged by a denial of his rights to the land, to bring a suit for the purpose of declaration of his rights as against such wrong doers, and for possession of the land as against them (b).

But that doctrine is not applicable to a case where the controversy is between two sets of tenants each claiming the disputed land to fall within his tenancy, for the controversy does not jeopardise the rights of the plaintiff. *Sarat Chandra Sinha v. Nritya Gopal Bhawas*, 8 Ind. Cas. 47.

MOOKERJEE and TEUNON, JJ.

References:—(a) 7 C.L.R. 577; 22 M. 261; 26 M. 195; 6 Ind. Cas. 577, *Relied on.* (b) 10 C. 1076, *F.*

(52) *Lease—Planting of trees by tenant without the consent of landlord—Trees belong to zamindar—Landlord's right to cut trees during subsistence of tenancy—Injunction.*

Where a tenant plants trees without the consent of the landlord, the trees belong to the zamindar, but the zamindar has no right to enter upon the land and cut the trees during the subsistence of the tenancy. If the landlord enters upon the land and cuts the trees, the tenant is entitled to an injunction restraining the landlord from interfering with his enjoyment of the land so long as the tenancy subsists. *Ram Baksh v. Ram Sarup*, 8 Ind. Cas. 151.

CHAMIER, J.

(53) *Tenant raising garden crop on dry lands by means of well sunk by him—Enhancement of rent—Custom—Implied contract—Consideration, necessity for—Madras Rent Recovery Act (VIII of 1865), S. 11 (3)—District Manuals, statements in, evidentiary value of.*

A landlord is not entitled to impose enhanced rent on his tenant for the latter's cultivating lands, originally dry, with garden crops by means of wells sunk at the tenant's expense, by virtue of a subsisting custom, as such a

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custom, even if established, would be unenforceable as conflicting with Madras Act (VIII of 1865) (a).

Such an enhancement is permissible, however, by virtue of a contract, expressed or implied. If implied contract is relied on as the basis for the enhancement, consideration for same must be proved. Such consideration may be of the same implied nature as the covenant to pay (b).

The payment of a uniform rate for dry lands for a period prior to the sinking of wells by the tenant is evidence of an implied contract to pay rent at that rate, and not that the charge was variable according to the crop raised.

If the landlord had a right, which should be proved, to revert to the *varam* system, when the tenant began to cultivate the more valuable crop with the aid of well water sunk by him, the landlord's abstention from exercising that right may be viewed as consideration for the implied contract to pay enhanced rent for the garden crop.

Statements in District Manuals as to custom prevailing in certain *taluqs*, while they may be referred to in corroborating or contradicting evidence in any particular case, cannot take the place of such evidence, or be made the sole basis for a finding thereon. **Armugam Chetty v. Jagaveera Rama**, 8 Ind. Cas. 330.

ABDUR RAHIM and AYLING, JJ.

References:—(a) 28 M. 444; 15 M.L.J. 292; 20 M.L.J. 142; 8 M.L.T. 115; 5 Ind. Cas. 911 and Letters Patent Appeals, Nos. 35 to 61 of 1905. R. (b) 30 M. 511; 2 M.L.T. 455; 17 M.L.J. 519; 31 M. 19; 17 M.L.J. 511; 3 M.L.T. 103; 28 M. 444; 15 M.L.J. 292, R.

(53-a) *Punjab Tenancy Act (XVI of 1887), Ss. 50, 77 (3) (g) and (i)—Alienation of occupancy rights by tenant—Alienation declared void at the instance of landlord—Tenants' right to recover possession from the landlord—Suit cognizable by civil court—Jurisdiction of Civil or Revenue Court—Revision—Defect of jurisdiction—Right decision—Interference—Practice.*

Where an occupancy-tenant alienates his rights, and the landlord, getting the alienation declared void, obtains possession of the tenancy, the former is entitled to recover back possession from the latter (a).

Such a suit for the recovery of possession is cognizable only by a Civil Court, inasmuch as

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the tenant neither has possession nor is he a tenant holding under the landlord in any way (b).

A defect of jurisdiction is not a sufficient ground for reversing a right decision on revision. The discretionary powers of revision can be exercised only in the interests of justice, that is, where the non-exercise of such powers would result in injustice or failure of justice (c). **Makhan Singh v. Nanda Singh**, 8 Ind. Cas. 733.

MEREDITH, O.J.C.

References:—(a) 17 P.R. 1892; 6 P.R. 1903; 7 P.R. 1905, (Rev.) F. (b) 104 P.R. 1890; 45 P.R. 1891 (F.B.); 44 P.R. 1891 (F.B.), R. (c) 5 P.R. 1903; (Rev.); 144 P.L.R. 1903; 2 P.R. 1910, (Rev.); 101 P.L.R. 1910; 6 Ind. Cas. 735, F.

(54) *Under-proprietary rights—Prescription—Revenue Court, adverse order passed by, effect of—Landlord, order passed in absence of, effect of—Assertion of under-proprietary right by a tenant against the landlord—Adverse possession.*

Where an order of a Revenue Court had been passed in the absence of the landlord, in favour of a tenant, directing an entry of his name in the Revenue papers as under-proprietor, it could not be any evidence of assertion of under-proprietary right so as to set time running against the landlord. In order to enable the tenant to acquire under-proprietary right by prescription, the tenant must show that he put forward a claim to such right to the knowledge of the landlord and that an adverse order was passed by the Court in his presence. **Subh. Karan Singh v. Sitla Bakhsh Singh**, 8 Ind. Cas. 710.

PIGGOT, A.J.C.

References:—4 O.C. 207; 8 O.C. 30, R.

(55) *Adverse possession—Tenant erecting temporary structures—Ownership of soil—Landlord and Tenant.*

Structures of a purely temporary nature, made by a tenant for the convenience of his house, do not constitute such an assertion of right on the part of the tenant as would justify the conclusion that he meant by erecting such structures to set up a claim to the ownership of the soil, and can, therefore, be no evidence of adverse possession. **Bechu v. Lachmi Kuar**, 8 Ind. Cas. 708.

LINDSAY, A.J.C.

Reference:—16 B. 338, R.

Landlord and Tenant—(Continued);

(56) *Landlord and tenant—Recognition by landlord of transfer of holding—Receipt of rent—Sarbarahakar—Marfate — Whether transferee recognised.*

Where the rent receipts describe the rent of the holding and the person paying as occupier of the holding and paying on her own account, it must be held that there was a sufficient recognition of the transferee as tenant (a).

But where the expression *sarbarahakar* occurs as applicable to the transferee, it shows that the landlord did not recognise the purchaser as tenant (b).

So also, where the rent receipts show that rents were paid *guzrate* or *marfate*, the transfer was not recognized. **Amodini Debi v. Hari Das**, 8 Ind. Cas. 661.

CASPERSZ, J.

References :—(a) 34 C. 902; 11 C.W.N. 865; 2 M.L.T. 493; 4 A.L.J. 570; 9 Bom.L.R. 846; 17 M.L.J. 397; 6 C.L.J. 122 (P.C.), F. (b) 7 C.W.N. 132, *Rel.*

(57) *Denial of landlord's title in rent suit—Dismissal of suit—Suit by landlord for khas possession, if maintainable—Forfeiture of tenancy—Res judicata—Bengal Tenancy Act (VIII of 1885), S. 45—C.P.C. (Act XIV of 1882), S. 13.*

In a suit for arrears of rent, the tenant defendant pleaded that there was not the relationship of landlord and tenant, and the suit was dismissed. The landlord then brought a suit for khas possession.

Held, that, the suit was maintainable, and that the tenant should not be permitted to argue that the relationship should be established in his favour. **Ekabar Sheikh v. Hara Bewah**, 8 Ind. Cas. 660.

JENKINS, C.J., and CHATTERJEE, J.

References :—5 Ind. Cas. 709; 14 C.W.N. 339, F.

(58) *Holding over—Suit for resumption—Limitation. See MAINTENANCE*, No. 6, 6 Ind. Cas. 339.

(59) *Sub-division of tenancy—Creation of new tenancies—Intention of parties. See ACT VIII OF 1885 (BENGAL TENANCY)*, No. 40, 6 Ind. Cas. 501.

(60) *Right to eject tenant on non-payment of rent—Denial of landlord's title in the pleadings, whether gives cause of action for ejectment. See EJECTMENT*, No. 3, 6 N.L.R. 83.

Landlord and Tenant—(Continued).

(61) *Registered occupant of holding in Béar — Relinquishment of holding, a surrender—Co-sharer's right of pre-emption—Failure to exercise the right, effect of. See PRE-EMPTION*, No. 27, 6 N.L.R. 78.

(62) *Rent suit—Plen of title of third party—Defendant claiming title in himself adversely to plaintiff. See RES JUDICATA*, No. 16, 7 Ind. Cas. 15.

(63) *Deposit by alleged transferee of tenant—Protest by landlord—Withdrawal of amount—Estoppel—Conduct of landlord. See ACT VIII OF 1885 (BENGAL TENANCY)*, No. 56, 7 Ind. Cas. 86.

(64) *Transfer of tenant's holding—Distrain of transferor's goods after transfer—Legality. See ACT VIII OF 1865 (RENT RECOVERY)*, No. 2, 7 Ind. Cas. 210.

(65) *True owner recovering possession by inducing trespasser's tenant to attorn to him—Estoppel. See ADVERSE POSSESSION*, No. 1, 5 Ind. Cas. 84.

(66) *See CUSTOMARY RIGHT*, No. 1, 11 C.L.J. 209.

(67) *Decree against landlord for khas possession—Ouster of tenants in execution—Tenant's remedy. See SPECIFIC RELIEF ACT*, No. 3, 14 C.W.N. 103.

(68) *Agreement with landlord in contravention of latter's covenant with Government if enforceable. See ACT VIII OF 1885 (BENGAL TENANCY)*, No. 13, 14 C.W.N. 470.

(69) *Tenancy—Holding over—Effect on running of time—Suit against representative of tenant—Limitation. See LIMITATION ACT*, 1877, No. 93, 19 M.L.J. 732.

(70) *Notice to quit—Whether plaint itself can be accepted as notice. See BERAR LAND REVENUE CODE*, No. 1, 6 N.L.R. 17.

(71) *Tenants contributing for reclamation of the lands—Uniform rent for half a century—Effect. See OCCUPANCY RIGHTS*, No. 1-a, 7 M.L.T. 201.

(72) *Possession through tenant—Dispossession—Possessory suit whether lies at landlord's instance. See SPECIFIC RELIEF ACT*, No. 7, 7 Ind. Cas. 924.

(73) *Decree in rent suit—Tenant's admission to be taken as a whole—Decree not at admitted rate, but at a lessor one—Second appeal. See ACT VIII OF 1885 (BENGAL TENANCY)*, No. 45, 5 Ind. Cas. 340.

Landlord and Tenant—(Concluded).

(74) Fixed rate tenancy—Division among co-tenants—Effect. See ACT II OF 1901 (AGRA TENANCY), No. 7, 5 Ind. Cas. 817.

(75) Payment of road cess on *hath* by landlord not recoverable from tenant. See ACT IX OF 1880 (BENGAL CESS), No. 1, 5 Ind. Cas. 254.

(76) Suit for burga rent, if maintainable in Small Cause Court. See BURGADAR, No. 1, 14 C.W.N. 629.

(77) *Bona fide* tenant under a *de facto* proprietor, if acquires raiyati rights—Non-occupancy raiyati, if entitled to possession of accretions. See ACCRETION, No. 1, 14 C.W.N. 681.

(78) Contract to pay rent—Failure of crop for want of rain—Effect. See CONTRACT ACT, No. 30, U.B.R. (1910), 2nd Qr. 22.

(79) Custom of enhancing rent for dry land converted into wet at tenant's expense:—Legality. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 7, 20 M.L.J. 142.

(90) Relationship of—Jurisdiction of Civil Courts. See MORTGAGE (GENERAL), No. 10, 32 P.R. 1910.

(81) Grove planted by tenants on the understanding that they will be at liberty to sell it—Custom not proved—Effect. See WAJIB-UL-ARZ, No. 7, 7 A.L.J. 587.

(82) Whether a tenant may be represented by the landlord in so far as his holding is subordinate. See CIV. PRO. CODE (1882), No. 10, 5 Ind. Cas. 732.

(83) Landlord accepting mortgage of non-transferable holding—Effect. See UNDER-PROPRIETARY RIGHTS, No. 2, 9 Ind. Cas. 691.

(84) Stipulation for surrender on demand—Notice to quit. See TRANSFER OF PROPERTY ACT, No. 77, 8 Ind. Cas. 362.

(85) Act inconsistent with the purpose of letting—Ejectment. See OCCUPANCY, No. 6-a, 8 Ind. Cas. 732.

(86) Dispossession of plaintiff—Joint liability of, for mesne profits when arises. See MESNE PROFITS, No. 5, 8 Ind. Cas. 707.

Land Registration Act.

See ACT VII OF 1876 (BENGAL).

Land Revenue Act.

(1) See ACT XVIII OF 1881 (C.P.).

(2) See ACT III OF 1901 (N.W.P.).

(3) See ACT XVII OF 1887 (PUNJAB).

Land Revenue Code.

See ACT V OF 1879 (ROMHAY).

Land Revenue Code (Mysore.)

(1) Ss. 54 and 159, and R. 35 of the Revenue Rules—Revenue sale—Encumbrances.

When a piece of land is sold for arrears of revenue due thereon, it must be presumed, in the absence of proof that the right, title and interest only of the defaulter was sold, that the provisions of the Revenue law were duly observed in carrying out the sale, and that the sale is free from encumbrances. **Abdul Rahiman v. Tiruvengala Setty**, 15 M.C.C.R. 120.

STANLEY ISMAY, C.J., and NANJUND-AYYA, J.

(2) S. 142—Registered occupant—Co-sharer.

The registered occupant of a land is responsible under S. 142 of the Land Revenue Code for payment of Kandaya due on the land, and in order to entitle him to recover money paid on that account from a co-sharer, it is not necessary to show that payment was made on coercive processes. **Mullay Chennasetty v. Borasetty**, 15 M.C.C.R. 85.

NANJUNDAYYA, J.

Land suit.

Land suit—Effect of not objecting to the valuation of a suit before the lower Court—Building upon another's land—Compensation.

Held, that, to determine whether a suit is a land suit, the true principle is to have regard to the character and use of the land at the time immediately before the cause of action arose; the use, to which the defendant may have devolved the land after the cause of action has arisen, is immaterial, and a land suit does not cease to be one, merely because something else is claimed along with it (a).

Held, also, that objection as to the valuation of a suit or to the admissibility of a document cannot be raised for the first time in appeal to Chief Court.

Held, further, that, except where the owner stands by and makes no protest when the building is being erected, a person knowingly building upon another's land is not entitled to claim compensation in the ejectment suit, but he can be allowed to remove the materials (b). **H. H. The Maharaja of Jaipur through Baij Nath v. Mathra Das**, 78 P.W.R. 1910.

JOHNSTONE and SCOTT-SMITH, JJ.

References:—(a) C. 31 P.R. 1901, *F.*; C. 20 P.R. 1894, *dissented from*. (b) 20 A. 345; 21 A. 496; 14 C. 189; 29 M. 497, *D.*

Lands Act.

- (1) See ACT XVIII OF 1876 (ODH).
- (2) See ACT IV OF 1872 (PUNJAB).

Lease.

- (1) *Construction of deeds—Lease-deed, providing for remission in case of excess or failure of rains—Middling season, whether any remission during.*

Where a lease-deed makes no provision for remission in "Middling years," but only for remission in case of excess or failure of rains,

held that abnormal seasons were alone contemplated, and that no partial remission can be made in middling seasons. **Damara Kumara Thimma Nayanam Bahadur Yaru v. Pullamma Naidu and others**, 7 M.L.T. 39 = 5 Ind. Cas. 510.

MUNRO and RAHIM, JJ.

- (2) *S. 375, C.P.O. (1883)—Compromise decree—"Relates to the suit," meaning of—Duty of Court—S. 13—Res-judicata, if mistake of law can give rise to—Compromise petition relating to lease of immoveable property—A pleading properly filed by parties—Part of compromise not embodied in the decree—Registration, whether necessary Registration Act, S. 17—Transfer of Property Act, S. 107, applicability of—Possession of rent—What constitutes delivery of possession.*

The words "relates to the suit" in S. 375 mean "relates to the matter of the claim in the case." There is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint (a).

The duty of the Court under S. 375 is to pass a decree in accordance with the compromise in so far as it relates to the suit, and to refuse to pass a decree in respect of such portions as do not relate to it but the Court cannot pass a "decree in terms of the *razinamah* in so far as it is consistent with the plaint."

If the Court misconstrues a decree and passes an order, it is a mistake of law, which does not give rise to *res-judicata* in a subsequent proceeding in which the operation of this order is called in question (b).

In the absence of clear and unambiguous words, the legislature cannot be supposed to have intended to make the proceedings of the Courts dependent for their efficacy and validity on registration by one of the parties. The provisions of the Registration Act do not apply to proper judicial proceedings, whether consisting

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of pleadings filed by the parties, or orders made by the Court. So a petition of compromise does not require registration under S. 17 of the Registration Act, even though it should relate to matters which are not the subject of the suit, and it is immaterial whether part of the compromise is embodied in the decree or not, for the compromise petition itself is a pleading properly filed by the parties, and it may be sued on without registration (c). S. 107 of the Transfer of Property Act, does not apply to orders and decrees, and so registration is not necessary in case of decrees or orders of Court.

Where the property leased is the rent payable by the tenants, the giving of a notice to the tenants requiring them to attorn and pay rent to the lessee amounts to a delivery of possession of the rent. In this country, attornment by the tenants liable to pay the rent, and receipt of rent from them, are not necessary to give the transferee possession of the rent (d). **Natesan Chetty v. Vengu Nachiar**, 6 M.L.T. 313 = 20 M.L.J. 20 = 33 M. 102 = 3 Ind. Cas. 701.

WALLIS and SANKARAN NAIR, JJ.

References:—(a) 30 M. 478 (480), partly equal to 16 M.L.J. 354; 5 C.W.N. 485 and 36 C. 193 (222), F.; 18 M. 410 (414) and 22 M. 214, R. (v) 30 M. 461 (462), F. (c) 20 A. 171 (P.C.), F.; 22 M. 508 (P.C.) and 28 A. 78, R.; 34 C. 191 (222); 1 C.L.J. 388, R.; (1897) A.C. 6 and 7. (d) 18 C.B.N.S. 90; 25 M. 587 (592), R.; Pollock and Wright on Possession, pp. 36 and 52.

- (3) *Estoppel—Lessor and lessee—Denial of lessor's right.*

A lessee is estopped from denying his lessor's right to recover rent. Where therefore one of the trustees of temple property leased it out, he was entitled to recover rent due from the lessee, and the latter was not entitled to deny his lessor's right to recover alone. **Kesho Das v. Makhsodan Das**, 7 A.L.J. 183 = 32 A. 213 = 5 Ind. Cas. 870.

STANLEY, C.J., and PIGGOTT, J.

- (4) *Lease of temple lands—Lease also to manage affairs of the temple—Contract as to management separable from lease—Validity of lease.*

Certain lands belonging to a temple were leased to A for ten years. He transferred it to the defendant's father. The plaintiff's father got a lease of the lands, and the right to collect rent due from defendants was also assigned to

Lease—(Continued).

him. The lease to plaintiff's father also empowered him to manage the temple affairs. Plaintiff sued to recover the lease amounts.

Held, that, though the transfer of management might be considered as illegal as amounting to an alienation of trust office, yet the lease was good so far as the lease of lands was concerned, since the two were clearly separable (*a*). **Ramanathan Chetty v. Lakshmanan Chetty**, 6 M.L.T. 161=3 Ind. Cas. 104=19 M.L.J. 485.

MUNRO and ABDUR RAHIM, JJ.

Reference :—19 M. 211, *F*.

- (5) *Limitation Act (XV of 1877), Sch. II, Art. 95—Knowledge—Suspicion—Bribe—Secret commission—Effect of bribe on mind of receiver—Suit for rescission of lease—Estoppel—Fraud, contract induced by, voidable only—Remedy by rescission, when obtainable—Remedy by damages.*

More suspicion is not knowledge within the meaning of Art. 95, Limitation Act, 1877.

Payments in the nature of a bribe or secret commission are open to the gravest reprehension, and when a bribe has been given, it is immaterial to enquire what, if any, effect the bribe had on the mind of its receiver (*a*).

In a suit for rescission of a lease by the lessor, on the ground that the lessee had bribed the lessor's servant to bring about the transaction it appeared that, after the institution of the suit, the plaintiff had prosecuted an appeal and defended another on the footing that the lease was a valid one :

Held, that the plaintiff's action in the two appeals was only inadvertent, the suits having been instituted and the appeals preferred before the present suit was instituted, and that the plaintiff was not thereby precluded from seeking to rescind the lease.

A contract induced by fraud is only voidable and not void ; and the remedy by rescission is open, only so long as the parties can be restored to the relative position which they originally occupied (*b*).

Where it is impossible to put the defendant back in his original position, the plaintiff should ask for damages and not for rescission. **Indra Nath Banerjee v. E. G. Rooke**, 3 Ind. Cas. 316=37 C. 81.

SHARFUDDIN and RICHARDSON, JJ.

References :—L.R. 3 Q.B.D. 549 ; (1899), 1 Q.B. 369, 68 L.J.Q.B. 360 ; 80 L.T. 11, R. (b) L.R. 3 App. Cas. 831, *F*.

Lease—(Continued).

- (6) *Malabar law—Lease by the senior grantee of property given to two in putravakasam—Validity.*

A lease of property by the senior member alone of two grantees in *putravakasam* is valid. **Chakkantavida Chakkam Abdulla v. Thazath Chekkotti**, 7 M.L.T. 180.

BENSON and KRISHNASWAMI AIYAR, JJ.

References :—29 M. 322, *Expt.* ; 16 M. 201, *R*.

- (7) *Limitation Act (XV of 1877), Sch. II, Art. 139—Transfer of Property Act (IV of 1882), S. 107—Lease for a fixed term—Registered qabuliat but no patta—No rent paid after fixed term—Ejectment suit—Limitation—Denial of title—Payment of rent—Admission of title—Evidence—Admissibility of qabuliat—Burden of proof—Tenancy—Oral contract—Findings.*

The lessee of the house in dispute executed a registered *qabuliat* in 1886 for a term of five years ; the lessor, however, executed no *patta*. After the said term of five years, no rent was ever paid. The lessor sued to eject the lessee in 1906 : *Held*,

(1) on the expiration of a lease for a fixed term, time begins to run against the lessor under Art. 139 of the second Schedule to Act XV of 1877 (*a*).

(2) It is not for the lessee to prove denial of lessor's title, but the lessor must prove any such payment of rent or admission of title by the lessee as would serve to extend the period of limitation.

(3) A registered *qabuliat* showing that the possession of the lessee originated in a contract of lease constitutes a valid contract binding on the person who executed it, and is admissible in evidence as against him (*b*).

(4) A lessor, who comes into Court with the allegation that the possession of the lessee originated in a lease for a fixed term, cannot, when he finds that plea fatal to his case, be permitted to turn round and assert that there was a lease but not for a fixed term.

(5) An oral contract of lease, together with the lessee's agreement of lease (*qabuliat*) creating a tenancy for a fixed term, becomes in fact a tenancy for that term, if the lessor makes no attempt to disturb the possession of the lessee.

Lease—(Continued).

and the latter continues to pay rent for the stipulated period. **Bhagwan Das v. Hari Ram**, 5 Ind. Cas. 350.

PIGGOTT, J.

References :—(a) 1 A.L.J. 201 ; 6 A.L.J. 584 ; 3 Ind. Cas. 566 ; 31 A. 514, F. (b) 26 A. 136 ; 27 A. 136, D. ; 2 A. 517, R.

(8) *Transfer of Property Act (IV of 1882), S. 106—Lessor and lessee—Ejectment—Notice—Denial of lessor's title before suit—Proof of notice or other sufficient cause—Onus—Objection as to want of notice or cause of action can be allowed for the first time in second appeal—Pleading—Practice.*

A lessor suing for the ejectment of his lessee as such is bound to prove either that the lessee had been duly served with notice under S. 106 of Act IV of 1882, or had denied the title of the lessor prior to the institution of the suit. Mere denial of title on the part of the lessee in the suit itself is not sufficient, as the plaintiff is bound to prove that he had a complete cause of action when he came into Court. An objection on the ground of want of proof of service of notice or other valid cause of action on the part of the lessor is one which goes to the root of the lessor's case, and can be entertained in second appeal, though not explicitly taken before that stage. **Chatter Singh v. Ishri Prasad**, 5 Ind. Cas. 336.

PIGGOTT, J.

References :—7 A. 899 ; A.W.N. (1890) 175 ; 2 M. 239 (246) ; 18 B. 110, R.

(9) *Ejectment—Right of one co-owner—Settlement by all co-owners—Unregistered lease—Tenancy by sufferance.*

Where the relation of joint landlords continues, a tenancy under them cannot be put an end to except by all the lessors acting together (a).

Therefore, if one co-owner makes a settlement of a certain land with the consent of the other co-owners, the lessee comes upon the land as a tenant, and although the tenancy may not be a valid one for want of a registered *pattah* for more than a year yet the lessee having been allowed to hold on, the tenancy becomes one by sufferance and cannot be terminated by one co-owner of the land. **Thakur Ram v. Shak-roo Mian**, 5 Ind. Cas. 277.

CHATTERJEE, J.

References :—(a) 35 C. 807 ; 7 C.L.J. 483, F.

Lease—(Continued).

(10) *Lease-hold interest, whether heritable—True test, what is—Lease for building and residential purposes—Whether heritable—Transfer of Property Act (IV of 1882), scope of—Not complete Code—S. 108, cl. (j)—Contract Act (IX of 1872), S. 37.*

The proposition that a lease-hold interest must be heritable, because it is an interest in land, is too broad, and requires to be qualified. The true test to apply is, to determine, from the terms of the grant or from the nature of the tenancy, whether the parties intended that the execution of the contract was to be contingent upon the continued existence of both or either of them.

Where a lease was clearly for building and residential purposes, it cannot be supposed to have occurred to the parties that such a lease would terminate upon the death of the lessee, who would have to spend considerable sums for the improvement of the land and for the erection of a suitable residence thereon. Such a lease-hold interest is heritable.

The Transfer of Property Act merely defines and amends certain parts of the law relating to the transfer of property by act of parties, and even in these respects, it does not purport to be a complete Code ; much less does it deal with cases of succession. **Kishori Lal Roy Chowdhury v. Srimati Krishna Kamini Chowdhurani**, 5 Ind. Cas. 500.

MOOKERJEE and TRUNON, JJ.

References :—68 Miss. 664 ; 9 South. 895, Rel. on.

(11) *Evidence, inadmissibility—Unregistered letter varying the terms of lease—Rent, payment of, at reduced rate for sometime, effect of—Grant, conflicting description of subject-matter—Lessee not put in possession of specific area—Rent, reduction of.*

A letter, addressed to a lessee by a lessor, containing all the essentials of a lease, is inadmissible in evidence to prove the reduction of rent, for want of registration (a).

Even if the letter be treated as an agreement for reduction of the rent, it is in effect an agreement purporting to limit an interest in immoveable property.

The mere fact that rent for some years has been received at the reduced rate does not bind the lessor to accept rent at that rate in future.

Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which

Lease—(Continued).

is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail if it sufficiently identifies the subject-matter (b).

But where these two elements, the boundaries and the quantity, are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter, which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary by the surrounding circumstances and the subsequent conduct of the parties (c).

A statement contained in a contemporaneous document furnishes a legitimate aid to construction (d).

Where the parties have adjusted the annual rental on the basis of the specific area, and the lessor has failed to put the lessee in possession of the specific area, the lessee is entitled to a proportionate reduction of rent, although there is not any express covenant that effect in the lease. **Raja Durga Prasad Singh v. Rajendra Narain Bagchi**, 10 C.L.J. 570—37 C. 293.

DOSS and RICHARDSON, JJ.

References:—(a) (1) 8 C.L.J. 90=35 C. 1010, *F.* (b) 7 Wheaton U.S. 7, *R.* (c) 12 Moo. P.C. 473; 14 E.R. 987; 93 U.S. 514; 3 How. U.S. 187; 7 Pet. U.S. 171, *R.* (d) 20 Ch. D. 27 (62, 63); 7 Ch. D. 75, *R.*

(12) *Lease—Agreement to lease—Specific performance—Transfer of Property Act (IV of 1882), S. 107.*

In India, a perfectly valid agreement for a lease may be made by parol, and a verbal arrangement, though void as a lease, is capable of enforcement as an agreement for a lease.

When, in pursuance of an agreement for a lease, the intended lessee has taken possession, though the requisite documents have not been executed, his position is the same as if the documents have been executed, provided that specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. **Singheeram Poddar v. Bhagbat Chandar Nundi**, 11 C.L.J. 543.

FLETCHER, J.

References:—21 Ch. D. 9; 2 C.L.J. 343, *F.*

Lease—(Continued).

(13) *Lease—Kabuliat—Specific performance—Registration, want of—Evidence, admissibility of.*

When a lease, which is compulsorily registrable, has not been registered and is inadmissible as a lease, it may nevertheless be admitted in evidence, in a suit for specific performance of the agreement to lease. **Kedar Nath Joypooria v. Poorasundari Dasi**, 11 C.L.J. 548 =6 Ind. Cas. 634.

FLETCHER, J.

References:—6 C. 534; 17 M. 456; 17 M.L. J. 219, *F.*; 10 Bom. 101, *dissented from.*

(14) *Lease—Writing evidencing lease for six months—Whether requires registration under S. 17, Registration Act, 1877—Evidentiary value—Lease unsigned by lessor, whether valid—Transfer of Property Act, 1882, Ss. 105, 107.*

A writing evidencing a lease for six months is not required to be registered under S. 17 of the Registration Act, 1877, and can be used in evidence of an oral letting accompanied with delivery of possession.

Quere:—Whether an instrument purporting to create a tenancy and signed only by the transferee constitutes a lease under the Transfer of Property Act? **Chinnasawmi Padayachi v. Avayambal**, 7 M.L.T. 299.

BENSON and KRISHNASWAMI IYER, JJ.

References:—31 A. 276; 26 A. 368 and 32 M 532, *R.*

(15) *Transfer of Property Act (IV of 1882), Ss. 1, 12—Bengal Tenancy Act (VIII of 1885), 'Ss. 10, 11, 155—Statute, repeal of, by implication—Lease—Condition restraining alienation—Validity—Breach of condition—Compensation.*

Before a Court can hold that there has been a repeal of one enactment by another by implication, it must be satisfied that the provisions of the two enactments are so inconsistent or repugnant that they cannot stand together.

S. 10 of the Transfer of Property Act has not been repealed by implication by Ss. 10 and 11 of the Bengal Tenancy Act. The provision in the former Act, saving conditions restraining alienation in leases where the condition is for the benefit of the lessor, is not inconsistent with or repugnant to the provisions of the latter Act, which gives to lessors general powers of alienation, and the two provisions in the two Acts are capable of standing together.

Lease—(Continued).

A permanent lease provided that the lessee should not transfer the land to anybody, and that, should he do so, he would lose all his interest in the land which would become the *khas* land of the lessor. The lessee having transferred the land, the lessor brought a suit for ejectment :

Held, that, though the *qabuliat* contained a condition for re-entry, that should not be enforced, unless the defendant fails to pay to the plaintiff compensation for the breach of the covenant as the Court may deem reasonable, under S. 155 of the Bengal Tenancy Act. **Khesab Lal Nag Majumdar v. Madhu Sudan Pal Kundu**, 6 Ind. Cas. 685 = 12 C.L.J. 120.

BRETT and RICHARDSON, JJ.

(16) *Limitation Act (XV 1877), Sch. II Arts. 110, 116—Registered lease—Determination—Holding over—Claim for rent—Limitation.*

Where a registered lease has been determined and the tenant holds over, the claim for rent for the period during which the tenant has held over is not a claim for compensation for the breach of a contract in writing registered. **Seydarakath Kakkachi v. Yaliarath Muhammad Kutli**, 6 Ind. Cas. 754.

BENSON and KRISHNASWAMI AIYAR, JJ.

(17) *Suspension of rent on account of scarcity—Lessee, whether entitled to suspension of rent fixed by lease—Rent Act (Oudh), S. 19.*

Held that a lessee is not entitled to a suspension of the rent fixed by his lease in proportion to the rental demand suspended under orders of the Local Government on account of scarcity.

The principle of S. 19 of the Oudh Rent Act applies to such a case. The respective rights and liabilities of lessees and their superior proprietors are to be determined by the terms of the contract between the parties. **Ram Narain v. Hon'ble Uday Partap Adiadat Singh**, 13 O.C. 146.

PIGGOTT, J.

(18) *Landlord and Tenant—Lease—Default in payment of rent on due date—Provision for accumulated payments with interest—Forfeiture—Surrender of property.*

Where the terms of a lease provided that, in default of payment of rent on the due date, the rent in arrear shall be paid with the interest with the next year's rent, and if default is

Lease—(Continued).

made even then, the property shall be surrendered to the lessor :

Held, that the tenant was not entitled to be relieved against the forfeiture. **Adiraya Shetty v. Billa Tyampu**, 6 Ind. Cas. 438.

BENSON and KRISHNASWAMY AIYAR, JJ.

References :—28 M. 389 ; 15 M.L.J. 208 ; 15 M.L.J. 210, R.

(19) *Landlord and tenant—Denial of landlord's title by tenant—Forfeiture—Election to determine tenancy—Lease created before the Transfer of Property Act—Action for ejectment—Transfer of Property Act (IV of 1882). Ss. 2 (c), 111 (g), 112—Claim for rent coupled with prayer for ejectment—Whether operates as waiver of right to eject.*

In the case of leases, created prior to the coming into force of the Transfer of Property Act, where a forfeiture has been incurred by the denial by the tenant of the landlord's title or by breach of the conditions of the lease, it is not necessary that the lessor should, prior to the action for ejectment, do some act showing an intention to determine the lease. The institution of an action on the ground of forfeiture itself amounts to the manifesting of the lessor's intention to determine the tenancy.

The principles of S. 111 (g) of the Transfer of Property Act are not applicable to leases executed before the Act (a).

Where a lease has been determined by the landlord's election to treat the lease as at an end, the claim for rent prosecuted along with a prayer for ejectment will not negative the landlord's title to seek ejectment. **Padmanabaya v. Ranga**, 6 Ind. Cas. 447 = 8 M.L.T. 110.

BENSON and KRISHNASWAMI IYER, JJ.

References :—(a) 31 M. 403 ; 4 M.L.T. 221 ; 33 C. 329 ; 3 C.L.J. 274, *not appr.* ; 99 E.R. 304 (309) ; 10 Ch. D. 747 (763) ; 48 L.J.Ch. 223 ; 39 L.T. 881 ; 27 W.R. 285 ; 71 R.R. 800 (807) ; 7 C.P. 360 ; L.R. 7 Ex. 26 (34) ; 41 L.J. Ex. 17 ; 27 L.T. 708 ; 20 W.R. 189 ; 2 K.B. 304 ; 72 L.J.K.B. 630, 89 ; 89 L.T. 112 ; 19 T.L.R. 510, R.

(20) *Lease—Rule against perpetuities—Patni right—Merger in zemindari right—Covenant running with land—Personal Covenant.*

A clause in a lease, by which it is agreed that the lease should be forfeited in certain circumstances, is not against the rule regarding perpetuities.

Lease—(Continued).

A *patni* right when purchased by the zemindar may merge in the superior right.

A covenant, is said to run with the land, when either the liability to perform it or the right to take advantage of it, passes to the assignee.

A covenant in a *patni* lease of certain Chakaran lands included in a *patni mahal*, to the effect that, if the rent of the parent *patni* fell into arrears or if that *patni* became extinct, then the *patni* of the Chakaran lands should also become extinct, is a covenant which does not run with the land, and the purchaser of the parent *patni* for arrears of rent does not get any right to the Chakaran lands by virtue of the covenant in the lease of those lands. **Ganada Das v. Maharaj Adhiraj Bijay Chand Mahatap Bahadur**, 7 Ind. Cas. 346.

VINCENT, J.

(21) *Lease—Occupancy holding—Enhancement of rent, suit for—Lessee not party—Lessee not bound by enhancement decree.*

The lessee, under a *zarpeshgi* lease of an occupancy holding, was not made party to a suit for enhancement of rent, which had been brought by the zamindar against the original tenant: *held* that the lessee was not bound by the decree and was not liable to pay the enhanced rent. **Behari Lal v. Shiam Lal**, 7 Ind. Cas. 640.

KARAMAT HUSAIN, J.

References:—29 B. 397; 7 Bom. L.R. 313, R.

(22) *Rent, suit for—Money rent or produce rent—Kabuliyat, construction of—Decree for money rent—Res judicata.*

A *kabuliyat* contains the following words:—A rental of Rs. 35 having been fixed on condition of making over, in lieu of the said amount of rent, a quantity of a total of 4 maps, 5 *salis* of rice of good quality per annum in accordance with the prevailing (standard) *seer* of the village as settled upon.

Held (per Woodroffe, J.) on a construction of the *kabuliyat* that the landlord was entitled to rent paid in money and not in kind.

In a previous suit between the parties, rents were decreed for money payment.

Held (per Richardson, J.) that the decree operated as *res judicata*. **Bipro Charan Majhi v. Suchand Roy Chowdhury**, 12 C.L.J. 595.

WOODROFFE and RICHARDSON, JJ.

Lease—(Continued).

(23) *Rent, suit for—Money rent or produce rent—Kabuliyat, construction of—Estimate of value—Payment of interest in default—Bengal Tenancy Act (VIII of 1885), S. 74.*

Under a document, the tenants agreed "to pay every year 80 cottahs of paddy and 10 cottahs of kalai measured by a cottah of 14 seers as the landlord's share.....; that "if, owing to any occurrence, we fail to give the same, then we will pay you its price amounting to Rs. 30 in the month of that very year. *Held*, that estimate of the value was not intended to modify in any way the terms of the contract between the parties, which was that the tenants should pay a yearly rent in kind, and that, on their failure to do so, they should pay its price.

There was a clause in the above document providing for payment of interest at a certain rate per month.

Held, that S. 74 of the Bengal Tenancy Act had no application. **Sheikh Isaf v. Gopal Chunder Dey**, 12 C.L.J. 593.

BRETT and RICHARDSON, JJ.

(24) *Rent, suit for—Rent in cash or kind—Lease, construction of—Market value of paddy.*

In the tabular statement which forms a part of the lease is entered "128 aris of paddy value 32 rupees." In the body of the lease it is stated that the paddy is to be delivered at a certain specified place....and measured with a measure to be supplied by the landlord. Later in the body of the lease it is said that, if the tenant fails to pay the measure of paddy according to the instalment, then the arrears of the rent in paddy or the price thereof with damages and costs shall be realisable by legal process.

Held, that what was contemplated was payment of the rent by delivery of the paddy itself, and the tenant was not at liberty to deliver either paddy or to pay Rs. 32; that the tenant was to pay the market value of the paddy. **Akbar Ali v. Durga Kripa Sen**, 12 C.L.J. 599.

STEVENS and HANDLEY, JJ.

(25) *Lease—Covenant against stocking grass—Breach of Covenant by lessee—Damage by fire to lessor—Compensation—Evidence—Burden of Proof.*

Upon a lease of a house, the lessee covenanted not to store grass in any part of it. He did so, however. The house was subsequently

Lease—(Continued).

burnt down, but there was nothing to show that the fire was due to the breach of the undertaking and was the natural result of the storing of the hay. *Held* that, for the breach of the contract, the lessee was liable to any damage which was caused thereby, i.e., which naturally flowed from the breach or which the parties knew was likely to result from the breach, *held* further that, the lessor having failed to establish that any damage was sustained by him by reason of any act of the lessee, he was not entitled to any compensation for the damage caused by the fire. **Mathura Das v. Mohan Lal**, 7 A.L.J. 1205.

STANLEY, C.J. and BANERJI, J.

(26) Case where lease held not to be one in perpetuity, but one for a specific period. See **PLEADING**, No. 2, 7 M.L.T. 106.

(27) Lease from month to month—Registration. See **HINDU LAW (JOINT FAMILY)**, No. 5, 7 M.L.T. 116.

(28) Leases for a period exceeding twenty-one years—Effect. See **ACT II OF 1882 (TRUSTS)**, No. 1, 19 M.L.J. 737.

(29) Duty of lessor to put lessee in possession on request—Agricultural lease—Land in possession of third person—Duty of lessor to remove the third person. See **TRANSFER OF PROPERTY ACT**, No. 82, 7 M.L.T. 119.

(30) Contingent covenant in a lease, when operative. See **PUTNI**, No. 1, 14 C.W.N. 601.

(31) Adverse possession by lessee against lessor—Lease for fixed term. See **LIMITATION ACT (1877)**, No. 90, 20 M.L.J. 131.

(32) Lease—Actual extent less than the extent granted—Principle of construction when there is conflict between quantity and boundaries—Lessee, if entitled to damages. See **GRANT**, No. 1, 7 M.L.T. 390.

(33) Consent of lessee to mortgage by tenant, whether binding upon the original landlord. See **ACT IX OF 1883 (C. P. TENANCY)**, No. 1, 6 Ind. Cas. 75.

(34) Agreement to—Registration—Parol agreement to lease out land for five years—Doctrine of part performance—Entry upon land by lessee—Ejectment. See **TRANSFER OF PROPERTY ACT**, No. 3, 5 Ind. Cas. 562.

(35) Lease—Determination, mode of—Restoration after cancellation—Effect. See **TRANSFER OF PROPERTY ACT**, No. 90, 7 M.L.T. 419.

Lease—(Continued).

(36) Expiry of, on the premises leased being destroyed by fire. See **TRANSFER OF PROPERTY ACT**, No. 84, 12 Bom. L.R. 474.

(37) Lease concurred to persons other than lessor, if multifarious document. See **STAMP ACT**, No. 3, 14 C.W.N. 861.

(38) Signature on document as a witness—Knowledge of contents—Denial of lessor's right—Transfer of the witness's right. See **ESTOPPEL**, No. 1, 7 A.L.J. 664.

(39) Document creating right to obtain other document—Registration. See **REGISTRATION ACT (1877)**, No. 20, 6 Ind. Cas. 443.

(40) Lease for a term less than five years—Non-reservation of annual rent—Registration. See **REGISTRATION ACT (1877)**, No. 19, 6 Ind. Cas. 382.

(41) Registered lease—Subsequent alteration by oral agreement. See **EVIDENCE ACT**, No. 18, 6 Ind. Cas. 577.

(42) Consideration consisting of past advance—S. 105, Transfer of Property Act—"Price paid," whether may be an outstanding debt. See **TRANSFER OF PROPERTY ACT**, No. 74, 6 N.L.R. 65.

(43) — in writing—Oral evidence. See **EVIDENCE ACT (MYSORE)**, No. 2, 15 M.C.C.R. 11.

(44) Perpetual lease when amounts to a sale. See **PRE-EMPTION**, No. 30, 7 A.L.J. 1022.

(45) Lessee having notice of deed forming part of title of lessor—Constructive notice of contents of deed. See **BENAMIDAR**, No. 1-a, 7 Ind. Cas. 218.

(46) Possession lawful under a lease—Whether adverse—Acceptance of new lease—Effect—Lease declared void—Effect—Implied surrender. See **ADVERSE POSSESSION**, No. 8, 8 M.L.T. 309.

(47) Of waste land the subject of suit—*lis pendens*. See **TRANSFER OF PROPERTY ACT**, No. 22, 6 N.L.R. 140.

(48)—by tenant—Rights of lessee. See **LANDLORD AND TENANT**, No. 38, 7 Ind. Cas. 750.

(49) Lease coming into operation before passing of the Act—Lessee's name not recorded—Suit by lessee—Maintainability. See **ACT III OF 1901 (U.P. LAND REVENUE)**, No. 2, 7 Ind. Cas. 540.

(50) Agreement to lease—Lease not registered—Contract if divisible—Suit for specific performance. See **SPECIFIC PERFORMANCE**, No. 3, 12 C.L.J. 464.

Lease—(Concluded).

(51) Patta tendered to and refused by tenant—whether a—Registration. See TRANSFER OF PROPERTY ACT, No. 74-a, 8 M.L.T. 371.

(52) Lease granted in execution of decree—Grant of fresh lease or extension of period of—Power of Court and Collector. See EXECUTION OF DECREE, No. 22-b, 8 Ind. Cas. 410.

(53) Lease—Signature by lessee only—Effect.

See TRANSFER OF PROPERTY ACT, No. 80, 8 M.L.T. 437 (F.B.).

(54) Lease by usufructuary mortgagee—Redemption—Right of mortgagor. See MORTGAGE (REDEMPTION), No. 20-b, U.B.R. (1910) 2nd. Qr. 14.

(55) Agreement to lease—Registration—Admissibility in a suit for specific performance. See REGISTRATION ACT (1877), No. 1-a, 8 Ind. Cas. 520.

Legal estate.

Rights and duties of owner of—Priority. See INSURANCE, No. 3, 12 Bom.L.R. 717.

Legal Practitioner.

See PLEADER.

Legal Practitioners Act.

See ACT XVIII OF 1879.

Legal representative.

(1) Effect of *bona fide* obtaining decree against *prima facie* legal representative of a deceased debtor—Right of real representative. See HINDU LAW (DEBTS), No. 1, 152 P.W.R. 1909.

(2) Decree against, of deceased debtor—Effect. See CIV. PRO. CODE (1882), No. 147, 7 M.L.T. 157.

(3) Application against persons not the legal representative—Effect. See CIV. PRO. CODE (1882), No. 92, 7 A.L.J. 512.

(4) Decree against sons for debt due by father—Form of decree—Personal decree. See DECREE, No. 6, 6 Ind. Cas. 397.

(5)—of judgment-debtor—Extent of liability of. See EXECUTION SALE, No. 4, 13 O. C. 297.

(6)—of executor—Liability to account. See EXECUTOR, No. 2, 7 Ind. Cas. 805.

Legatee.

M. Suit by—Executor to furnish accounts—Limitation. See LIMITATION ACT (1908), o. 5, 12 Bom. L.R. 881.

Legitimacy.

Legitimacy—Proof—Presumption of marriage from long co-habitation—Mother originally prostitute—No presumption.

G claimed to be the legitimate son of M. There was no evidence of marriage between his parents, and no case was made of legitimation by subsequent acknowledgment.

Held that prolonged co-habitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and it did not apply in the present case, the mother before she was brought to the father's house, having been a prostitute. **Ghazaufer Ali Khan v. Musammat Kaniz Fatima**, 14 C.W. N. 690 (P.C.) = 7 A.L.J. 579 = 11 C.L.J. 649 = 32 A. 345 = 12 Bom. L.R. 447 = 8 M.L.T. 59 = 6 Ind. Cas. 674 = 20 M.L.J. 579 = 13 O.C. 170.

LORD MACNAUGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

Lekha Bahl.

Value of. See CUSTOM (PUNJAB ALIENATION), No. 4, 8 P.W.R. 1910.

Letters of Administration.

(1) *Grant of—Vesting of property of deceased from the time of grant—Right of heirs to deal with the property until the grant—Application of S. 191 of the Succession Act to the vesting of the property.*

An administrator derives his title wholly from the Court. He has none until the Letters of Administration are granted, and the property of the deceased vests in him only from the time of the grant (a).

But until the grant of Administration, the property of an intestate vests in the heirs sufficiently to enable them to deal with their interests.

The provisions of S. 191 of the Succession Act as to the Letters of Administration relating back do not vest the property in the Administrator before the grant of administration. **Anthony Cruz Gonzales v. Mathis Boopal Rayan**, 8 M.L.T. 77 = 7 Ind. Cas. 242.

BENSON and KRISHNASWAMI IYAR, JJ.

Reference :—(a) Williams on Executors Vol. I, p. 468.

(2) *Letters of Administration—Caveat not compulsory—Incompetency of Court to decide what property belongs to the estate—Religious shrine—Property acquired by Mahant—Probate and Administration Act (V of 1881), Ss. 70, 72.*

Letters of Administration—(Concluded).

A person can oppose the application for granting Probate or Letters of Administration without first lodging the *caveat* as required by Ss. 70 and 72 of Act 7 of 1881.

In proceedings relating to grant of Letters of Administration, the District Court has no jurisdiction to decide what property belongs to the estate of the deceased.

Property acquired by a *mahant* belongs to the religious shrine of which he is the *mahant*, and Letters of Administration relating to such property can be granted only to the person who is shown to have near spiritual relationship with the deceased *mahant*. **Khazan Das v. Ram Saran Das.** 6 Ind. Cas. 650.

CHEVIS, J.

(3) Application for, when no estate left to be administered—Effect. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 4, 14 C.W.N. 463.

(4) Suit for share of property of intestate—Order for—Limitation when begins. See LIMITATION ACT (1877), No. 75, 7 Ind. Cas. 704.

Letters Patent (Bombay).

(1) *Letters Patent (Amended)*, cls. 12, 14—*Leave of Court—Causes of action arising partly in the limits of the Original Civil Jurisdiction of the High Court—Joinder of causes of action—Jurisdiction—Practice.*

The plaintiff joined in his plaint two claims, the causes of action in which arose in part within the local limits of the ordinary Original Civil jurisdiction of the High Court of Bombay; to this was added a third claim, the cause of action with regard to which arose wholly outside the said limits. Leave of the Court under cl. 12 of the Amended Letters Patent was obtained as to the first two claims. The Plaintiff then applied under cl. 14 to be permitted to join together all the claims in one suit. To this, the defendants raised two objections: first, that an application under cl. 14 could not be made in a case in which leave has to be obtained under cl. 12, in respect of other causes of action; and, secondly, the application should be made before the plaint is filed:

Held, overruling the objections, that the Court had Original jurisdiction in respect of the first two claims as soon as leave had been obtained under cl. 12; that it then became lawful for the Court to call on the defendant's to show cause why the cause of action in respect of the third claim should not be joined in the

Letters Patent (Bombay)—(Continued).

suit; and that there was nothing in cl. 14 to show that that must be done before the plaint was filed. **J.G. Dobson v. The Krishna Mills Ltd.**, 12 Bom. L.R. 988.

MACLEOD, J.

(2) *Cl. 15—Order of a Judge refusing to decide whether arbitrators are going beyond the scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of company for further loss.*

An order of a Judge dismissing a petition to revoke a submission to arbitration, on the ground that the arbitrators are going beyond the scope of the reference, is a judgment within the meaning of cl. 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators, though he complains that no such jurisdiction exists.

It decides a question of right, namely, whether or not he is, by the terms of reference to arbitration, deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

Per Chandavarkar, J.—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

The loss or damage by fire, which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it, if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that under-writers become responsible for the further mischief so incurred (*a*).

Per Batchelor, J.—The loss insured against is limited to the loss by fire (which includes the

Letters Patent (Bombay)—(Concluded).

loss by water in extinguishing the fire) and cannot conveniently embrace, all possible damages, however remote, which could, by ingenuity, be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for, whereas this contract refers only to loss, by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the Companies after the loss by fire or water had become an accomplished fact. **The Bombay Fire Insurance Co. v. Ahmebhdhoy Habibhoy**, 11 Bom. L.R. 1 = 1 Ind. Cas. 14 = 34 B. 1.

CHANDAVARKAR and BATCHELOR, JJ.

Reference :—(a) (1851) 6 Ex 468, R.

(3) Cl. 15—C.P.C. (Act XIV of 1882), S. 558, effect of, on Letters Patent—Order refusing to try issues before first hearing—“Judgment”—Appeal.

S. 588, C.P.C., 1882, has not taken away the right of appeal given by the Letters Patent.

The word judgment in cl. 15 of the Letters Patent, means a decision which affects the merits of the question between the parties by determining some right or liability. An order refusing to try and dispose of certain issues before the first hearing of the suit merely regulates the procedure in the suit, and thus is not a “judgment” within the meaning of cl. 15 of the Letters Patent.

Consequently no appeal lies from such an order. **Jehangir Mancherji Cursetji v. The Secretary of State for India**, 11 Bom. L.R. 245 = 2 Ind. Cas. 150.

JENKINS, C.J., and TYABJI, J.

References :—8 B.L.R. 433; 17 W.R. 364; 13 B.L.R. 91; 21 W.R. 303, relied on; 3 M.H. C.R. 384, Diss.

Letters Patent (Madras).

(1) S. 10. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

(2) Cls. 11 and 44—Jurisdiction—High Court—Power to try, in the ordinary Original Civil jurisdiction and suits about charities in the Mofussil. See HIGH COURT, No. 1, 7 M.L.T. 292.

(2-a) S. 12—Suit for maintenance to be charged on immoveable property, whether “suit for land.”

Letters Patent (Madras)—(Continued).

Where the plaintiff, a widow, sued for maintenance, and prayed that the same may be charged on certain immoveable properties within the jurisdiction of the High Court.

Held, on the question whether the High Court had jurisdiction to entertain the suit under S. 12 of the Letters Patent,

that a suit, which prays for any relief with reference to any specific property is a suit for land. “The plaintiff’s right of maintenance is not merely a personal obligation. It is a real right, but it is not a charge or any other proprietary right until it is referred to specific property by contract or decree.”

Held, that, as the plaintiff claimed to have her maintenance made a charge on specified immoveable property, the prayer was for a decree to operate directly on the land. The suit was therefore one for “land.” **Sundrabai Sahiba v. Tirumal Rao Sahib**, 6 M.L.T. 263 = 20 M.L.J. 103 = 33 M. 131 = 3 Ind. Cas. 930.

BENSON, O.C.J., and SANKARAN NAIR, J.

References :—27 M. 157 (161); 1 C. 249; 2 C. 445; 5 C. 82; 19 C. 358; 9 B.I.C.R. 12; 14 B. 353; 22 B 701 (704); 20 B. 249, R.

(2-b) S. 12—Granting of leave to sue—When motion for revocation should be made.

The party who seeks to revoke the leave should do so at once and should always be prepared to extend the time for filing his written statement on that ground, because it is for the interest of the parties that the question whether leave is to be revoked or not should be decided at the outset before any costs are incurred. **Subbiah Chetty v. Abdul Karim Baker Sahib**, 8 M.L.T. 349.

(3) Letters Patent, S. 15—Order of single Judge—“Dismissed with costs”—Whether amounts to judgment—Appeal.

Where a single Judge of the High Court simply stated ‘dismissed with costs’, without anything more, and when it became impossible to say whether the learned Judge meant to dismiss the case on the merits or whether he thought that, in the exercise of his discretion, he was not inclined to interfere. *Held* that it cannot be said that the order amounted to a judgment, and that no appeal lay. **Natti Gounden v. Gurnada Gounden**, 8 M.L.T. 288.

MUNRO and SANKARAN NAIR, JJ.

Letters Patent (Madras)—(Concluded).

(3-a) *Ol. 15—Order refusing to frame issue—Whether a “judgment”—Meaning of “judgment”—What it includes—Interlocutory order and judgment, distinction between.*

No appeal lies from an order of a Judge on the original side declining to frame an issue which is asked for by one of the parties to the suit (a).

The word “judgment” in S. 15 of the Letters Patent is to be deemed to include any order in any interlocutory proceedings;

The test seems to be, not what is the form of adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceedings is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a “judgment.”

An adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a “judgment” within the meaning of the Letters Patent. (*Per Chief Justice*).

The term “judgment” in S. 15 of the Letters Patent covers “an interlocutory or preliminary judgment.” But a “preliminary or interlocutory judgment” is not the same thing as an interlocutory order. And whatever width of interpretation the term “judgment” may be capable of, it ought not to be so understood as to cover “interlocutory orders.” (*Per Krishnaswami Ayyar, J.* **T.V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar**, 8 M.L.T. 453 (F.B.).

WHITE, C.J., KRISHNASWAMI AIYAR, and AYLING, JJ.

References :—(a) 1 M. 148, *Dist.*; 4 C. 531 = 3 C.L.R. 311, *F.*; 14 M. 88; 28 M. 28; 30 M. 143; 26 M. 437; 27 M. 432, *Diss*; 3 M.H.C. 394; 24 M. 358; 5 C.W.N. 781; 24 M. 252; 25 M. 654; 8 B.L.R. 433; 9 C. 482 (P.C.) = 10 I. A. 4 = 13 C.L.R. 511; 35 C. 1096; 29 B. 249; 34 B. 1 = 11 Bom. L.R. 1 = 1 Ind.Cas. 14, R.

(4) Ss. 15 to 18—Division of opinion between Judges in appeal—Further appeal whether lies. See **BANKER AND CUSTOMER**, No. 9, 6 Ind. Cas. 387,

Libel.

Libel, language, interpretation of—Charge by writer in newspaper of tampering with loyalty of soldiers—Penal Code (Act XLV. of 1860), S. 131—Fair comment—Mis-statement of fact in comment—Parliament, statements made in, put forward as writer's own, if privileged—Parliamentary debates, relevancy of—“Hansard's Reports,” admissibility of—Judicial notice of facts of public history—Evidence Act (1 of 1872), Ss. 57 and 58 (2)—S. 55—Damages—Character, evidence of—Political reputation, injury to—Deportation of plaintiff under Reg. III of 1818 and reasons given therefor, if mitigate damages—Official acts—Presumption of regularity—Costs.

Where a writing in a newspaper contained the statement that the plaintiff “has been guilty of tampering with the loyalty of the Punjab sepoys,”

Held—that the statement amounted to an imputation that the plaintiff had been guilty of a criminal offence (S. 131, Penal Code).

Per Harington, J.—In deciding whether the allegation was libellous, the meaning put on the word “tamper” in the dictionary was of little importance. The question was, what would a reasonable man understand to be conveyed by the statement, taken with the rest of the writing.

Per Curiam—When what purports to be a comment on a matter of public interest contains a false allegation of fact, such statement is not protected as fair comment (a).

It was urged in defence that the allegation of fact, viz., that the plaintiff was guilty of tampering with the loyalty of sepoys, was a repetition of statements made by a responsible minister in Parliament, and that, in any case, the statements made in Parliament in connection with the deportation of the plaintiff by Government under Reg. III of 1818, and the fact of the deportation itself, went in mitigation of the damages:

Held—that a statement which was put forward as the writer's own cannot claim to be privileged as a fair and accurate report of a proceeding in Parliament; and that, moreover, the statement was not in fact a reproduction of the statements in Parliament.

Per Harington, J.—That what was said in Parliament cannot, in the circumstances, be relevant to the issue of privilege;

Libel—(Continued).

That the statements were not also admissible in mitigation of damages, as evidence of plaintiff's bad character, since evidence of rumours of suspicions to the same effect as the defamatory matter cannot be given (b) ;

That, even if relevant, the speeches made in Parliament could not be proved by the mere production of Hansard's reports, without formal proof by examining the reporter, nor could they be referred to by the Court as relating to a matter of public history under S. 57 of the Evidence Act ;

Per Woodroffe, J.—(Contra)—That, although the penultimate clause of S. 57 does not absolve a party from proof of any fact which does not fall within the provisions of cls. 1 to 13 of the section, the facts of which the Court may take judicial notice are not limited to those clauses ;

That the fact that there were debates in Parliament in which plaintiff's deportation and conduct were discussed was a matter of public history and of such notoriety that it was reasonable to assume their existence without formal proof ; and Hansard's reports were properly referred to, to enable the Court to take judicial notice of the facts relating to the debate.

Per Curiam—The debates in Parliament were not covered by the expression "course of proceeding" in cl. (4).

Per Woodroffe, J.—The debates were relevant as disclosing the reasons for the deportation, which were such as could be relied on in mitigation of damages. They were also relevant as furnishing matter for comment.

Held (Per Harington, J.)—That the fact that the plaintiff was deported, taken in conjunction with events which preceded it, and the part which he took in the agitation at a time of political unrest, should be taken into consideration in estimating the injury done to his reputation by the particular allegation, though, if the fact of the deportation had stood alone, it would not probably weigh heavily in reduction of damages.

Per Woodroffe, J.—The fact that the Government thought fit to deport the plaintiff, the reasons therefor as inferrible from the preamble to Reg. III of 1818 and from the answers given in Parliament, and the plaintiff's conduct in so far as it appeared to justify the action of the Government, were matters to be considered

Libel—(Concluded).

in estimating the injury caused by the particular libel to his political reputation which alone was affected by the libel ; but which had had probably already suffered greatly from the action of Government and statements publicly made by responsible Government officials.

Per Curiam—That the decision of a Judge as to the amount of damages is open to review on appeal.

That, although the amount was materially reduced on appeal, the respondent was in the circumstances entitled to the costs of the appeal. *The "Englishmen," Limited v, Lala Lajpat Rai*, 14 C.W.N. 713=6 Ind. Cas. 81.

HARINGTON and WOODROFFE, JJ.

References :—(a) 20 Q.B.D. 275, 282 (1887) ; (1909) 1 K.B. 299. R. (b) 8 Q.B.D. 491 (1882), R.

License.

(1) *License—Revocability—Licensee executing works of permanent character—Compensation.*

As a general rule, a license is revocable at the will of the grantor, for no interest in the land is conferred on the grantee by the grant of a license. The position, however, is different, if, on the basis of the license, the licensee executes works of a permanent character. In the latter case, the grantor of the license is entitled to revoke it, if he makes compensation to the licensee for the loss he may incur by reason of the revocation of the license. *Surnomoyee Peshakar v. Chunder Kumar Das*, 12 C.L.J. 443.

MOOKERJEE and CARNDUFF, JJ.

(2) To employ cremation priest if can be granted. See CIV. PRO. CODE (1908), No. 10, 12 C.L.J. 74.

Limitation.

(1) *Limitation—Adverse possession of house—Whether amounts to adverse possession of site—Bar of limitation.*

Where the defendant had been in adverse possession of the house for more than twelve years, it follows that he was in possession also of the site on which the house stands, and the suit in respect of the site is barred by limitation. *Naradja Kassim v. Morris Sebastian Pereira*, 7 M.L.T. 309.

MILLER and KRISHNASWAMIYER, JJ.

(2) *Devaswam property—Suit for declaration of rights—Limitation.*

Limitation—(Continued).

Where the grant of patta to the defendant is the foundation of the action and the cause of action is dated 1895, a mere suit for declaration of rights brought more than six years after that date will be barred. **Thashe Yittil Pantheeradi Ananda Varar v. Kayumpreth Illath Vasudevan Nambudri**, 8 M.L.T. 249.

BENSON and KRISHNASWAMI Aiyar, JJ.

(3) Application for delivery of possession of property purchased at execution sale—Limitation. See **EXECUTION OF DECREE**, No. 2, 5 Ind. Cas. 89.

(4) Practice—Pleadings—Suit on exclusive title barred—No relief can be given on basis of tenancy in common. See **HINDU LAW (PARTITION)**, No. 3, 7 M.L.T. 95.

(5)—for suit for declaring decree not binding See **DECLARATORY SUIT**, No. 2, 7 M.L.T. 155.

(6) Plaintiff ordered to be registered after—Effect. See **CIV. PRO. CODE** (1982), No. 35, 5 Ind. Cas. 330.

(7) Defendant not himself in possession—Plea of adverse possession See **PARTITION**, No. 3, 5 Ind. Cas. 325.

(8) Death of decree-holder—Substitution—Limitation. See **CIV. PRO. CODE** (1882), No. 174, 5 Ind. Cas. 272.

(9) Limitation. Suit on failure of consideration. See **CIV. PRO. CODE** (1982), No. 146, 7 M.L.T. 282.

(10) Destruction of mortgaged property—Demand for additional security—Reasonable time—Limitation—See **TRANSFER OF PROPERTY ACT**, No. 43, 7 A.L.J. 391.

(11) Limitation—Account settled See **ACCOUNT**, No. 2, 7 M.B.T. 372.

(12) Plea of, regarding a previous application for execution—Ss. 234, 248, C.P.C. (1892) See **EXECUTION OF DECREE**, No. 13, 13 O.C. 90.

(13) Return of plaint to be filed in proper Court—Saving of. See **CIV. PRO. CODE** (1882), No. 56, 6 Ind. Cas. 637.

(14) Joint trust—One trustee allowing right to become barred—Suit by the other trustee within 3 years after majority, whether barred. See **COMPROMISE**, No. 4, 20 M.L.J. 421.

(15) Limitation—Suit for money against members of joint Hindu family—Institution of suit more than three years after senior member became major. See **HINDU LAW (JOINT FAMILY)**, No. 7, 8 M.L.T. 71.

Limitation—(Concluded).

(16) Burden of proof as to. See **GUARDIAN AND MINOR**, No. 7, 86 P.W.R. 1910.

(17) Limitation—Permissive possession. See **INAM TITLE DEEDS**, No. 1, 8 M.L.T. 167.

(18) Application to set aside, sale on ground that holding was not transferable—Limitation. See **EXECUTION SALE**, No. 2, 7 Ind. Cas. 48.

(19) Possession of intermediate female heirs—When does not run against reversioners. See **HINDU LAW (INHERITANCE)**, No. 9, 15 M.C.C.R. 99.

(20) Suit to recover assessment under S. 59 of Madras Revenue Recovery Act—Reliefs by way of declaration and injunction prayed for in the same suit—Limitation. See **ACT II OF 1864 (MADRAS REVENUE RECOVERY)**, No. 6, 8 M.L.T. 201.

(21) Declaratory suit for partition—Omission of relief—Separate suit—Limitation. See **CIV. PRO. CODE** (1908), No. 102, 7 Ind. Cas. 284.

(22) Money left with vendee for payment to vendor's creditor—Failure to pay—Suit to recover money—Limitation. See **TRANSFER OF PROPERTY ACT**, No. 35, 7 Ind. Cas. 639.

(23) Balance of account struck—Promise to pay interest—Bond—Limitation. See **CONTRACT ACT**, No. 19, 135 P.W.R. 1910.

(24) Land in cantonments—Adverse possession See **CANTONMENT**, No. 1, 7 A.L.J. 1194.

(25) Contract to revive barred items—Balance struck—Limitation See **DEBTOR AND CREDITOR**, No. 1, 138 P.W.R. 1910.

(26) Execution of decree—Limitation—Objection by judgment debtor when may be raised. See **CIV. PRO. CODE** (1882), No. 113, 8 Ind. Cas. 22.

(27) Plaint showing one ground of exemption from—Plaintiff's right to plead another and inconsistent ground to get over the bar of. See **EVIDENCE ACT**, No. 6, 8 Ind. Cas. 81.

(28) Adverse possession—Necessity for finding whether defendant's possession was adverse or derivative—Failure to account for origin of possession—Legal presumption—Derivative possession See **POSSESSION**, No. 6-7, 3 Ind. Cas. 506.

(29) Chit fund transactions—Default in payment of instalments—Right to recover—Waiver. See **CHIT FUND**, No. 1, 8 Ind. Cas. 510.

Limitation Act (1871).

(1) Art. 105—Right barred under, not revived by Limitation Act of 1877 or of 1908. See CIV. PROC. CODE (1882), No. 48, 7 A.L.J. 1201.

Limitation Act, 1877.

- (1) *S. 3, Sch. II, Arts. 13, 14—"Suit"—Order in a proceeding other than a suit—Code of Civil Procedure (XIV of 1882), S. 310-A*

A Civil Court acting under S. 310-A of the Code of 1882, set aside a sale, on an application made about 14 months after the sale. The auction-purchaser, more than a year after the order, sued for possession of the property and for a declaration that the order under S. 310-A was passed without jurisdiction. *Held* that the order, whether passed rightly or wrongly, was not a nullity, and that, the order having been passed in a proceeding other than a suit, Art. 13, Sch. II, Limitation Act, barred the present suit, inasmuch as the plaintiff could not obtain a decree for possession without first having the order set aside. **Kishori Lal v. Kuber Singh**, 7 A.L.J. 937 = 7 Ind. Cas. 503.

STANLEY, C.J., and BANERJI, J.

- (2) *S. 5—"Sufficient cause"—Decree or judgment—Pendency of application for review of, when saves bar of limitation.*

Where there are no reasonable grounds for asking for a review, the pendency of an application for review of a decree or judgment cannot be held to be a "sufficient cause" (within the meaning of S. 5, Limitation Act, 1877) for not presenting an appeal, within time, against that decree or judgment. **Musadi Lal v. Badhawa**, 100 P.R. 1910 (Civil).

RATTIGAN and WILLIAMS, JJ.

References:—15 C. 242; 183 P.R. 1888 (F.B.), R.

(29) S. 5—Suit for registration of document—Limitation. See REGISTRATION ACT (1877), No. 25, 5 Ind. Cas. 416.

(3) S. 5—Applicability. See ACT XXVI OF 1886 (OUDH RENT), No. 1, 13 O.C. 108.

- (4) *Ss. 5, 7—Application for leave to appeal in forma pauperis—Delay—Excuse of delay—Minor applicant—Probate—Grant of probate—Title not concluded by the grant—Civ. Pro. Code (Act V of 1908), S. 11—Res Judicata.*

plaintiff, a minor, filed a suit in *forma pauperis* for a declaration that he was the

Limitation Act, 1877—(Continued).

adopted son of Vyankatrao and to recover possession of his property. The suit was dismissed on the 10th February, 1908. An application for leave to appeal in *forma pauperis* was presented to the High Court on the 18th April, 1908; but having been beyond time it was rejected. On an application to excuse the delay, the High Court excused it on the ground that, the applicant having been a minor, S. 7 of the Limitation Act, 1877, applied. At the hearing the respondent objected that the application for permission to appeal in *forma pauperis* must be treated as an appeal, and that S. 5 and not S. 7 of the Limitation Act, 1877, applied to it.

Held, overruling the contention, that, whether the application be treated as falling under S. 5 or S. 7, the result was the same. If it fell under S. 5, and was an appeal, then, under the second paragraph of that section which applied to appeals, the Courts had jurisdiction to excuse the delay. If, on the other hand, it be treated as an application and fell under S. 7, it was clearly within time and there was no need of excusing delay, because the section provided that a minor son could apply even after he had attained the age of majority but within a period prescribed.

The grant of probate does not conclude the parties as to title. The probate is only conclusive as to the appointment of executors and the validity and the contents of the will. On an application for probate, it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition. **Chintaman Vyankatrao Ghadge v. Ramchandra Vyankatrao Ghadge**, 12 Bom. L.R. 694.

CHANDAVARKAR and HEATON, JJ.

- (5) *Ss. 5, 7, Art. 170—Limitation—Forma pauperis—Application for leave to appeal as pauper made after time—Payment of Court-fee—Sufficient cause.*

Held, that section 7 of Act XV of 1877 does not apply to an application for leave to appeal in *forma pauperis* made in the name of a minor by his next friend. It must be made within the time allowed under Art. 170 of the 2nd Schedule to the Act (a).

Held, also, that an unstamped memorandum of an appeal is to be considered presented on the date on which the Court-fee required thereon is paid, and that presenting an application to appeal as *pauper*, not made in good faith and

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within the time prescribed therefor, is not sufficient, under section 5 of Act XV of 1877, to bring it within, if it is otherwise out of, limitation on that date (b) *Seva Datt Pershad v. The Collector of Lahore*, 141 P.W.R. 1909.

ROBERTSON and SHAH DIN, JJ.

References—(a) 18 Mad. 484, F. (b) 79 P. R. 1906, F.

(6) S. 5, Art. 106—Suit by widow for account of partnership property—Limitation See PARTNERSHIP, No. 8, 142 P.W.R. 1910

(6-a) S. 7—See Nos 4 & 5, *supra*

(7) S. 7, Arts 44, 91, 113 and 144—Res judicata—Suit for possession of immovable property from trespasser—Decree conditional on payment of some money—Non judicial hypothec—Expiry of limitation for execution—Second suit allowed—Limitation for such suit—Minor and adult plaintiffs—Benefit of minority—S. 13, C.I.C., 1882.

Held, that, where a plaintiff sues for recovering an ancestral immovable property from a trespasser and obtains a decree for its possession conditional on payment of some money to the defendant, without specifying the date up to which it is to be paid, the decree does not create a judicial hypothec or new cause of action. But the decree holder is not debarred by such decree from maintaining a second suit on the original cause of action after expiry of the period prescribed for its execution (a), provided the second suit is brought within 12 years (prescribed under Art. 142 of second schedule of Act XV of 1877) from the date on which the defendants first took possession of the property (b) Arts 44 and 91 have nothing to do with such a case.

Held, also, that minority does not prevent limitation running against minors except as is provided under S. 7 of this Act. In case of several minor plaintiffs extension of more than three years cannot be allowed after the date of attaining majority by the youngest. *Shamir v. Badha Singh*, 148 P.W.R. 1909—100 P.R. 1909.

REID, C.J., and WILLIAMS, J.

References—93 P.R. 1979, 57 P.R. 1883, 137 P.R. 1889, 135 P.R. 1892, F., 86 P.R. 1877; 10 P.R. 1888; 93 P.R. 1908=139 P.W.R. 1909, 80 P.W.R. 1909, D., 5 A. 493, R.

(8) S. 7, Arts. 142, 144. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

Limitation Act 1877—(Continued).

(9) S. 7, Sch. II, Art. 166—Civ. Pro. Code (Act XIV of 1882), S. 311—Execution of decree—Sale, application to set aside—Minority, effect of.

Held, that an application under S. 311, Civ. Pro. Code, 1882, to set aside an auction sale, presented on behalf of a minor by his next friend or guardian, after the expiry of one year from the date of sale, is not barred under Art. 166, Limitation Act, XV of 1877. S. 7 of the Act applies to such cases, and the period of limitation is extended under the provisions of the section. The operation of section 7 is not confined to applications made by minors after attaining majority but extends to applications made by guardians during the minority of their wards.

Held also that S. 6 of Act IX of 1908, did not govern the application, which was made before the Act had come into force. *Gujjar Mal v. Sita Ram*, 5 P.L.R. 1910=6 Ind. Cas. 488.

RATHIGAN, J.

References—8 Bom. 262, 263, 1 C. 243, 23 C. 389, 3 C.W.N. 25, R., 1 C. 226, 23 C. 374, J.A. 111, F.

(10) Ss. 7 and 5 and Art. 17—Limitation Act (IX of 1908) S. 7 Minors—Decree holders—Minors' application to execute the decree on behalf of some of the joint decree holders—The application cures for all—Discharge by one decree holder under S. 231, Civ. Pro. Code, 1882 or (1) XXI, R. 15, Civ. Pro. Code, 1908, not one contemplated by S. 8 of the Limitation Act of 1877, or S. 7 of the Act of 1908.

Two minors represented by a guardian, obtained a decree in 1901. Applications to execute the decree were made in 1904, 1905 and 1906. At those dates, one of the decree-holders had attained majority, but the other was a minor. In 1909 both the decree-holders applied to execute the decree as majors. The defendants contended that the elder decree-holder having attained majority, the applications by the guardian had been as to her unauthorized, and the present writ for execution of the decree was barred as regards her. It was also contended that as the elder decree holder was able to give a discharge, since her majority, for the decretal debt, without the concurrence of the minor, time had run against both under S. 8 of the Limitation Act of 1877, and certainly under S. 7 of the Limitation Act of 1908—

Limitation Act, 1877—(Continued).

Held, that though the elder decree-holder had attained majority, the applications made by the guardian as next friend of the younger decree-holder took effect in favour of both; for, by reason of the first explanation of Art. 179 of the Limitation Act, an application made by one of the several joint decree-holders took effect in favour of all.

Held, also, that the contention under S. 7 of the Limitation Act of 1877 or S. 8 of the Act of 1908, was inconsistent with the decisions in (a).

The applicability of (b) has not ceased owing to any change in the words of S. 7 of the Limitation Act of 1908. **Mulchand Panachand Gujar v. Kesari Khupchand Gujar**, 12 Bom. L.R. 682=34 B. 672.

BASIL SCOTT, C.J.

References :—(a) (1895) 20 B. 383. (b) (1899) 22 A. 199.

(11) *S. 8—Putni sale, suit to set aside—Minority of some of the plaintiffs—Pleading—One co-sharer entitled to sue—Civil Procedure Code (Act XIV of 1852), S. 50.*

Courts are bound not to dismiss as barred a suit which on the face of it is not barred.

Where one or more of several plaintiffs is or are a minor or minors, if the provisions of section 8 of the Limitation Act apply, it would not be necessary to expressly claim in the plaint exemption from the law of limitation as prescribed by the concluding paragraph of section 50 of the Civil Procedure Code. The fact is patent on the record.

The propriety of allowing amendment of plaint in second appeal discussed.

One of the defaulting co-sharers may alone sue to have a putni sale set aside. **Gangadhar Sarkar v. Khaja Abdul Aziz**, 11 C. L. J. 34=2 Ind. Cas. 77.

CHITTY and VINCENT, JJ.

Reference :—12 B.L.R. 370, is not an authority on the contrary.

(11-a) S. 8. See No. 10, *supra*.

(12) *S. 10—Amounts recovered by trustees to be paid over to a katlai—Suit for recovery of arrears for 11 years and odd—Limitation.*

The plaintiffs, who are the managers of a *katlai* in a temple, sued the trustees of the temple, for the recovery of arrears of 11 and odd years of certain *tasdik* amounts recovered from the Government by the trustees for the purpose of being handed over to the managers of the *katlai*.

Limitation Act, 1877—(Continued).

Held, that the suit fell under S. 10 of the Limitation Act, and no portion of the claim was barred. **Medal Dalavai Tirumalai Appa Modellar v. Rama Subbar**, 20 M.L.T. 374=6 Ind. Cas. 781=8 M.L.T. 130.

BENSON and KRISHNASWAMI Aiyar, JJ.

(13) *S. 12—Appeal under S. 10, Mad. Forest Act (V of 1882)—Computation of time—Time requisite for obtaining a copy, whether deducted—Applicability of section.*

The provision in S. 12 of the Limitation Act, that, in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the order appealed against should be excluded, does not apply to appeals under S. 10 of the Madras Forest Act, 1882. So, in computing the period of limitation for appeals under that section, the time required for obtaining copies of the order in such cases ought not to be deducted. **Abu Baker Sahib v. The Secretary of State for India**, 7 M.L.T. 132. (F.B.)=20 M.L.J. 283=5 Ind. Cas. 884.

WHITE, C.J., WALLIS and MILLER, JJ.

References :—10 M. 210, overruled; 18 M. 99, approved; 20 M. 476, R; 22 M. 179; 28 M. 389 and 11 M. 309, R.

(14) *S. 12—Applicability to appeals under the Companies Act. See ACT VI OF 1882 (COMPANIES), No. 3, 4 Ind. Cas. 872.*

(15) *S. 12 and Sch. II, Art. 152—Appeal—Computation of time—Time requisite for obtaining copy—Applying for copy of decree after obtaining copy of judgment.*

Plaintiff obtained a decree in the Munsif's Court on 12th October 1905. He applied for a copy of the decree on 18th October 1905 and obtained it on 19th December 1905. For a copy of judgment he applied on 22nd December, 1905 and obtained it on 16th February 1906.

Held, that the plaintiff was entitled, under S. 12 of the Limitation Act, to a deduction of the time between 18th October 1905 and 19th December 1905 and the further time between 22nd December 1905 and the 16th February 1906 and there is appeal to the lower appellate Court was not barred. **Selamban Chetty v. Ramanathan Chetty**, 4 Ind. Cas. 301=7 M.L.T. 29.

SANKARAN NAIR and KRISHNASWAMI Aiyer, JJ.

Reference :—8 M.L.J. 148, F.

(16) *S. 14—Court—Foreign Court—Interpretation—Construction of statute.*

Limitation Act, 1877—(Continued).

The word "Court" in S. 14, Limitation Act, 1877, only refers to a Court in British India, and does not include a foreign Court such as one in a Native State.

All legislation is primarily territorial, and a limit must be placed upon the general sense of a word used in a statute with reference to that principle of law, unless there is something in the language or object of the statute which compels the Court to interpret the word in its wide sense (a). **Ghanmalapa Chenbasapa Tengulkai v. Abdul Yahab Muhammed Hussein**, 12 Bom.L.R. 977.

CHANDAVARKAR and HEATON, JJ.

Reference:—(a) (1901) A.C. 102, *Followed*.

(17) S. 14: See **FOREIGN JUDGMENT**, No. 3, 41 P.L.R. 1910.

(18) Ss. 14, 18—*Fraud, definite knowledge of—Mere suggestion of fraud not sufficient—Provincial Small Cause Courts Act (IX of 1887), S. 17—Deposit or security imperative.*

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is remote for the suit to be brought. Mere suggestion of his having been defrauded does not amount to such knowledge as is required by S. 18 of the Limitation Act, 1877 (a).

The provisions of section 17 of the Provincial Small Cause Courts Act are mandatory, and an application to set aside an *ex parte* decree must be accompanied by the necessary security or deposit (b).

But, if such an application is filed without security, which is subsequently furnished within the time prescribed by the law of limitation for an application and deposit of the decretal amount or security, the applicant has a right to have his application heard on the merits (c).

An *ex parte* decree was made by a Small Cause Court on August 7, 1908. The defendant made an application to set aside the decree on March 15, 1909, on the allegation that the decree was fraudulent and he became aware of it on February 26, 1909. The application was filed in the Court of the Munsiff who had made the decree in the Small Cause Court side, but the application was treated as one to set aside an ordinary *ex parte* money decree. On August

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7, 1909, the mistake was discovered and the petition was amended, and the defendant was asked to make the necessary deposit under section 17 of the Provincial Small Cause Courts Act within August 14. He obtained further time till the 28th and on that day he put in the money:

Held, that, for the purposes of limitation, the defendant was entitled to the benefit of the provisions of section 14 of the Limitation Act, 1877, and to a deduction of time from March 15 to August 7, and as, on August 7, the petitioner first became definitely aware of the fact that an *ex parte* decree had been made against him by the Small Cause Court Judge, the deposit was within time. **Basiruddin Mondal v. Sonaulah Mondal**, 6 Ind. Cas. 154.

MOOKERJEE and TRUNON, JJ.

References:—(a) 17 B 341 (P.C.), 20 I.A. 1, F (b) 19 C. 83, 28 A 470, 3 A.L.J. 318, A.W. N (1906) 93, 9 Bom L.R. 883, F.; 13 M 178 (F.B.), *disseminated from* (c) 32 C 339, 1 C.L.J. 1, F.

(18 a) S 15 *Sch II, Arts 176, 179—Execution of decrees—Whether S 15 applicable to applications for execution—Whether Art 176 applies to execution of decrees—Limitation Act (IX of 1908), S. 15, change in the law made by*

The rule embodied in S 15 of the Limitation Act 1877, was limited in its application to suits and could not be extended to applications for execution of decrees, and it was not open to the Court to apply the principle deducible from it to applications for execution of decrees.

But where there had been a previous application for execution followed by an injunction or prohibitory order, the subsequent application for execution could be treated as one in revival of the previous application.

S. 15 of the Limitation Act of 1908, however, has been so framed as to be applicable not only to suits but also to applications for execution of decrees.

Art. 178 of the Limitation Act is applicable only to applications for which no period of limitation is provided elsewhere in the schedule to the Act, and is clearly inapplicable to applications for execution of decrees to which Art 179 is applicable. **Amulya Ratan v. Freeo Nath**, 7 Ind. Cas. 886.

MOOKERJEE and SHARF-UD-DIN, JJ.

Limitation Act, 1877—(Continued).(18-b) S. 18—See No. 18, *supra*.(19) S. 19—*Acknowledgment—Admission of liability entered in wajib-ul-arz.*

A *wajib-ul-arz* of 1863 provided that the predecessors-in-title of the plaintiff and the defendant were mortgagors and mortgagees respectively, and that the mortgage was to be redeemed in the month of Jeth in any year. The *wajib-ul-arz* in question was signed by the predecessors-in-title of the defendant: *Held*, that the entries in the *wajib-ul-arz* operated as a sufficient acknowledgment to save limitation, within the meaning of S. 19 of Act XV of 1877. **Shankar v. Musammatt Dharmon**, 5 Ind. Cas. 77.

PIGGOTT, J.

References:—1 A. 117; 1 A. 425; A.W.N. (1895) 211; A.W.N. (1894) 87; 6 A.L.J. 197; 2 Ind. Cas. 215; 31 A. 247, R.

(20) S. 19—*Suit for value of goods sold—Defendant's acknowledgment of delivery of goods in his written statement in prior suit—Whether sufficient to save limitation.*

The plaintiffs sued for the recovery of the value of cloths sold to the defendant by the first plaintiff and his deceased brother, Basappa, and relied upon an acknowledgment of the liability made by the defendant in a written statement filed by him in a prior suit, as saving limitation. The passage in the written statement was to the effect that one Kasim Sahib and the defendant received from Basappa and Marriappa (members of the plaintiff's family) not from the plaintiff, cloth for sale on commission.

Held, that there was a clear acknowledgment saving the bar of limitation, in the written statement, of the delivery of the articles therein referred to, to the defendant, from the circumstances of which delivery followed the legal incidents of his position to account for the price (a). **Kadri Pakirappa v. Manki Husan Sahib**, 6 M.L.T. 155=3 Ind. Cas. 19=19 M.L.J. 650.

BENSON and SANKARAN NAIR, JJ.

References:—(a) 35 C. 844 (P.C.) at 851=25 I.A. 95=2 C.W.N. 402, F.; 6 M. 182, *doubled*.

(21) S. 19—*Sarkhat executed in lieu of debt, partly barred and partly new—Contract—Acknowledgment—Contract Act (IX of 1872), S. 25 (3).*

A certain debt barred by limitation stood due to the plaintiff by the defendant. The plaintiff remitted a portion of the debt and advanced

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a further sum in cash. The defendant thereupon executed a Sarkhat, in which he admitted the receipt in cash of a sum including the unremitted portion of the barred debt, and the further sum advanced at the time, and undertook to pay interest thereon at a certain rate.

Held, that the transaction amounted to a new contract and was not merely an acknowledgment of the barred debt. **Muhammad Abid Hussain Khan v. Lala Bhagwan Das**, 5 Ind. Cas. 418.

STANLEY, C.J., and BANERJI, J.

Reference:—24 B. 394, R.

(22) S. 19—*Limitation—Mortgage—Acknowledgment—Entry of mortgage in Muntkhib Khewat of a large village signed by one of the two mortgagees.*

Held, that, where in the Muntkhib Khewat a mortgage entry occurs among many other ownership entries, and it is signed at the end by one of the two mortgagees, not proved to have been the duly authorized agent of his co-mortgagee, there is no acknowledgment within the meaning of S. 19 of Act XV of 1877 so as to extend the period of limitation. The Settlement Officer is not an agent of the mortgagee within the meaning of S. 19 of the Act. **Ganga Ram v. Pokhar Das**, 35 P.W.R. 1910=39 P.R. 1910=5 Ind. Cas. 992.

JOHNSTONE, J.

References:—C. 32 P.R. 1880; C. 63 P.B. 1888; C. 145 P.R. 1889; C. 116 P.R. 1891, F.; C. 93 P.R. 1877 and C.A. No. 1541 of 1883, R.; C. 53 P.R. 1905 (F.B.), D.

(23) S. 19—*Acknowledgment by one of two mortgagees in a deed of transfer—Acknowledgment valid as against the representatives of that mortgagee.*

A mortgage was executed in 1844. Subsequently the mortgagee right became vested jointly in H and B. In 1881 H alone transferred the entire mortgagee right to the plaintiffs and the defendants. In 1906 the plaintiffs only acquired also the equity of redemption. The plaintiffs instituted the suit for redemption beyond time from 1844 and within time from 1881: *Held*, that the acknowledgment made by H contained in the deed of 1881 was a valid acknowledgment so as to bind the defendants who derived their interest from H. **Sheonandan Singh v. Achhabar Singh**, 6 Ind. Cas. 190=7 A.L.J. 847.

RICHARDS and GRIFFIN, JJ.

Limitation Act, 1877—(Continued).

(24) *S. 19—Madras Regulation V of 1804 as amended by Madras Act. IV of 1899—Debt due by Ward of Court—Acknowledgment of liability by Collector as Agent of the Court of Wards—Whether saves limitation.*

The Court of Wards has the power to make an acknowledgment of a debt due by the ward, which would bind the ward and give a new starting point for limitation (a).

An acknowledgment by the Collector, as Agent of the Court of Wards, is equally binding on the minor and equally efficacious to have limitation (b).

Quere:—Whether a sarbarahkur or manager can admit a fresh liability? **Kondamodalu Linga Reddi v. Alluri Sarvarayudu of Annadevarapetta**, 6 Ind. Cas. 407.

WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 17 A. 198; 22 I.A. 31; 30 A. 422; 5 A.L.J. 375 (F.B.); A.W.N. (1908) 175; 4 M.L.T. 49, F. (b) 19 M. 255, D.; 17 M. 221; 26 B. 221; 17 A. 198, R.

(25) *S. 19—Power of agent to sign an acknowledgment—“Duly authorised,” meaning of—Agent having authority to receive goods, whether has authority to sign acknowledgment S. 188, Contract Act—Acknowledgment conditional and subject to principal's approval, and not admitting correctness of amount charged—Effect of.*

Under the provisions of S. 19 of the Limitation Act, an acknowledgment may be signed either by the principal debtor himself or by an agent duly authorised in this behalf.

The words “duly authorised in that behalf” do not mean specially or expressly authorised, they are the proper designation of an agent acting within the scope of his powers, ordinary or special (a).

An agent, who has authority to receive supply of goods for his principal, has also implied authority to sign an acknowledgment of balances due (*vide* S. 188, Contract Act); such an acknowledgment would be good for the purposes of S. 19, though the correctness of the amount charged is not admitted, and though the acknowledgment is only conditional and subject to approval by his principal (b). **The Firm of Sheru Mal Chaina Mal v. Von Goldstein**, 55 P.R. 1910=6 Ind. Cas. 948.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 7 P.R. 1890, R. (b) 33 C. 1047 (P.C.); 10 M. 259; 26 C. 204; 26 C. 715; 43 P.R. 1910, R.

Limitation Act, 1877—(Continued).

(26) *Ss. 19 and 20—Limitation Act (IX of 1908), S. 21—Acknowledgment of debt—Payment of interest—New period of limitation—Payment by eldest brother for all brothers including minor brother—Agent duly authorised—Payments valid to create fresh starting point for limitation.*

The manager of a Hindu joint family has the same authority to acknowledge as he has to create a debt. He has power to continue a liability by payment of interest, and in so doing he would be considered as the agent duly authorized, within the meaning of S. 20 of the Limitation Act, 1877, to bind the other members (a).

There is nothing in S. 20 of the Limitation Act, 1877, to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment. Therefore, where a debt incurred by the father is binding on his sons, any one of them can acknowledge the obligation or make a payment on behalf of all (b).

Therefore, where the eldest brother made a payment to avert a threatened suit, it was for the benefit of the younger brothers, including the minors, of whose property the eldest brother was in fact the guardian though he had not been appointed by the Court, and the payment will save limitation under S. 20 of the Limitation Act, 1877. **Saroda Charan Chuckerbutty v. Durga Ram De Sinha**, 5 Ind. Cas. 484=14 C.W.N. 741=11 C.L.J. 494.

CASPERSZ and DOSS, JJ.

References:—(a) 5 M. 169 (F.B.); 30 A. 422; 5 A.L.J. 375; A.W.N. (1908) 175; 4 M.L.T. 49; 17 B. 512, F. (b) 32 C. 1077; 9 C.W.N. 868; 33 C. 278; 11 C.W.N. 107, F.

(26-a) *Ss. 19, 20—Acknowledgment—Admission should be of distinct liability in dispute and not of any liability—Debtor liable in respect of many transactions—Payment of interest—Appropriation—Limitation. See EVIDENCE ACT. No. 6, 8 Ind. Cas. 81.*

(27) *S. 19, Art. 56—Contract Act (IX of 1872), S. 230 (3)—Principal and agent—Contractor employed by agent to do work for principal—Payment for work done to agent by principal for contractor—Contractor's right to sue agent—Ruling Prince—Suit against—Limitation Act (XV of 1877), S. 19, Sch. II, Art. 56—Acknowledgment.*

Limitation Act, 1877—(Continued).

A contractor engaged in British India by the agent of a ruling Prince, to do work in his State, is not competent to sue the Prince for work done by him, when permission to sue has been refused by Government. But where the agent has been paid up by the Prince, the contractor has a good cause of action against the agent, and his suit is governed by Art. 56 of the Limitation Act.

An acknowledgment is a valid acknowledgment within the meaning of S. 19 of the Limitation Act, notwithstanding the fact that it does not specify the amount due to the creditor and is not addressed to him, if it does admit that he has a good and subsisting claim. (*a*) **Abdul Ali v. Goldstein** 14 P. L. R. 1909—43 P. R. 1910

RATTIGAN and SHAH DIN, JJ.

References —(*a*) 25 M. 220 (F. B.) 13 M. J. A. 37, 25 C. 44 33 C. 1047 (P. C.) 97 P. R. 1884, 26 M. 34, R.

(28) S. 19 Sch. II Arts. 170 176 Acknowledgment—Widow in possession of husband's estate—Reversioner not bound—Limitation Act (XIV of 1859), General Clauses Act (I of 1860), S. 6—Suspension of limitation by fusion of the interest of mortgagor and mortgagee—Civil Procedure Code (XVI of 1882) S. 43—Relinquishment

A reversioner does not derive his title from a female heir holding a limited interest. An acknowledgment by such a female heir of the right of redemption of the mortgagor of an estate subject to mortgage is not an act done for the benefit of the estate. A reversioner therefore, is not bound by such acknowledgment. The act does not bind the estate. The rule of *res judicata* by which a decree fairly and properly obtained against a widow is binding on the reversioner does not apply to an acknowledgment by the widow. An acknowledgment of liability only extends the period of limitation for the institution of a suit and does not confer title to property.

A suit based upon an acknowledgment made when Act XIV of 1859 was in operation but which was instituted when the Act of 1877 had come into force, is governed as to limitation by the latter Act. S. 6, General Clauses Act of 1860, does not apply, inasmuch as the acknowledgment the basis of the suit, is not a thing done in pursuance of any Act of the Legislature. Consequently under S. 19 of Act XV of 1877, the suit would be barred, the

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reversioners not deriving title from the widow who had made the acknowledgment.

Art. 190, Sch. II, Limitation Act, 1877, does not apply, in that, the mortgagor having acquired the widow-mortgagee's limited interest, there was not a complete fusion of interest.

Although relinquishment of a portion of the relief that a plaintiff is entitled to seek bars a second suit under S. 48 Code of Civil Procedure, 1892 a defendant is not precluded from putting it forward as a defence to a suit brought against him. **Shib Shankar Lal v. Soni Ram**, 6 A. L. J. 931=3 Ind. Cas. 981=32 A. 38

BANERJI and LUDHAL, JJ.

(29) S. 19 and Sch. II, Art. 179, cl. (4)—Step in aid of execution—Compromise to have rest of decree executed at future time, rather step in aid of execution—Acknowledgment—S. 19 whether applicable to applications for execution

A compromise to have the rest of a decree executed at a future time without fixing any period for the same, is an application for taking a step in aid of execution (*a*)

Such a petition of compromise is an admission on the part of the judgment debtor which would attract the provisions of S. 19 of the Limitation Act 1877, and entitles the decree holder to a fresh period of limitation from that date.

S. 19 of the Limitation Act 1877, applies to an application for execution. **Bhadeswari Koer v. Awadh Behary Lal** 6 Ind. Cas. 366

CHATTERJEE and VINCENT, JJ.

References —3 C. L. J. 347, 8 C. 716, 10 C. L. R. 613; 9 C. 730, 13 C. L. R. 91, F.

(30) S. 20—Interest payment of—Payment of principal and interest—Savings of limitation

Where a certain amount was paid on account of principal and interest, and it was not specified how much was for interest and how much for principal. *Held*, that the payment was a payment of interest as such, so as to attract the consequences for which provision is made in S. 20 of the Limitation Act. **Rai Mohan Shaha v. Lakshu Karikar**, 6 Ind. Cas. 16

MOOHERJEE and TRUNON, JJ.

References —4 Bom. L. R. 281, F., 3 B. 198, 5 Bom. L. R. 350, D.

Limitation Act, 1877—(Continued).

(31) S. 20—Acknowledgment of liability—Endorsement of payment—Reckoning of time—Whether from date of endorsement or payment

Under S 20, Limitation Act (1877), time has to be reckoned from the date of payment and not from the date of endorsement of such payment.

A mere endorsement of payment does not amount to an acknowledgment of a subsisting liability within the meaning of the said section **Gade Lakshminarasimham Pantulu v. Bharata Mahanty** 8 Ind Cas 349

ABDUR RAHIM and KRISHNASWAMI AIYAR, JJ

(31-a) S 20—Pardanashin lady—Payment of interest—Agent duly authorised See **ATTESTATION** No 2, 5 Ind Cas 539

(31-b) S. 20 See Nos 26, 26 a *supra*.

(32) S 20, cl (I)—Payment of interest as such—Payment without intimation that it is for interest—Saving of word *it is*

When the defendant had at different times made payments to the plaintiff who was his creditor, in reduction of the general balance of account against him but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt *Held*, that there had been no payment of interest as such by the defendant so as to bring the case within cl 1 of S 20 of the Limitation Act 1877 (a) **Maheswar Panda v. Balidya Nath Jana** 7 Ind Cas 7

HOLMWOOD and SHARFUDDIN JJ

References —(a) 3 B 193 and 35 C 813 I'

(33) S 22—Party added as defendant after the period within which suit can be brought—Relief claimed against party, whether not time barred See **INSURANCE**, No. 1 3 Sind L R 191.

(34) S. 22 and Sch II, Art 120—Declaratory suit—Suit for declaration that the defendant's rent was higher than what appeared on record of rights—Continuing causes of action—Substitution of assignee of original plaintiff—Limitation

The cause of action for a declaration that the rent payable by the defendant is higher than what appears on the record of rights is not a continuing cause of action as the right for a declaration arose when the contrary assertion was first made

Limitation Act, 1877—(Continued).

Therefore, where the original plaintiff in such a case brought his suit within six years from the publication of the record-of-rights, but he having assigned his interest, the assignee's name was substituted in the record after the expiry of more than six years from the publication of the record-of-rights

Held, that the suit was barred by limitation under S 22 of the Limitation Act **Syed Mohamed Mehdihasan Khan v. Phul Kuar Mahton** 5 Ind Cas 115

HARRINGTON and CHATTERJI, JJ

References —11 CWN 521 (F B), 34 C 612 5 C L J 486, 2 M L T 312, F

(35) S 22 Sch II Art 120 See **SHEBAIT**, No 1 7 M L T 63

(36) S 23, Arts 115, 116—Covenant by usufructuary mortgagee to pay Government revenue—Mortgaged property sold for arrears of revenue—Subsequent decree for redemption—Suit by mortgagor to recover damages for lands not delivered—Wrongful cutting of trees—Limitation, when begins—*Transfer of Property Act* Ss 76 and 92

A usufructuary mortgagee undertook to pay Government revenue. He defaulted to do so, and the property was sold in public auction. Subsequently on the 5th November 1902, the mortgagee obtained a decree for redemption. The mortgagee failed to deliver certain items of property. Then the mortgagor instituted a suit on 6th November 1905 within six years from the redemption decree for recovery of damages in respect of (1) the items of property not delivered and (2) certain trees wrongfully cut by the mortgagee while in possession.

Held that the case as regards (1) fell under Arts 115 and 116 of the Limitation Act, read with S 25 of the Act and that the time began to run from the date of the redemption decree and not from the date of auction sale

Held also that the claim as regards (2) fell under Art. 36 of the Limitation Act and under that article, time began to run from the date of the misfeasance viz, the cutting of trees, which took place in 1901, and so the claim was barred

S 76 of the Transfer of Property Act, IV of 1892, provides only a cumulative remedy and is not intended to operate as a bar to any other remedy which the mortgagor may have under the law.

Limitation Act, 1877—(Continued)

A mortgagee is under an obligation under S 92, Transfer of Property Act, to put the mortgagor in possession of the property, and that is in the nature of a continuing obligation, which cannot be said to cease so long as the mortgagor's right to redeem is not barred. **Shivachidambara Mudaly v. Kamakshi Ammal**, 6 M L T 239—33 M 71

MILLER and ABDUR RAHIM, JJ.

(37) S. 23, Sch II, Arts 120 144—*Right to flow of water—Obstruction by erection of dam—Prayer for removal of dam and injunction—Continuing wrong—Bar of limitation*

The plaintiffs sued for a declaration of their right to take water for their garden from a water-course and for an injunction for the removal of an obstructing dam erected by the defendants in the water course. It was found that the plaintiff has, by evidence of immemorial user, established his right of taking water for irrigating his land and that the defendants about seventeen years before suit completely obstructed the flow of water to plaintiff's land by erecting a dam.

Held, that the suit is not either in terms or technically, a suit for possession of any land or of a particular mass of water under the control of the defendant and the suit is not barred under Art 144 (*Per Crouch J J C*) (a).

Held, per *Hayward, A J C*, that the deprivation of supply of water gives rise every year to a fresh period of limitation and that the prayer for injunction cannot be barred for a fresh claim arises each year and the prayer cannot fail to be in time by reason of S 23 read with Art 120, Sch II Limitation Act 1877 (b).

The wrong is the deprivation of the supply of water, and not the erection of the dam by the defendants. The wrong is a continuing wrong, because of the renewal of the deprivation of the supply of water every year (c). **Goverdhandas v Naraindass**, 3 S L R 228 (F B).

KNIGHT, J C and CROUCH and HAYWARD, A J C's.

References—(a) 5 L J Ch 90, 3 A 24 (31), R.; 6 C. 394; (1894) Ch 293, 4 W R C R 300; 4 W. R. C R 107 and 5 M 253, *Dist. d Cons* (d) 25 B 644 (649), R (c) 10 A & E 108; 6 C. 394 (404), (1894), 1 Ch. 293, R.

(37-a) S. 28. See No. 64, *infra*.

Limitation Act, 1877—(Continued)

(38) S. 28, Sch II, Art. 144—*Adverse possession—Suit by vendee or auction-purchaser for possession.*

Ordinarily a purchaser, who has not acquired possession, has twelve years from the date of the purchase within which he can sue for possession, but after that time any suit brought by him would be time-barred. In the case of a vendee who has obtained a decree or of an auction purchaser, if merely symbolical possession has been obtained, the decree holder or auction-purchaser has twelve years from the date of obtaining symbolical possession within which he may bring a suit for physical possession, at the end of that time his rights are extinguished. **Amolak Shah v. Maula Baksh**, 70 P L R. 1910

RFID, C J and CHEVIS, J

References—5 C 584, 24 C. 717, 18 B. 37; 25 B 275, 25 B 358, 19 A 499, F

(39) Arts 62—*Money realised by the defendant and above the amount due—Money had and received—Taxes imposed without jurisdiction—Equality of*

A resolution of the Government of India directed a Municipality to assess taxes on goods other than those imported by sea and also to charge at a certain rate. The Board in ignorance of the resolution assessed the plaintiff's goods at a higher rate. *Held*, that it being the duty of the Board to ascertain if they had any power to assess any goods, the imposing of of taxes in ignorance of the Government resolution was illegal.

From 1809 onwards, the Board had been charging the plaintiffs at a rate not sanctioned by the Government. *Held*, that the money realised over and above the sanctioned amount was in the nature of money had and received by the defendant for the plaintiff's use, and Art. 62 of the Limitation Act applied. *Held* further that the suit was not a suit for compensation to which Art. 2 of the Limitation Act would apply. **The Rajaputna Malwa Railway Co-operative Stores v The Ajmere Municipal Board**, 7 A.L.J. 496=6 Ind. Cas. 401.

STANLEY, C J. and BANERJI, J.

(40) Art 10—*Buddhist Law—Pre-emption—Physical possession, meaning of.*

The expression "physical possession" in Art 10 of the Limitation Act means a possession that is personal and immediate or, in other

Limitation Act, 1877—(Continued).

words, a possession perceptible to the senses and evident to everybody as much as possession can be perceived and be evident. The expression precludes any sort of formal or constructive possession or even possession by attornment of tenants. The entry of one's name in the Revenue Registers as owner would not constitute a taking of physical possession, **U Tet Tun v. Ma Ni**, 8 Ind. Cas. 603.

FOX C.J. and PARLETT, J

(40-a) Art. 10—Pre-emption—Limitation. See **PRE-EMPTION**, No. 17, 5 Ind. Cas. 667.

(41) Art. 11—Investigation under S. 260, C. P.C. (1812)—Ex parte order—Adjudication on the merits—Regular suit—Limitation.

Where an objection was put in, under S. 278, C.P.C (1882), for the attachment of certain properties in execution of a decree, and opportunity was given to the objector as well as to the decree-holder for producing evidence, and the decree-holder did not appear on the day fixed for the hearing, and the case was decided *ex parte*, and an order was made for the release of attachment in favour of the objector, after an investigation under S. 280,

held, there was an adjudication on the merits and, a regular suit by the decree holder, for establishing that the property was that of his judgment-debtor, could be brought only within one year from the date of such order, under Art. 11, Limitation Act (1877) **Mussammat Jiwan v. Nathumal**, 23 P.R. 1910 = 19 P.W. R. 1910 = 5 Ind. Cas. 890.

ROBERTSON, J

References:—32 C. 537, R. 87 P.R. 1904, D.; 15 R. 521 (P.C.) R.; 90 P.R. 1902; 76 P.R. 1903; 22 B. 875; 19 A. 253 (F.B.) 11 O. C. 180, 8 Bom. L.R. 794 *also referred to*.

(42) Sch. II, Art. 11—C.P.C. (Act. XIV of 1882), S. 335—Suit brought within one year of adverse order under S. 335, C.P.C.—Suit by benamidar—Adverse possession as against mortgagor subsequent to mortgage—How far affects mortgagee's rights.

Plaintiff, against whom an order was passed under S. 335, C.P.C., 1882, sued for possession within one year from the date of the order. At the hearing it was found that he was only a *benamidar*, and the second plaintiff was brought on record as the real owner. It was contended for defendants that the suit was barred under Art. 11 of Sch. II of the Limitation Act, as the first plaintiff, as *benamidar*, was not entitled

Limitation Act, 1877—(Continued).

to sue and time had run out before second plaintiff was brought in as such. It was also found that, after the mortgage to plaintiff, fourth Defendant had held possession of property adversely to the mortgagors for over twelve years.

Held (1) that the plaintiff, though a *benamidar*, was entitled to sue as the person against whom the order was made under S. 335, C.P.C., 1882.

(2) that as the fourth defendant's adverse possession commenced subsequent to the date of the plaintiff's mortgage, it was not adverse to the plaintiff till the latter purchased the property in Court auction in 1904 (a). **Yenkatachala Asari v. Subramania Chetty**, 8 M.L. T. 377.

MUNRO and KRISHNASWAMI AIYAR, JJ.

Reference.—33 C. 1015; 10 C.W.N. 904, F.

(42-a) Art. 11—S. 335, C.P.C., 1882, order under—Suit brought within one year—Whether barred. See CIV. PRO. CODE (1882), No. 170, 7 M.L.T. 306.

(42-b) Art. 11—Order in claim proceedings—Judgment debtor not a party—Suit by aggrieved party—Limitation. See CIV. PRO. CODE (1882), No. 137, 6 M.L.T. 417.

(42-c) Art. 12. See No. 62, *infra*.

(42-d) Art. 13. See No. 1, *supra*.

(42-e) Art. 14. See No. 1, *supra*.

(43) Sch. II, Arts. 22, 36, 120—Tort—Assault—Insult—Reputation—Mental pain—Contemnation—Damages—Cause of action.

A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art. 22, Sch. II, Limitation Act.

Insult and contumely resulting to a party from an assault do not constitute a separate cause of action. The cause of action is the assault, though damages may be awarded for the resulting insult and contumely. **Arhat Meir v. Baldeo Ahir**, 5 Ind. Cas. 124.

STANLEY, C.J. and BANERJI, J.

(44) Arts. 29, 62, 96, 97, 120—Money paid by defendant not liable to pay into Court and retained by decree-holder—Limitation.

A suit to recover money voluntarily paid into Court by a defendant, under the mistaken belief that the defendant is liable to pay it on account of costs, &c., and wrongly received by the plaintiff from the said Court, is governed

Limitation Act, 1877—(Continued).

either by Arts. 96 or 120, and not by any of the Arts. 29, 62, or 96 of the second Schedule to Act XV of 1877 (a). *Fazal ud din v Zainab*, 6 Ind Cas. 684.

RATTIGAN, J.

References —(a) 30 C. 440, R., 8 B 17, *doubted and distinguished*

(45) Art. 35—Construction—Starting point for limitation See *RESTITUTION OF CONJUGAL RIGHTS*, No 1, 9 M.L.T 314

(45-a) Art 36 See Nos. 43, *supra* and 64 *infra*

(46) *Sch II, Arts 36 and 49—Suit for compensation for unlawful detention of plaintiff's money*

A suit for compensation for the Court having unlawfully detained the plaintiff's specific moveable property, to wit, a deposit of a certain sum of money, owing to the wrongful act of the defendant, is governed by Art 49 and not by Art. 36, Limitation Act, 1877, *Tula Ram Marwari v Mohri Lal Marwari* 7 Ind Cas 5.

HOLMWOOD and SHARFUDDIN, JJ.

(46-a) Art. 39 109, 120—Claim for mesne profits—Nature of action—Action for damages for trespass—Limitation—See *MESNE PROFITS*, No 4, 8 Ind Cas 162.

(46-b) Art. 44—See No 7 *supra*

(47) *Arts 46, 49—Sale of share certificates—Loss resulting by fall in value of shares which are detained by vendor—Suit to recover loss in value—Unlawful detention—Demand and refusal.*

The plaintiff purchased from the defendant five shares in a certain limited company, on the 16th April 1906. A receipt for the shares was given by the defendant to the plaintiff, and the plaintiff signed the receipt, and gave it back to the defendant in order that the latter should get the share-certificates from the Company and make them over to the plaintiff. The defendant got the share certificates from the Company in May 1906, but thereafter, instead of making them over to the plaintiff, retained them in his own custody. On the 8th August 1906, the plaintiff demanded from the defendant the delivery of these certificates and, after some proceedings, obtained them. By that time, however, the shares having fallen in the market, the plaintiff sued in August 1909 for compensation for the loss suffered by him in consequence of the fall in value. The first

Limitation Act, 1877—(Continued).

Court held that the suit was barred under Art. 48 of the Limitation Act, 1877:

Held, that the suit was within time, as Art. 49 of the Act applied. The defendant's detention of the share-certificates between May and August 1906 was not unlawful within the meaning of the Article; and it did not become unlawful until a demand and refusal had occurred in August 1906.

Article 18 of the Limitation Act, 1877, deals only with specific moveable property which falls under one of two classes, namely, (1) such property as has been lost, and (2) such property as has been acquired. (a) by theft, (b) by dishonest misappropriation, or (c) by conversion. No other kind of moveable property is affected by this article. *Maganlal Bhukandas Sheth v Thakurdos Vrijbhukhandas*, 12 Bom. L R 513—7 Ind Cas 447.

BACHELOR, J.

(47) Art 49 See Nos. 46 and 47, *supra*.

(18) *Sch. II, Arts. 49, 120—Idol—Suit for removal of idols to their new temple from defendant's temple whether a suit for moveable property*

The old temple of the idols of plaintiffs having been blown down by a storm, they were placed in the temple of the defendant. Then the *shebait* plaintiffs re-built the temple and wanted to bring the idols to it. They were opposed by the defendant. Thereupon this suit was brought with the prayer that the idols may be taken out of the temple of the defendant and placed in their own new temple so as to be in the custody of the *shebait* plaintiffs.

Held, that Art. 49 of Sch. II of the Limitation Act, 1877 was not applicable to the suit which was not a suit for moveable property, that Art. 120 would apply as it was a suit for which no provision has been made in the Limitation Act, and that the period would run from the time when obstruction was made by the defendant to the worship of the idols being continued by the *shebait* plaintiffs. *Ball Panda v. Jadu Meny Santra*, 7 Ind Cas. 475.

CHATTERJEE and RICHARDSON, JJ.

(49) *Sch. II, Arts. 49, 145—Deposit of moveable property—Suit for recovery of the thing deposited—Limitation.*

A suit for the recovery of a deposit of moveable property, whether there has been a demand and refusal or not, is governed by Art. 145 and not by Art. 49 of Sch. II of the Limitation Act.

Limitation Act, 1877—(Continued).

The article applies even in the case of a bailment upon a promise not to recall the thing, gratuitously lent, for thirty years or more. *Gangineni Kogiliah v Gottipati Pedda Kondappa Naidu*, 5 Ind. Cas. 1.

WHITE, C J. and KRISHNAWAMI AIYAR, J.

References—9 M L J. 51, *Disapp*, 15 M. 157, D.

(49-a) Art 56. See No 27 *supra*.

(50) Art. 61—*Compromise decree—Certain incumbrances to be discharged within certain time—Paid by plaintiff after date fixed—Cause of action—Money paid for defendant's use.*

Under the terms of a compromise a village fell to the lot of the plaintiffs. It was provided that the incumbrances affecting that village would be paid by the defendants within a certain time. The defendants having failed to discharge the incumbrances the plaintiffs paid them off. *Held* that the suit to recover the amount so paid was governed by Art 61 of the Limitation Act, and the cause of action accrued to the plaintiffs on the date that the money was paid. *Girraj Singh v. Raghubans Kuar*, 7 A L J 585.

STANLEY, C J. and BANERJI, J.

(51) Art 61—Cause of action in suit for contribution when arising. See CONTRIBUTION No 1, 13 O. C 23

(52) Arts 61, 131—*Cash allowance—Tastik—Arrears of cash allowance suit to recover—Periodically recurring right*

The plaintiff, the manager of a temple, sued the managers of another temple to recover from them the arrears for six years of a cash allowance (tastik) due to the plaintiff's temple from year to year from the defendant's temple. The defendants admitted to plaintiff's claim but pleaded the bar of limitation with respect to two out of the six years. The lower Courts held that Art. 181 of the Limitation Act, 1877, applied to the case, and decreed the plaintiff's claim in full. On appeal—

Held, that the claim was governed by Art 131 and it was rightly decreed

The important question in all these cases is, who is the person sued and what is that is sued for? If what is sued for is the establishment of a title to the right itself, then Art. 181 of the Limitation Act, 1877, applies, whether the defendant is the person originally liable to

Limitation Act, 1877—(Continued).

pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff who has actually received payment from that person. Art 131 applies in that case to the person originally liable to pay, and Art. 62 applies to the co-sharer who has received the payment

A cash allowance of the nature such as we have in the present case is according to Hindu Law *Nibandha* or immoveable property where it is annually payable the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due

But where there are more than one person entitled to the payment as co-sharers and the payment is made to one of them by the person liable to pay the co-sharer receiving the amount holds it *minus* his share on behalf of the rest as money had and received for their uses, though as to him with reference to the aggregate of rights it is *Nibandha* or immoveable property in the nature of a periodically recurring right. *Sakharam Hari v Laxmipriya Tirtha Swami* 12 Bom J. R 157=5 Ind Cas 869

CHANDAVARKAR and KNIGHT, JJ

(52 a) Art 62. See Nos 39 and 44, *supra*

(53) Arts 115, 120—*Money due under specific sum of money—Plaint amendment of—Test—Discretion*

A suit may properly be described as one for compensation for breach of contract within the meaning of Art 115 Limitation Act of 1877, although it may be a suit for recovery of a specified sum of money (a)

The discretion of the Court in the matter of granting or refusing an application for amendment of the plaint cannot be restricted by inflexible rules of law. It must be decided on the circumstances of each individual case, whether such application should be granted or not. The test to be applied is, whether the party against whom the amendment is sought

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would be prejudiced if the application were granted, but, observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court. **Nistarini Debi v. Chandi Das Debi**, 12 C.L.J. 423.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 6 B. 75; 6 C. 94, R.

(54) *Sch. II, Art. 85—Current mutual account—Limitation.*

Where the dealings between the parties are such as to create independent obligations in favour of one party against the other, the account between them is a mutual account (a). Article 85, Limitation Act of 1877, applies to a case of this nature giving rise to reciprocal demands, and limitation begins to run from the close of the year, in which the last item was entered in the account. **Chittiar Mal v. Behari Lal**, 6 A.L.J. 921=32 A. 11=4 Ind. Cas. 261.

BANERJI and ALSTON, JJ.

References:—(a) 22 Bom 606, F. (b) A.W. N. (1896) 186, *relied on*.

(54-a) *Sch. II, Art. 85—Mutual, open and current accounts, test of—Advance of loans—Re-payment intended to reduce liability—Sums due on accounts before three years before institution of suit—Limitation.*

As a general rule, payments made on account by one party and credited by the other, whether in money or goods, do not render the account mutual, so as to defer the operation of the statute to the date of the last item.

To bring a case within the operation of Art. 85 of Sch. II of the Limitation Act, there must be independent obligations between the parties. The test of 'mutuality' is not the existence of a shifting balance which, though important evidence of mutuality, is not conclusive, but there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations.

Plaintiffs advanced to defendants moneys from time to time from 1893, and the defendants sent periodical consignments of coffee to plaintiffs, which the latter sold, crediting the proceeds to the defendants' account. The loans bore interest at 12 per cent. per annum, and the plaintiffs were to have a further charge, which was called a 'commission,' viz., a special

Limitation, Act 1877—(Continued).

rate of interest being three times as high, on all sums advanced before the receipt of the first consignment of coffee for the year, as on those advanced subsequently. In a suit by plaintiffs for recovery of Rs. 7,587-9-9 being the amount due in November, 1899.

Held, that the suit was barred as to all items except those which accrued due within three years prior to the institution of the suit, and that the case was not governed by Art. 85, Limitation Act, as there was no mutuality and reciprocity between the parties, the consignments of coffee having been made simply and solely on account of the antecedent loans and with a view to reduce the balance due thereunder. **Shive Gowda v. Fernandez**, 8 M.L.T. 412=8 Ind.Cas. 141.

WHITE, C.J. and AYLING, J.

References:—7 W.R. 67 at p. 70, 6 M.H.C.R. 142; 9 B.H.C.R. 429; 17 M. 293; 6 C.L.J. 158; 22 B. 606; 6 C. 447; 32 A. 11; 6 A.L.J. 921; 4 Ind. Cas. 261, R.

(55) *Sch. II, Arts. 89 and 115—Suit for accounts against collecting agent—No express stipulation to account yearly.*

In the absence of an express contract that account should be rendered at the end of each year, a suit by a landlord for accounts against his collecting agent is governed by Art. 89 of Sch. II of the Limitation Act (XV of 1877). **Debendra Nath Ghosh v. Sheikh Esha Huj Mistri**, 14 C.W.N. 121=5 Ind. Cas. 58.

MITRA and CHITTY, J.

References:—1 C.L.J. 221, D.; 8 C.W.N. 113; 32 C. 719, F.

(56) *Arts. 89, 115, 116—Suit for accounts—Limitation. See ACCOUNTS, No. 1, 11 C.L.J. 43.*

(57) *Sch. II, Arts. 89, 115, 116, 132—Suit against gomasta for accounts—Hypothecation of immoveable property to secure agent's liability—Limitation—Registered contract—Stipulation to furnish periodical accounts.*

Ordinarily speaking, a suit by a principal against his agent for an account is governed by Art. 89 of the Limitation Act (XV of 1877), and the period is three years from either the demand for and refusal of such account or the termination of the agency. Where, however, there is a definite contract to account at the end of each year, the appropriate article would be 115, as the contract would be broken by the

Limitation Act, 1877—(Continued).

failure of the agent to account at the end of each year. In either case, if the contract be registered, Art. 116 applies and the period is six years.

The fact that the agent had executed a *kabuliyat*, whereby he had hypothecated certain immovable properties to secure his liability, would not alter the nature of the suit, so as to make Art. 181 of the same schedule applicable **Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy Chowdhury**, 14 C.W.N. 122 = 5 Ind. Cas. 59.

CHITTY and VINCENT, JJ.

Reference:—(a) 1 C L J. 211 (1902), *relied on*.

(58) *Sch. II, Art. 90—Constructive knowledge of negligence of agent—Start of limitation*

A appointed B his *Sajwal* (agent) to collect rent from his tenants, on the condition that, if any rent would become time barred owing to the negligence of B, it would be recovered from B personally. C stood surety for B. Some rent fell in arrears and became barred by time through the negligence of B. A sued to recover the time-barred arrears of rent from B and C. *Held*, that Art. 90 of *Sch. II* of Limitation Act, 1877, applied to the case.

Held, further, that limitation began to run against B and C from the time when A got constructive notice of the negligence of B, and that A must be deemed to have constructive notice of B's negligence when it was first reported to A's office that some rent had become time-barred through B's negligence. **Lala Anan Parshad v. Sri Maharaja Perbhu Narain Singh Kashi Nareah**, 6 Ind. Cas. 186.

KNOX and KARIMAT HUSAIN, JJ.

(59) *Art. 91—Specific Relief Act (I of 1877), S. 39—Suit for a declaration that a deed is inoperative—Limitation—Cause of action Evidence Act (I of 1872), S. 92—Deed of gift—Agreement contrary to the terms of the gift—Evidence to prove the agreement.*

The plaintiff executed an unconditional deed of gift in favour of the defendants. More than three years after the execution of the deed, the plaintiff sued that the deed might be declared ineffectual and inoperative owing to the material conditions and stipulations not having been fulfilled. The suit was brought within three years from the breach of an alleged agreement.

Held, that the suit was time-barred, as it was brought more than three years from the execution of the deed.

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The suit fell under S. 39 of the Specific Relief Act, and Art. 91, *Sch. II*, Limitation Act, applied to it.

As the agreement alleged by plaintiff was one which was actually contrary to the deed of gift itself, the plaintiff was barred, under S. 92 of the Evidence Act, from giving any evidence in proof of the agreement. In the absence of all the proof of any such agreement, the cause of action accrued to the plaintiff on the date of the execution of the deed. **Safdar Singh v. Akbar Shah**, 5 Ind. Cas. 497.

TUDBALL and PIGGOT, JJ.

(59 a) Art. 91. See No. 7, *supra*.

(60) *Arts. 91, 120, 144—Gift by a Hindu co-parcener—Suit for declaration and possession by other co-parceners—No prayer for setting aside the gift—Hindu Law—Powers of a co-parcener to alienate.*

A Hindu co-parcener made a gift of his undivided share in favour of the defendant. The donee made an application for mutation and his name was recorded. He together with other co-parceners applied for ejectment of certain tenants. He then brought a suit for profits. The co-parceners of the donor thereupon sued for a declaration that they and their uncle, the donor, were owners, and in the alternative for possession. The suit was brought more than three years after the date of gift. *Held* that, inasmuch as a Hindu co-parcener has no right to alienate any portion of the family property without the consent of other co-parceners, it was not necessary for the plaintiffs to sue to have the deed of gift set aside. *Arts. 91 and 120 of the Limitation Act* had therefore no application but Art. 144 of the Act was the article which applied to the case. **Muktabal Singh v. Karan Singh**, 7 A.L.J. 783 = 6 Ind. Cas. 841.

STANLEY, C.J. and GRIFFIN, J.

Reference:—34 C. 329 (P.C.), R.

(61) *Sch. II, Arts. 91, 141—Suit by minor to recover possession of property transferred by guardian—Cancellation of the document ancillary—Decree for possession conditional upon restoring what was for minor's benefit—Practice.*

The natural guardian of a minor sold certain immovable property belonging to the minor. The minor brought a suit to recover possession of that property. It was found that the minor had benefited to a certain extent by the sale.

Limitation Act, 1877—(Continued).

A decree was accordingly made in his favour for possession, subject to the condition of his restoring the amount by which he had benefited. Upon second appeal the suit was dismissed as barred by limitation, the article applied being 91 of Schedule II to the Limitation Act.

Held that the article applicable was article 141, and not article 91 the substantive relief being the recovery of possession and the cancellation of the instrument being ancillary and that the suit was not barred by limitation.

Held further that the principle applicable in respect of such a transaction is to make a decree for the property transferred by the guardian but to attach to the decree the condition of refunding to the transferee so much of the consideration as was for his benefit or for which there was a justifying necessity. **Bachchan Singh v Kamta Prasad** 7 A L J 337 5 Ind Cas 585

STANLEY C J, PANJABI J

(62) Arts 95 12 120—Suit by certified purchaser to set aside fraudulent sale—Limitation. See CIV PRO CODE (1852) No 148 8 M L T 154

(63) Arts 95 97 116 120—Failure to get actual possession on account of mortgagor's fraud—Rights of mortgagee. See MORRIS GAGE (USURIOUS LENDING), No 4 13 O C 115

(63-a) Art 96 See Nos 44 *supra* and 73 *infra*

(63 b) Art 97 See Nos 14 and 63 *supra*

(64) Sch II Arts 98 36 S 25 Joint family property passing by survivorship to sons—Whether forms part of "the general estate" of father within the meaning of Art 98—Hindu Law—Son's liability to pay barred debts of the father—Art 36—Contract Act, Ss 134 137—Omission of creditor to sue principal debtor—Bar of limitation—Effect of—Whether discharges surety—S 28, Limitation Act

The joint family property of the father and sons, which passes by survivorship to the sons on the death of the father does not form "the general estate" of the deceased trustee (father) within the meaning of Art 98, Sch. II Limitation Act, 1877.

The sons are not, under the Hindu Law, liable to pay a debt of the father which was barred against him under Art 36, Sch. II, Limitation Act, 1877 (a).

Limitation Act, 1877—(Continued).

The mere omission of the creditor to sue within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission does not discharge the surety under Ss 134 137, Contract Act (b) **Subramania Aiyar v Gopala Iyer**, 20 M L J 693=38 M. 908

BENSON and KRISHNASWAMI IYER, JJ

References—(a) 27 M. 243 (252) and 22 M 342 R (b) 25 Ch. D 666 (672), 6 C 940; 14 C 50 1 M 228 *Ref to*, 24 A 503, *not agreed*, 5 B 647 7 B 146, 12 C 890, *App*, 26 M 239 (242), D

(64 a) Art 106 See No 6, *supra*

(65) Art 109 See COURT FEES ACT, No. 18 11 C L J 541

(65) Art 109 See No 46 a, *supra*

(65 b) Sch II Art 110—"Ascertained rent"—Acceptance of patta—Summary suit for enforcement of decree of—Declaration of terms by High Court—Disposal of summary suit by High Court—Limitation—Starting point.

A landholder tendered a patta for fasli 1311 to his tenants on the last day of the fasli. The tenant refused to accept it. Thereupon, a summary suit was filed to enforce acceptance of patta. Pending the summary suit the High Court settled on 7th August, 1902 the terms of the patta in certain regular proceedings started by the tenants. The summary suit was decided on 21st May 1904 finally in terms of the decree of the High Court. The present suit was instituted on the date of expiry of 9 years from the date of the disposal of the summary suits on 21st May, 1904.

Held that limitation runs from the date of the adjudication by the Revenue Court, as it was only then that it can be said that the rent for suit fasli was ascertained. **Singaram Pillai v Hazarath Kibulal Syed Gulam Ghouse Sha Sahib Kadir**, 20 M L J 927.

MUNRO and SANKARAN NAIR, JJ

References—(a) 27 M. 143 (P C.), F., 29 M. 556 D

(66) Art 110—Arrears of rent when become due. See LANDLORD AND TENANT, No. 40, 8 M L T 345

(67) Sch II, Arts. 110, 115, 116—Suit for rent—Suit for use and occupation—Limitation. See TRANSFER OF PROPERTY ACT, No. 90, 7 M L T 419.

Limitation Act, 1877—(Continued).

(68) Arts. 110, 116—Registered lease—Determination—Holding over—Claim for rent—Limitation. See LEASE, No. 16, 6 Ind Cas 754

(69) Arts 113, 135—Suit for possession of mortgaged property—Limitation See MORTGAGE (USUFRUCTUARY), No 6, 7 Ind Cas 646

(69-a) Art 115 See Nos 36, 53 55, 56 57 and 67, *supra*

(69 b) Art. 116 See Nos 36, 56 57 63 67 68, *supra*

(70) Art 118—Limitation—Adoption by registered deed—Adopted son living with his adoptive father—Presumption of knowledge—Finding of fact—Perjury—S of Act XVIII of 1861.

Held that when the deed of adoption is registered the adopted son and the adoptive father live together for a considerable time and the reversioner contesting the adoption resides in the same village the presumption is that he has come to know of the fact of adoption within the meaning of Art 118 of Act XV of 1877

Held, also, that the unanimous opinion of the Courts below that the person seeking to set aside an adoption had come to know of the alleged adoption six years before instituting the suit is a finding of fact and cannot be disturbed on revision **Sawan Singh v Mansa and Suraina**, 49 P.W R 1909

CLARK C and REID J

(71) Sch II, Art 118, 141—Suit for possession—Declaration that adoption is invalid—Hindu Law—Adoption Power to adopt son meaning of Whether adoption of son or boy after death of first, valid—Adoption of orphan given by elder brother is valid

Where the relief sought in a suit is the recovery of possession and not merely a declaration that a certain adoption is invalid the provisions of Art 118 of Sch II of the Limitation Act, 1877, do not apply but Art 141 applies and the period of limitation is twelve years (a).

Where by a Will a Hindu gave his widow power to adopt a son to him and no special words were used restricting that power to one adoption

Held that the widow was empowered to make a second adoption in the event of the death of the son first adopted

The maxim of *factum valet* applies to the adoption of an orphan boy who was given in

Limitation Act, 1877—(Continued).

adoption by his elder brother as the parents of the boy were dead, and the adoption is not invalid on the ground that he was not given in adoption by his father or mother **Bhagabat Pershad v. Murari Lal**, 7 Ind Cas 427.

BRETT and VINCENT JJ

Differences—(a) 13 I A 84, 13 C. 308 24 B. 260 33 I A 156 10 C W N 1065, 8 Bom L R 722 16 M L J 440 3 A L J 695, 4 C L J 405, 1 M L J 265 9 C C 377 28 A 727 *distinction* 70 M 308 2 M L T 178 17 M L J 192 25 C 351 27 C 242 (at p 254), 4 C W. N 105 *relied upon*

(72) Art 120—Suit for declaring that alienation by karnavathi was not binding on the tawad—Cause of action accrued of—Knowledge or ignorance of plaintiff is immaterial in the absence of fraudulent concealment See CIV PRO CODE (1882) No 62 33 M 31

(73) Art 120—Putli Vatham—Suit by reversioners Limitation See HINDU LAW (SUCCESSION) No 6 13 Bom L R 201

(73 a) Art 120 See Nos 28 34 35, 37, 43, 44 46 48 53 60 62 63 *supra*

(74) Arts 120 96 Defendant claiming partition according to the shares of the parties created in 1591—Fresh invasion of right—Fresh cause of action—Limitation

Held that it is a matter of law a person is entitled to pass by an invasion of a right to property and is not by his forbearance debarred from a future suit for a future invasion.

In 1992 plaintiffs and defendants were recorded owners of their joint holding in the proportion of three sevenths and four sevenths shares respectively In 1995 86 for some unknown reason plaintiffs were recorded as owners of one third In 1991, one of the co shareholders complained of the correctness of the entry but without success

The incorrect entry was repealed in the present settlement In 1906 defendant applied for partition on the strength of the entry of 1891, and plaintiff sued to obtain a declaration that they were entitled to three sevenths shares as recorded in 1892

Held that the plaintiff's suit was within time and was governed by Art. 120 and not by 96 of the Indian Limitation Act (XV of 1877) and that fresh cause of action accrued to them

Limitation Act, 1877—(Continued).

in 1906 (a). **Kham Singh v. Kesar Singh**, 88 P.W.R. 1910=7 Ind. Cas. 528.

SHAH DIN and CHEVIS, JJ.

References:—(a) C. 140 P.R.=187 P.W.R. 1907; A.W.N. (1898) p. 215, F.; C. 20 P.R. 1900; A.W.N. (1908) p. 262, *D. Robert Skinner v. Shankar Lal, R.*

(75) *Sch. II, Arts. 120, 123—Suit for distributive share of property of intestate—Order for letters of administration—Commencement of limitation.*

The plaintiff sued the defendant for her distributive share of the property of her intestate deceased husband. The defendant applied for letters of administration to the estate of the deceased and obtained the order upon contest on January 22, 1902. The suit was brought within six years from that date.

Held, that either Art. 123 or 120 of the Limitation Act, 1877, applied to the case, and that the suit was within time; that, until the contest as to the right to obtain letters of administration was determined, the person entitled to represent the estate was unknown, and that time began to run at the earliest from the date of the judgment directing the issue of the letters of administration to defendant. **Mahomed Syed Fayez Ali Khan v. Sitara Begum**, 7 Ind. Cas. 704.

CHATTERJEE and RICHARDSON, JJ.

(76) *Sch. II, Arts. 120, 123, 144—Mahomedan Law—Suit for recovery of share of wife's property—Moveables and immoveables—Article applicable.*

To a suit by a Mahomedan for a share of his wife's property in the possession of another sharer, more than 12 years after his wife's death, Art. 144 is applicable when the property is immoveable, and Art. 120 when it is moveable.

Art. 123 applies only when the suit is for a share of an estate, which it is the legal duty of the defendant to distribute. **Khadessa Hajee Bappu v. Puthen Veethil Aylssa Ummah**, 20 M.L.J. 288 (F.B.)=6 Ind. Cas. 50=8 M.L.T. 4.

MILLER, MUNRO & ABDUR RAHIM, JJ.

References:—19 A. 169, F.; 16 M. 61; 15 M. 57; 15 M. 60, R.

(77) *Arts. 120, 131—Illegal levy of quit rent—Declaratory suit.*

Suit for declaration that the Zemindar was not entitled to recover more than a stated sum

Limitation Act, 1877—(Continued).

from the plaintiff for quit rent. The cause of action was put as having arisen on 3rd October 1898, the date when the illegal excess collection was made. The suit was brought in December 1901.

Held that Art. 131 did not apply, as the suit was not one for a periodically recurring right.

That the proper article applicable was Art. 120, and the plaintiff's right to sue for a declaration arose on each occasion when the Zamindar collected the enhanced rent, as each illegal exaction is a separate injury and gives rise to a new cause of action. **Sriman Madabushi Achamma v. Gopesetti Narayanasawmy Naidu**, 6 M.L.T. 268=38 M. 171=3 Ind. Cas. 747.

MUNRO and ABDUR RAHIM, JJ.

Reference:—12 M.L.J. 126, applied.

(78) *Sch. II, Arts. 120, 144—Suit by a Mahomedan for partition of both moveables and immoveables—Limitation as regards immoveables.*

A suit by a Mahomedan, for partition of a share of immoveable properties, is governed by Art. 144, Limitation Act (1877). **Syed Noonsleen Saib v. Syed Ibrahim Saib**, 6 Ind. Cas. 579=8 M.L.T. 97.

BENSON and KRISHNASAWMI AIYAR, JJ.

References:—21 C. 157; 20 I.A. 155; 28 B. 725; 26 I.A. 71, R.

(78-a) Art. 123. See Nos. 75 and 76, *supra*.

(79) *Art. 124—Scope—Applicability—Right to beneficial enjoyment of property—Date of accrual of—Suit to recover possession—Limitation—Starting point.*

Art. 124, Sch. II, Limitation Act, 1877, deals with a suit for possession of a hereditary office. To apply the article, the suit must be one against the holder of such office.

Mere possession of lands attached to an office does not, by itself alone, give a right to the office.

Where a plaintiff sues to recover lands on the ground that he is entitled to beneficial enjoyment thereof, time begins to run against him from the date when he becomes entitled to such beneficial enjoyment. **Kamalathammal v. Krishna Pillai**, 20 M.L.J. 731.

BENSON and KRISHNASWAMI IYER, JJ.

References:—13 M. 277, R; 23 M. 271, *Expt.*; 36 C. 1003, not *Appl.*

Limitation Act, 1877—(Continued).

(80) *Art. 125—Limitation—Alienation by Hindu widow of a house—Sust by reversioners of her husband to contest its validity.* ♦

Held, that Art 125 of Schedule II, Limitation Act (XV of 1877) (now Act IX of 1908) does apply where the widow has alienated house property including the site

Quere—Whether this article would apply if the alienation be one of the house only apart from the site *Rajya Ram v Sher Singh* 15 P.W.R. 1910=5 Ind. Cas. 842

ROE and RATTIGAN, JJ

(81) *Sch. II, Art. 125—Sust by adopted son for declaration in respect of alienation by his adoptive mother*

A suit by an adopted son for a declaration in respect of an alienation by the widow who adopted him, made before the adoption is governed by Art 125 Limitation Act (XV of 1877) *Bappanna Yenkata Subbarayadu v Bpappanna Ratnamma*, 6 Ind. Cas. 443=8 M.L.R. 121.

MUNRO and ABDUR RAHIM JJ

Reference—26 M. 143 n

(82) *Art. 127—Non participation—Whether amounts to exclusion* See CIV PRO CODE 1908, No 152, 7 M.L.J. 174

(83) *Art. 131—Suit to establish right to maintenance when not barred under—Non compliance whether amounts to repudiation of claim* See MAINTENANCE No 37 M.L.T. 278

(83 a) *Art. 131* See Nos 52 and 77 *supra*.

(83 b) *Art. 132* See No 57 *supra*

(84) *Sch. II Arts 123 124 145—Suit by prior mortgagee without making prior mortgage party—Sale and purchase by himself—Subsequent suit by second mortgagee and purchase by himself—Interest acquired by latter—Suit by him to redeem prior mortgage purchaser—Limitation*

Where a prior mortgagee sues on his mortgage without making the second mortgagee a party, and in execution of the decree obtained by him purchases the property himself, and subsequently the second mortgagee also sues on his mortgage without making the prior mortgagee a party and purchases the property in execution of his decree, he acquires by his purchase only the interest he previously possessed as mortgagee

Limitation Act, 1877—(Continued).

He can seek to enforce his rights as such by suit, as against the prior mortgagee purchaser, only within the period of 12 years from the due date of his own mortgage as provided in Art 132 of Sch II of the Limitation Act (XV of 1877) and he cannot claim the benefit of a fresh period of limitation running in his favour from the date of his purchase.

A suit brought by him to redeem the prior mortgage purchaser more than 12 years after the due date of his mortgage would be barred by Art 132 Limitation Act (XV of 1877) *Nidhiram Bandopadhyaya v Sarbeshwar Biswas* 14 C.W.N. 439=5 Ind. Cas. 877

BRETT and SHARFUDDIN, JJ

(85) *Sch. II, Art. 134, applicability of—In its own and mortgagee—In case purchaser whether can acquire absolute interest from mortgagee—In case sale—Purchase—Guarantee of title*

A purchaser at an auction sale obtains no guarantee of title

Art 134 Limitation Act, 1877, does not apply to cases of forced sales in execution of decrees (a) *Paras Ram v. Lalman*, 7 Ind. Cas. 570

GRIFFIN J

In force—(a) A.W.N. (1905) 56, 2 A.L.J. 234 25 M. 99 11 M.L.J. 323, F

(5c) *Sch. II Art. 131 See MORTGAGE (RI DEMPTION)*, No 57 M.L.R. 187

(46 a) *Art. 131* See No 54, *supra*

(46 b) *Art. 132* See No 61 *supra*.

(87) *Sch. II Arts 126 127 128 and 144—In case sale—Property sold in possession of the purchaser—Adverse possession—Lacking of the possession of two the parties*

In the execution of a decree the immovable property of the judgment debtor, which at that time was in the possession of a trespasser, was sold and purchased by the present plaintiff, who however was not given the actual but only formal possession of the property. Subsequently the judgment debtor, the present defendant, ejected the trespasser by suit and obtained possession of his property. The auction purchaser the present plaintiff within 12 years from the date on which the judgment debtor the present defendant, had taken possession from the trespasser, but more than 16 years after the date of his own purchase sued the judgment debtor for possession of the property

Limitation Act, 1877—(Continued)

Held that the suit was governed by Art. 144 of the Limitation Act XV of 1877, and was not barred, because as against the auction-purchaser (plaintiff), the first trespasser as well as the judgment debtor (defendant) both were trespassers, and the latter trespasser could not be allowed to add to the period of his adverse possession the period of the former trespasser, from whom he had not derived his title in any way.

Arts. 136 and 137 of the Limitation Act do not apply to suits against the vendors or judgment debtor but only to suits against third parties or trespassers that is, against persons other than the vendors or judgment debtors.

A formal delivery of possession as against judgment debtor in possession does constitute such possession as is contemplated by Art. 142 of the Limitation Act but it is of no value whatsoever as against a third person or trespasser against whom such possession can not be obtained by an auction purchaser. **Gajadar Rai v Ramlakhar Rai** 5 Ind Cas 273.

TITLE

(87 a) Art. 137 See No 87 *supra*

(88) Arts. 137 141 144—Defendant—Adverse possession—Independent trespassers.

The rights of S while in possession of certain trespassers other than defendants were purchased by the plaintiff on 20th November 1901. Formal possession was delivered to them on 25th November 1902. Defendants obtained possession not as representatives of the original trespassers but under an independent title, in 1907. Plaintiffs brought the present suit for possession in 1908. *Held* that the suit was not barred by limitation. Art. 137 Sch. II Act XV of 1877 applied only to a suit against a third party and not the judgment debtor or his representative. Art. 112 did not apply because the plaintiffs were never in actual possession and were not dispossessed. The article applicable was Art. 141 under which limitation began to run when the possession of the defendants became adverse. Defendant includes a person through whom a defendant derives his liability to be sued. The present defendants did not derive title from the first set of trespassers and were not entitled to add to their own possession the period of their possession. **Ram Lakhan Rai v Gajadhar Rai**, 7 A L J 1184.

STANLEY C J and BANERJI, J

Limitation Act, 1877—(Continued).

(89) Art. 138, where applicable. See CONSTRUCTION (OF DEEDS), No. 2, 6 Ind. Cas. 467.

(90) Art. 139—Lease for fixed term—Adverse possession by tenant—Limitation, commencement of.

Where a lease was for a fixed term, and, under S. 111 of Tr P Act was determined at the expiry of the term, limitation begins to run against the lessor from the date of expiry of the lease. **Sangila v Maruthamuthu**, 20 M. L. J. 131. 5 Ind Cas 907 = 8 M. L. T. 100.

MILLER and SANKARAN NAIR, JJ.

(91) Art. 139—Lease for fixed term—Applicability of the article. See LIASE, No. 7, 6 Ind Cas 350.

(92) Arts. 133 140—Maintenance grant—Death of grantee—Holding over—Suit for resumption—Limitation. See MAINTENANCE, No. 6 Ind Cas 339.

(93) Sch. II Arts. 139 144—Whether applies to suit against representative of tenant—Tenant holding over—Effect upon running of limitation of tenancy by sufferance—English text.

Art. 137 Sch. II Act XV of 1877, applies to suit by a landlord to recover possession from a tenant or his representative in interest (a).

It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the Transfer of Property Act according to which a lease is determined by efflux of the time limited thereby (S. 111). Such a tenancy does not operate in England to interrupt the running of time (b). **Subrayati Ramah v Gundala Ramanni and others**, 19 M. L. J. 782.

LEWSON and KRISHNASWAMY IYER, JJ.

References.—(a) 7 C. L. J. 615 (626), *Appr.*, 31 M. 163 (157), *Not I.* (b) (1870 J) L. R. 3 P. C. 751 (761), *R.*

(93 a) Art. 140 See No. 92 *supra*

(93 b) Art. 141. See Nos. 61 and 71, *supra*

(93 c) Art. 142 See Nos. 7, 8 87 and 88 *supra*.

(94) Arts. 112 144—Suit for possession—Facts to be proved—Onus of proof on whom rests—

Art. 142 and not Art. 144, Limitation Act, 1877, applies to a suit for possession of ancestral property.

The plaintiff must show possession and dis-possession within twelve years prior to the date

Limitation Act, 1877—(Continued).

of the institution of the suit. **Maddals Venkatarayadu v. Mo Morva Sankarayya**, 7 M. L.T. 810=20 M.L.J. 306=6 Ind. Cas. 667

WHITE, C.J. and MILLER, J.

References.—10 C 374, 16 C. 473 and 17 C 137, R.

(95) **Arts. 142, 144—Dispossession—Discontinuance of possession—Applicability of the articles—Extinguishment of title—Limitation Act (XV of 1877), S. 29—Taking of adverse possession—Decree for possession barred—Nature of a guardian's possession—Suit under S 213 of C P C (Act XI) of 1882).**

On the death of their father in 1879 the two minors R and D had their property managed by A who brought them up. In 1891, when R and D had become majors they found that A claimed the property in her own right. They thereupon sued her in that year and obtained a decree in their favour, which was confirmed in appeal in 1894. They applied to execute the decree more than three years after the date of the appellate Court's decree, and it was rejected as having been beyond time. This was in 1897. In 1899, V, a cousin of R and D wrongfully took possession of the property from A, and he sold it in 1898 to B, who mortgaged it to E in 1900. In the same year the plaintiff obtained a money decree against R and D and in execution got the property attached. His claim was resisted by B and E, and the attachment was removed in 1904. The plaintiff then sued in 1905 both B and E, and R and D for a declaration that the property could be attached and sold in execution of his decree against R and D. The defendants B and E contended that the suit was barred under Art 142 of the Limitation Act, as the plaintiff was not in possession either by himself or through his predecessors-in-title R and D within twelve years preceding the suit.

Held (1) that, there having been no allegation of possession in R and D lost by dispossession or discontinuance of possession, but the case put forward having been a title in them established by their decree against A and a wrongful possession obtained from her after the decree by V, under whom E and B claimed, the limitation applicable to the suit was that provided by Art. 144, not Art. 142 of the Limitation Act, 1877 (a)

(2) That, the suit having been brought by the plaintiff under S. 283 of the C.P.C (Act XIV

Limitation Act, 1877—(Continued).

of 1882) to establish his right to attach and sell the property in execution of his money-decree, he need only prove that, on the date of the attachment, his judgment debtor had a subsisting right to the property (b).

(3) That A's possession must be deemed to have begun in 1879 as that of a bailiff or agent for the minors R and D and to have continued as such until 1891, when, after the minors came of age, she denied their title, and that, as she never dispossessed anybody, in a suit against her, her plea of limitation would be decided by the application, not of Art 142, but of Art 144 of the Limitation Act (c)

(4) That though the decree against A had become incapable of execution by lapse of time, still the right established by it remained, and though that right could not be enforced against A by execution through the Court, the decree-holders could enter by ousting any trespasser, A included (d).

Per Chandavarkar, J.—Discontinuance of possession contemplated by Art 142 implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in (e)

Per Hutton J.—Art 142 has no application to claims which neither in form nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession. As a general principle any one suing in ejectment must prove possession within twelve years. The reason for this is that possession is commonly the effective assertion of title which is relied on, but it is not the only one. There is another which in some cases is equally good, and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit, and if the same title is so asserted and made good in a later suit against other opposing parties, it is good against them also and entitles to possession, whether the title claimant has or has not been in possession within twelve years, unless the opponent can defeat the title by adverse possession. **Yasudeo Atmaram Joshi v Eknath Balkrishna Thite** 12 Bom. L.R. 956

(CHANDAVARKAR and HUTTON, JJ.)

References.—(a) 14 Bom. 458 (1887) P.J. 412, followed (b) 18 Bom. 260, followed. (c) (1737) 1 Ath. 489, 2 Sm. L.C. (10th Ed.) pp. 644, 645, 2 Bom. 413, 7 Bom. 34, referred to. (d) 15 Bom. 238, R. (e) (1880) 14 Ch. D. 537, (539), R.

Limitation Act, 1877—(Continued).

(96) Arts. 142 and 144—Joint holding—Absence of one co-sharer—Long silence and inaction—Abandonment—Adverse possession. See POSSESSION, No. 1, 29 P.R. 1910.

(97) Arts. 142, 144—Suit for possession of scheduled land by Nawab Bahadur—Limitation. See ACT XV OF 1891 (MURSHIDABAD), No. 1, 6 Ind. Cas. 392.

(98) Art. 144—Adverse possession—Tenants in common—Exclusion must be proved—Burden of proof—Partial partition, suit for, when maintainable.

A obtained a decree against B, and in execution bought B's one fifth share in two villages. In a division between B and his coparceners, all the family properties had been divided by metes and bounds, except the two villages aforesaid, and also certain Imam lands, which were held by the divided members as tenants in common, but were in the actual management of one member, who paid to each member his share of income therefrom. But from 1893, B was not paid his share of the income, and the present suit was brought by A in 1906, for partition and recovery of B's share in the two villages. It was contended that the suit was barred by limitation and adverse possession, and also that the suit was bad being one for partial partition.

Held that Art. 144 was applicable to the case and to succeed, it was incumbent on the member, who asserted adverse possession, to prove that B was, in denial of his title, excluded from enjoyment of the share (a).

Held also that a suit for partial partition is not bad, when the portion is capable of partition without much inconvenience to the other sharers (b). **Duvvadu Hari Kishna Chowdury v. Sripada Yenkatla Lakshmi Narayana Pantulu and others and Duvvadu Parasu Ramayya Chowdury, alias Narayana Chowdury v. Sripada Yenkatla Lakshmi Narayana Pantulu and others**, 7 M.L.T. 155—5 Ind. Cas. 491=20 M.L.J. 323.

SIR ARNOLD WHITE, C.J., and MUNRO, J.

References.—(a) 35 C. 961, 24 M. 441, 21 M. 153, R. (b) 27 M. 361 (366), *commented on*: S.A. 175 of 1905, D.; 12 C.W.N. 640; 34 C. 1026, F.; 7 C. 577; 1 C.L.J. 40, R.

(99) Art. 144. See MORTGAGE (REDEMPTION), No. 8, 5 Ind. Cas. 478.

(100) Art. 144—Suit for dispossession of vendee of a right of occupancy—Sale without

Limitation Act, 1877—(Continued).

consent of landlord—Period of limitation. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 2, 3 P.R. 1910 (Rev.).

(100-a) Art. 144. See Nos. 7, 8, 87, 88, 60, 76, 78, 87, 88 and 93 to 97, *supra*.

(100-b) Art. 145. See No. 49, *supra*.

(101) Art. 148—Sale—Right of repurchase given under a separate document—Not enforced within time allowed—Nature of document—Suit for redemption—Maintainability of.

A sale deed was executed on 29th August, 1852, by the predecessors of plaintiffs in favour of the predecessors of defendants. On 8th September following, the latter executed a document in favour of the former, agreeing to reconvey the property if their money was repaid in nine or ten years. The former document was presented for registration on the 18th and the latter on the 19th May, 1855. On a suit for redemption being brought more than six years after execution, the Court below held that the document of August, 1852, was an out and out sale, and the suit on the covenant contained in the second deed, not having been enforced within time, was barred by limitation (a).

Held Per Stanley, C.J.—The transaction did not constitute a mortgage, but was a sale with a provision of re-purchase. Such a transaction, although not common in India or England, was not illegal. The covenant of repurchase not having been enforced and the period allowed to expire, the suit was barred by limitation.

Per Banerji, J.—The transaction was one of mortgage and not of sale, and the suit having been brought within 60 years was within time. Execution of two documents, one purporting to be a deed of sale and another a deed of mortgage, was common in this country, and such transactions were always regarded as mortgages by way of conditional sale. **Jhanda Singh v. Sheikh Wahid-ud din**, 7 A.L.J. 484=6 Ind. Cas. 193.

STANLEY, C.J., and BANERJI, J.

References.—(a) 22 A. 149, D.; 12 A. 387, F.

(101-a) Art. 148. See Nos. 28 and 84, *supra*.

(101-b) Art. 152. See No. 15, *supra*.

(102) Sch. II, Art. 164—O.P.O. (Act XIV of 1883), S. 248—Notice to show cause against enforcement of decree—Process for enforcing judgment—Limitation.

Limitation Act, 1877—(Continued).

A notice under S. 248, C.P.C., 1882, to show cause why a decree should not be executed, is not a process for enforcing a judgment within the meaning of Art. 164, Limitation Act, 1877. **Ghidambara Thevan v. Arunachela Tevan**, 8 Ind. Cas. 668.

MUNRO and SANKARAN NAIR, JJ.

References.—2 C. 128, F.; 22 W.R. Civ. Rul. 5, Not F.

(102-a) Art. 166—Application to set aside sale on the ground of irregularity. See **EXECUTION OF DECREE**, No. 12, 40 P.R. 1910.

(102-b) Art. 166 See No. 9, *supra*.

(103) Art. 168—Application to restore appeal made after expiry of 90 days—Application treated as review. See **CIV. PROC. CODE** (1882), No. 76, 7 P.L.R. 1910.

(108-a) Art. 170 See No. 5, *supra*.

(104) Art. 173-A—Execution of mortgage decrees—Uncertified payment—Limitation See **MORTGAGE (GENERAL)**, No. 27, 12 C.L.J. 65.

(105) Art. 173-A—Adjustment not recorded—Effect. See **MORTGAGE (GENERAL)**, No. 17, 7 Ind. Cas. 625.

(106) Art. 178—Obstruction to execution removed—Limitation for execution See **EXECUTION OF DECREE**, No. 22, 7 Ind. Cas. 707.

(106-a) Art. 178. See No. 18-a, *supra*.

(107) Arts. 178, 180—Order dismissing appeal on default by the Privy Council—Affirmance of decree below—Limitation for execution of decree.

The decree-holder obtained a decree for sale upon mortgage. The judgment debtor appealed, but the High Court dismissed the appeal on 8th April, 1898. The appellant appealed to the Privy Council, but took no steps to prosecute the appeal. His appeal was dismissed for want of prosecution on 13th May, 1901. On 14th May, 1904, the decree holder applied to the Court below to make the order for sale absolute.—The application was dismissed on the ground that the procedure prescribed by S. 610, Code of Civil Procedure, 1882, had not been followed. An application was made by the decree-holder on 11th June, 1906, under S. 610, and the decree was transmitted for execution to the Court below. The present application was then made for order absolute. The judgment-debtor pleaded limitation in bar of the application. *Held* that the dismissal of judgment-debtor's appeal for want of prosecution

Limitation Act, 1877—(Continued).

was an affirmance of the decree of the High Court within the meaning of S. 596 of the Code, it being immaterial on what grounds the appeal was dismissed. The order of His Majesty dismissing the appeal for default was an affirmance of the decree of the High Court and was alone capable of enforcement. An application for such enforcement made within twelve years of the date of the order was governed by Art. 180 of the Limitation Act, 1877, and was an application which was made within time. **Abdul ajid v. Jawahir Lall**, 7 A.L.J. 1001 (F.B.).

STANLEY, C.J. and BANERJI and CHAMBER, JJ.

References.—(a) L.R. 6 A.C. 482; 20 All. 367, approved of and applied.

(104) Art. 78—Application for order absolute of decree nisi—Intervention of objections subsequently proved to be groundless—Continuation or revival of previous application. See **TRANSFER OF PROPERTY ACT**, No. 60, 6 Ind. Cas. 537.

(109) Art. 179—Decree for partition—Execution conditional on payment of Court-fees—Application for execution without payment—Application made in accordance with law.

A decree for partition of immoveable property was passed on the 30th of June, 1900, whereby it was directed that the plaintiff should not be entitled to execute it until he had paid Court fees. An application to execute this decree was made on the 29th June, 1903, but, as it was not accompanied by payment of the Court fee, it was dismissed. A second application to execute the decree was made on the 27th June, 1906, and the Court fees were paid. The lower Court held that the second application was time-barred, for the first application was not one made in accordance with law as required by Art. 179 of the Limitation Act, 1877.

Held, that the second application was in time since the first application was made in accordance with law, for it was competent to the Court to order on the application that the execution should begin on Court-fee being paid within a certain date.

An application for execution of a decree to be in accordance with law must ask for something within the decree and not outside it **Nathu-Bai Kusandas v. Pranjivan Lalchand**, 12 Bom. L.R. 13=84 B. 189=5 Ind. Cas. 601.

CHANDAVARKAR, J.

Limitation Act, 1877—(Continued)

(110) *Art. 179—Ss 235, 238, 245, C.P.C. (1882)—Application for execution returned for amendment of formal defect—Application amended but not filed within time allowed and registered—Limitation—Step in aid of execution*

Where an application for execution of a decree, made in proper form under S 235 C.P.C. (1882) was returned by the Court, for supplying within 10 days the necessary extracts from the Collector's register under S 238 regarding certain shares of a revenue paying mouzah, and a correct valuation of this and other properties sought to be attached, but the application was not filed till long after the expiry of the 10 days and some days after the period of limitation expired and the decree holder along with the application filed a petition explaining the delay and it was registered.

Held—That the previous application which was returned was a step taken in aid of execution, such as would save the amended application from being barred by limitation (1)

That the decree holder's application to the Collector for the extracts from the Collector's register was itself a step in aid of execution.

Proper scope of S 245 of the Code indicated **Mathura Prasad v. Mustt Anurago Koer**, 14 C.W.N. 181—5 Ind. Cas. 573

HOLMWOOD and CHATHAM J.

References—(a) 23 C. 217 D. & F. 17 S. 631 7 A. 351, 20 A. 179 25 C. 531 L.

(111) *Art 179 Application in accordance with law—Application not made on durable paper as required by rules of Court—Application asking relief the right to which may not be established—Effect of—Rules framed under S 652 C.P.C. (1882) nature of*

An application for execution of a decree, though not made on durable paper as required by rules of the Court (framed under S 652 C.P.C.), is an application "in accordance with law" within the meaning of Art 179 Limitation Act (a)

The rules that can be framed by the Court under S 652, C.P.C. are rules consistent with the Code, which regulate any matter connected with its own procedure or the procedure of Civil Courts subject to its superintendence. No rule framed under S 652 can add to, or detract from, the essential elements laid down in S. 235. The rule must be construed as what it actually is—a rule affecting

Limitation Act, 1877—(Continued).

the procedure of this Court only, and not one that alters in any way the provisions of any article of the Limitation Act or any rule of law having universal application.

Where an application was made for the execution of a decree by arrest of the defendants, and it was contended that no warrant of arrest could have been issued in pursuance of the decree, and that the application was not in accordance with law if it be one which the Court was not competent to grant, it was held, that the plaintiffs in that case had a right to ask for a warrant of arrest under certain circumstances (S 252, para 2, C.P.C.) and it was at least possible that they could have established their right to it and that the application could not be held to be nullified, merely because they might have failed in their proof (b)

The People's Bank of India v. Mahomed Ali, 3 Sind. L.R. 171—1 Ind. Cas. 1154

CROUCH and KNIGHT A.J.C.S.

References—(a) 4 Bom. L.R. 391 Not F., 31 L. 162 and 25 C. 591 (F.B.) F. (b) 13 B. 237 L. & D.

(112) *Sch II Art 179—Civil Procedure Code (Act VIII of 1882), S. 230—Execution of decree—Limitation—Step in aid of execution—Application by legal representative for his name to be substituted in place of deceased decree holder—Decree twelve years old—Application in continuation of previous applications for arrest of judgment-debtor*

Held that an application, by the legal representative of a deceased decree holder for his name to be substituted in place of the deceased is a step in aid of execution within the meaning of cl 2 of Art 179 Limitation Act (a)

When applications for the arrest of the judgment debtor are ineffectually made within twelve years from the date of the decree and struck off owing to the judgment debtor not being found a fresh application for arrest, made after the expiry of twelve years, which is not otherwise barred, may be regarded as made in continuation of the previous applications, and cannot be held, to be barred by S. 230, Civ. Pro. Code, 1882 (b) **Mussammat Prabh Devi v. Diwan Chand**, 6 P.L.R. 1910—6 Ind. Cas. 490.

REID, C.J.

References—(a) 29 A. 301, F. (b) 21 A. 155, 6 M. 365, F.

Limitation Act, 1877—(Continued).

(113) *Art. 179—Execution of decree—Attachment of decree—Application by decree-holder to have attached decree executed—Step-in aid of execution—C.P.C. (Act XIV of 1882), S. 273, cl. (b).*

A decree-holder obtained his decree in the Court of the Munsiff, and, on his application, a decree which had been passed in favour of the judgment-debtor in the Court of the Subordinate Judge, was attached in execution of his decree. The decree holder then put in an application in the Court of the Sub Judge under S. 273, cl. (b) of the C P C of 1882, praying that that Court would execute its own decree and apply the sums realised at first in discharge of his decree obtained in the Munsiff's Court.

Held, that the application in the Court of the Sub-Judge under S. 273, cl (b) of the C P C, 1882, must be taken to be a step taken in aid of execution of the decree obtained in the Munsiff's Court, within the meaning of Art 179 of Sch II of the Limitation Act 1877 and that an application for the execution of the decree made within three years from that application was not barred by limitation. **Gya Loan Office Co. Ltd. v Dhirat Kundal Lal** 5 Ind. Cas. 675

BRETT and CHITIA JJ

References —7 A. 382, 15 C 371 24 C 779, 1 C.W.N. 676, *Rel on*.

(113-a) Art 179—Application against persons not the legal representatives—Effort See CIV. PRO CODE (1882), No. 42, 7, 1 L J 512

(113-b) Art. 179 See Nos 10 and 18 *supra*.

(114) Art. 179, cls. (1) and (4)—Re construction of lost record—Step in aid of execution See EXECUTION OF DECREE, No 7, 11 C.L.J. 243.

(115) *Sch. II, Art 179 (4)—Step in aid of execution—Application for time to procure service of notice under S. 245, Civ Pro Code, 1882.*

An application to the Court to do an act in aid of execution, even though it is refused, is an application within the meaning of Art. 179 of the Limitation Act for the purpose of saving limitation.

Therefore, an application, which is not an ordinary application for adjournment, but an application for time to adduce evidence to prove

Limitation Act, 1877—(Continued).

that notice under S. 248, Civ. Pro. Code, 1882, had been duly served, though refused, is an application within the meaning of the article. **Narsingh Dayal Singh v. Kali Charan Singh**, 5 Ind. Cas 147=14 C.W.N. 486.

BRETT and SHARFUDDIN, JJ.

(116) *Art 179 (4)—Step-in-aid of execution—Application for execution by assignee of decree—Non production of assignment deed—Striking of darkhast.*

A decree was passed on the 12th October, 1894. The decree holder applied to execute it on the 16th August, 1897, but the darkhast was struck off as the process fee was not paid. The decree having been assigned the assignee applied to execute it on the 16th August, 1900, but the darkhast was struck off as the deed of assignment was not produced. On the 11th August, 1903 the third darkhast was presented by a mukhtyar of the assignee, but it met with a similar fate as neither the mukhtyarnama nor the deed of assignment was produced. The fourth darkhast was presented on the 19th December 1905 and a notice was issued to the Judgment debtor under S. 248 of the Civ. Pro. Code, 1882. The darkhast was compromised by payment of Rs. 45. The fifth darkhast was filed on the 11th December, 1906. The lower Courts held that it was barred by the Law of Limitation, as the second and the third darkhasts could not be regarded as applications for execution made in accordance with law. On appeal—

Held reversing the order, that the present darkhast was not barred, for the application of a party for the execution of a decree is a step-in aid of it, though he fails to produce evidence to show that he had a right to execution. **Vinayaka Yaman Paranjap v. Ananda Ram ji**, 11 Bom.L.R. 1281=31 B 68=4 Ind Cas 582.

CHANDAVARKAR and HEATON, JJ

Reference 13 All. 89, F.

(117) *Art. 179 (4)—Execution of decree—Step-in-aid of execution—Civ Pro Code (XIV of 1882), Ss 251-A, 258—Applicability to decrees under S. 84 of Transfer of Property Act.*

An application under S. 258, C P C (1882), calls upon the Court to do a certain act, which *ipso facto* satisfies the decree to the extent of the payment certified, and without which the decree would not be satisfied to any extent

Limitation Act, 1877—(Continued).

whatever. Such an application, therefore, is a step-in-aid of execution. S. 257-A of the Code does not apply to a decree under S. 93 of the Transfer of Property Act. **Chotey Singh v. Ishwari**, 7 A.L.J. 251 = 5 Ind. Cas. 295.

KNOX and PIGGOTT, JJ.

(118) *Sch. II, Art. 179 (4)*—Application by the decree-holder to reject an objection, and to examine witnesses, whether a step-in-aid of execution.

In execution of his decree, a decree-holder applied for attachment and sale of certain property. A third person preferred an objection, and the decree-holder made two written applications, one, to reject the objections of the objector, and, second, to examine his (decree-holder's) witnesses: *Held*, that both the applications were applications to take steps-in-aid of execution, and were sufficient to save limitation, within the meaning of Art. 179 (4), Limitation Act, 1877. **Shugan Chand v. Ramjas**, 5 Ind. Cas. 292.

TUDHALL, J.

References:—5 A. 344, *F.*; 7 A. 898, *D.*; 16 C. 747; 21 C. 23, *R.*

(119) *Sch. II, Art. 179, Cl. (4)*—Step-in-aid of execution—Sale, confirmation of, application for—Decree-holder, auction purchaser.

An application by a decree-holder auction-purchaser for confirmation of the sale is not an application to the proper Court to take a step-in-aid of execution within the meaning of Sch. II, Art. 179, cl. (4) of the Limitation Act. **Panchanan Chowdhury v. Nrisingha Prosad Roy**, 11 C.L.J. 356.

AMEER ALI and GORDON, JJ.

(120) *Sch. II, Art. 179, cl. (4)*—Step-in-aid of execution—Application to certify payments—Civ. Pro. Code (Act XIV of 1882), S. 258, applicability of, to mortgage decree.

An application by the decree-holder to certify to the Court the payments which had been made to him by the judgment-debtor out of Court, is an application to take a step-in-aid of execution within the meaning of cl. (4) of Art. 179 of the Limitation Act, 1877 (*a*).

When a payment made by a judgment-debtor to the decree-holder is not certified to the Court, and the time within which the judgment-debtor could have compelled the decree-holder to certify the payment has already expired, the Court of execution cannot recognize the alleged payment.

Limitation Act, 1877—(Concluded).

S. 258 of the Code of 1882 applies to proceedings in execution of mortgage-decrees. **Haridharan De v. Hari Charan Datta Poddar**, 6 Ind. Cas. 48.

MOOKERJEE and TEUNON, JJ.

References:—(*a*) 3 Ind. Cas. 374; 10 C.L.J. 467, *F.*

(121) *Art. 179, Cl. 4*—Step-in-aid of execution—Starting point of limitation—Application for or actual taking of, a step—Notice required by law to be issued—Execution application presented with batta for issue of notice—Whether a step-in-aid—Whether an application for, or taking such a step saves time.

Under Art. 179, cl. 4, the period of limitation starts with the application to the Court to take a step-in-aid of execution, and if the application is in accordance with law and if its purpose is to move the Court to take a step-in-aid of execution, it makes no difference whether the Court does or does not take the step demanded.

Where the law requires the issue of a notice before execution could be had, an application for execution presented with batta for the issue of notice is an application for a step-in-aid of execution. **Yala Subrama Pillai v. Sankara Subba Naidu**, 8 M.L.T. 235.

MILLER, J.

(122) *Art. 179 (4)*. See EXECUTION OF DECREE, No. 8, 5 Ind. Cas. 480.

(122-a) *Art. 179, cl. (4)*. See No. 29, *supra*.

(123) *Sch. II, Art. 180—C.P.C., 1882, S. 248*—Execution application made after lapse of one year from date of decree—Order for execution without issue of notice to judgment debtor—"Revived," meaning of, in Art. 180.

An order to issue execution after notice to the judgment-debtor has the effect of reviving a judgment or decree within the meaning of Art. 180 of Sch. II of Limitation Act, 1877, but an order alone without any notice has no such effect. **Desoo Venkatasa Perumal Chetty v. Srinivasa Ranga Row Pantulu**, 4 Ind. Cas. 306 = 7 M.L.T. 32.

BENSON, C.J. and SANKARAN NAIR, J.

References:—25 B. 37; 27 A. 216, *R.*

(124) *Art. 180*. See No. 107, *supra*.

Limitation Act, 1908.**(1) Period of limitation applicable to suits for taking partnership accounts—Partnership**

In a partnership agreement it was stated that the partnership was to continue up to a certain date, but prior to that date the partnership was dissolved —

Held, that the period of limitation, under Art 106 of the Limitation Act, for taking partnership accounts, or share in partnership profits, ran from the actual date of dissolution and not from the date mentioned in the agreement

Held, further, that, where a suit for general partnership accounts and share in partnership profits is itself barred, the plaintiff cannot be allowed to proceed against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation **Ahmed Sooleman Juvani v Bhagwandas Visram & Co.**, 11 Bom L R. 1854 34 P 15

BEAMAN, J.

(2) S. 7—Applicability—Minors making applications more than 3 years after

In this case a decree was made in favour of some persons, some of whom were minors. The last application for execution was made by the minors under the old Limitation Act and was in time. The new Limitation Act came into force within three years from the above application. The minors made the present application more than three years after the last application. **Held** that the Act of 1908 came into force before time ran out and must be applied to the case, and that the order refusing execution is wrong **Anthavarapu v. Taugudu Lingayya**, 8 M L T 341

MILLER J.

(3) S. 10—Trust for a specific purpose—Trust created by operation of law—Trusts indicated in a will—No specific trust for residue—Suit to follow residue in trustee's hands—Limitation

A testator made his will on the 20th of February 1889 and died on the 7th of December following. Under the will, he gave certain legacies, including one of Rs. 300 to his sister (the plaintiff). Five persons were appointed trustees under the will, which provided "They are to dispose of the properties in accordance with what is written in the above will and should my out-standings have to be recovered for giving effect to the said dispositions, they

Limitation Act, 1908—(Continued).

are to do the same and I do by this will give them power to do whatever else they may have to do to carry out this will." The trustees carried out the trusts under the will and there was left with them a residue of the testator's property remaining undisposed of. The plaintiff filed a suit in 1906 for a declaration that she was the heir of the testator, her brother, and as such entitled to the residue. A question arose as to whether the suit was time barred, because there was no trust declared with regard to the residue and no direction given to distribute it among heirs at law —

Held that the suit was not barred by limitation inasmuch as the residue had become vested in the trustees for the purpose of application in carrying out the trusts of the will

Once the testator's property is vested in the trustees for a specific purpose it is not necessary that any resulting trust of the residue which necessarily arises by operation of law should be specified in words of the will in order to bring it within the scope of S. 10 of the Limitation Act, 1908 **Mojilal Premchand v. Gavri-shankar Kushalji**, 12 Bom L R. 947

SCOTT C J and BATCHELOR J

Reference — 21 Bom 646 R

(4) S. 10 S. 11 Art. 120—Executors and administrators whether trustees for specific purposes within the meaning of S. 10—Suit by beneficiary against executor for recovery of money misappropriated by latter governed by Art. 120

Under the law of limitation executors and administrators are not trustees for specific purposes within the meaning of S. 10, and a suit against them is governed by Art. 120. If an executor has converted the money of the estate to his own use during his administration, then the monies so converted must be considered to be still in his hands, so that, unless a suit be barred, he can be made to account for them also. Art. 120 of the Limitation Act applies to this case and he can be sued, within 6 years of the termination of his administration to recover sums so misappropriated (a). **Nagarathammal v. Namasivaya Mudali**, 7 M L T 123=5 Ind Cas. 832

WALLIS, J.

References — (a) 1 Ch. D. 49, F, 10 Bom. L R. 846 and 13 C W.N. 557, F.

(5) S. 10, Arts. 120, 123—Suit by legatee—Executor to furnish accounts—Accounts—

Limitation Act, 1908—(Continued).

Limitation Act not wholly an act of procedure—Construction of statute.

Where the defendant has acquired, under the Limitation Act of 1877, the right of immunity to render accounts for more than six years before suit, he cannot be deprived of this right by any amendment in the law of a later date.

The law of limitation is not always a law of procedure, that is to say, a purely adjective law, for, amongst its other consequences it certainly has the creation of rights by prescription; and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation.

A legatee, who had received a great portion of the legacy bequeathed to him, filed a suit, against the executors of the will, to be put in possession of the full amount of his legacy. A question having arisen as to the period for which the executor should furnish accounts:

Held that the legatee was entitled to take accounts for the six years next before the institution of the suit. **Gajanan Vinayak v. Waman Shamrao**, 12 Bom. L.R. 881.

BEAMAN, J.

(6) *S. 14—"Prosecuting another civil proceeding"—Infructuous appeal—Period taken in getting certified copy of judgment.*

A person may be said to have been "prosecuting another civil proceeding" within the meaning of S. 14, sub-section (2) of the Limitation Act, during the period when he was taking the indispensable preparatory steps in Court for the institution of the appeal which ultimately proved infructuous.

Therefore, when a person has applied for a copy of the judgment and decree or order in order to enable him to prefer an appeal against that order, he may be deemed to have been "prosecuting a civil proceeding" at least during the period occupied in the preparation of the certified copies. **Lakshiram Mandal v. Sonatun Basar**, 7 Ind. Cas. 775.

MOOKERJEE and TRUNON, JJ.

References:—20 W.R. 380; 13 B.L.R. 146; 21 W.R. 207, *Rel. on.*

(7) *S. 19—Receipt given by one authorised to grant it—Acknowledgment of liability—Failure to set up the receipt as a ground of exemption from law of limitation—Amendment of plaint whether allowed in revision—Practice.*

Limitation Act, 1908—(Continued).

A receipt acknowledging delivery of goods given by one who has authority to grant the same, is an acknowledgment of liability within the meaning of S. 19 (a).

Where a person has failed to set up in his plaint such a receipt as a ground of exemption from the law of limitation, *held*, the plaint might be allowed to be amended even in case of a revision by High Court. **Nathamuni Narayana Iyengar v. Balasubramania Iyer**, 8 M.L.T. 199=7 Ind. Cas. 797.

WHITE, C.J.

Reference:—(a) 19 M.L.J. 650, *F.*

(8) *S. 20, Application of—Suit for recovery of a debt or legacy—Suit for possession of property.*

Held, that the first part of S. 20 of the Limitation Act applies only to suits for the recovery of a debt or legacy, and does not apply to a suit for possession of property. **Kanhaya-Bakhsh Pande v. Sheonandan Singh**, 13 O.C. 179.

CHAMBER, J.

(9) *S. 21. See LIMITATION ACT (1877), No. 26, 5 Ind. Cas. 484.*

(10) *S. 22—Computation of limitation period. See CIV. PRO. CODE (1908), No. 98, 7 M.L.T. 185.*

(11) *S. 31 (2)—Suit withdrawn not on the ground of limitation—Civil Procedure Code (Act XIV of 1882), Ss. 373, 374—Law as to withdrawal of suits before Act IX of 1908.*

The law as to withdrawal of suits, before the coming into force of the new Limitation Act, IX of 1908, was that

(a) a plaintiff could^e withdraw the suit as a matter of right, such a withdrawal standing in no need of permission from the Court, and

(b) he could withdraw the suit, on the grounds specified in S. 373, C.P.C., 1882, with permission to bring a fresh suit.

If the withdrawal was under (a), a second suit on the same cause of action was barred; but if it was under (b) a second suit could lie under S. 274 of the Code subject to the law of Limitation.

S. 31 of Act IX of 1908 does in no way touch the provisions of Ss. 373 and 374 of the Code of 1882. It only deals with withdrawals other than those under S. 373, and enacts that a claim withdrawn on the ground of the 12 years,

Limitation Act, 1908—(Continued).

rule of limitation may be restored. **Ram Autar Sahu v. Gulab Chaudhri** 6 Ind. Cas 700

KARAMAT HUSAIN, J

(12) Art 12—Suit for setting aside execution sale—Applicability of article See **EXECUTION SALE**, No 4, 18 O C. 297.

(13) *Sch. I, Art 15—Covenant for quiet enjoyment—Breach—Limitation*

Where there is a covenant for quiet enjoyment and breach of it by defendants, the plaintiffs are entitled to sue within 3 years of the breach, under Art 15, Sch I of the Limitation Act. **Kutti Ali's wife Achumma v. Elayacham Dharman Achan** 7 M L T 229 6 Ind Cas 290

BENSON and KRISHNASWAMI IYER JJ

Reference —29 M 353, D

(14) Art 36—Applicability—Suit for value of jewels lost by negligence of servants See **CIV. PRO CODE** (1852) No 215 7 M L T 93.

(15) *Sch II, Arts 61 83, 116 applicability of—Suit by agent for recovery of moneys spent by him in the course of agency—Limitation* See **PRINCIPAL AND AGENT** No 5 8 M L T 194

(15 a) Art. 83 See No 15, *supra*

(16) Art 85—What is an open and current account with reciprocal demands See **ACCOUNT**, No 4, 99 P W R. 1910

(17) Art 89—Principal and agent account between—Agent's liability to account—Demand and refusal termination of the agency

D received from G a sum of money as the agent of N on the 4th November 1902 In May 1903 disputes arose between D and N in which D denied N's right to the money But on the 30th June 1903 D again received from G another sum of money as the agent of N There was not, after that date any demand and refusal or termination of the agency N filed a suit against D in 1907 to recover the money from D —

Held that the claim was not barred, for, though D asserted his own right in 1903, the adverse claim was not continued and acted upon; and when, in June 1903, he again received the money for and on behalf of N, his conduct plainly amounted in law to a continuance of the agency and fiduciary relationship and his liability to account in respect of it.

Limitation Act, 1908—(Continued).

An agent's liability to his principal is to render an account of the sums received by him; the account is one and indivisible; and he cannot plead limitation as to any particular item as against his principal **Nathubhai Bhikaridas v. Devidas Mangaldas**, 12 Bom L R 951

CHANDAVARKAR, J

(19) Art 95—Suit to set aside decree on ground of fraud—Limitation See **EX PARTE DECREE**, No 2 17 P L R 1910

(13) Arts 37, 116—Suit to recover money secured by a mortgage deed found to be invalid *Limitation* See **MORTGAGE (GENERAL)**, No 29 13 O C 155

(20) Arts 105, 109—Surplus collection made by mortgagee—Suit by mortgagor to recover—Limitation See **CIV. PRO CODE** (1892), No 19 7 A L J 1201.

(20 a) Art 109 See No 20 *supra*

(20 b) Art 116 See Nos 15 and 19 *supra*

(21) Art 110—Suit for money deposited as security for payment of rent—Limitation

Where money was deposited with a lessee as security to ensure payment of rent payable under a contract of lease *held* that Art 120, Limitation Act applies to a suit for recovery of such deposit (a) **Sakhawat Ali v. Thakur Baldeo Sahai**, 13 O C 256

INDSIA J C

Reference —12 C 313 P

(21 a) Art 120 See Nos 4 and 5, *supra*

(21 b) Art 123 See No 5 *supra*

(22) Art 134—Redemption by one mortgagor—Value of possession—Limitation *against mortgagors*

G a Muhammadan died leaving some property which was under mortgage He left a son a widow and a daughter The son redeemed the entire property and remained in possession He then mortgaged the property including his sister's share, which was subsequently sold by auction G's daughter's representative brought this suit for redemption *Held* that the suit having been brought within 60 years of the date of the original mortgage, it was not barred by limitation The possession of the brother or his transferees in respect to the sister's share, was that of mortgagees, and, unless there was set up an adverse title to her share, the nature of the possession could not change. **Said ud din Khan v. Ratan Lal**, 7 A L J. 95 = 5 Ind. Cas 123 = 32 A 160.

KNOX and RICHARDS, JJ.

Limitation Act, 1908—(Continued).

(28) *Art. 134—Limitation—Mortgage—Redemption—Transfer by mortgagee to third person—Mortgagor and his descendants not taking steps to protect their interest—Revision—Questions of fact and law—S. 70 (a) and (b) of Act XVIII of 1884.*

S mortgaged a house to H, and some years after M sued H, to recover it on the ground that it belonged to M; then H, and M compromised, and H gave the house to M on receiving a certain sum of money. Shortly after this M transferred the house to N, who built upon it. 32 years after this the descendants of S, claimed to redeem the house.

Held that:—

1. The inference from the above circumstances is that M was its owner;

2. He did not take possession of the house as mortgagee but as owner; and

3. M began to hold the property adversely to all the world from the date of taking possession.

Held, also, that in case of revision under cls. (a) and (b) of S. 70 of Act XVIII of 1884, the Chief Court can interfere as to questions of fact, only if in deciding them the lower appellate Court has been guilty of 'material irregularity' resulting in injustice, and can interfere on any question of law which arises on the fact as ultimately found by the Chief Court. Hira Singh v. Bhagat Singh, 93 P. W.R. 1910=7 Ind. Cas. 708.

JOHNSTONE, J.

(24) *Art. 164—Meaning of "knowledge." See CIV. PRO. CODE (1908), No. 103, 12 Bom. L.R. 462.*

(25) *Art. 164—Setting aside ex parte decrees—Limitation. See CIV. PRO. CODE (1892), No. 191, 12 Bom. L.R. 730.*

(26) *Art. 164—Setting aside ex parte decrees—Review of judgment. See CIV. PRO. CODE (1908), No. 108, 12 Bom. L.R. 886.*

(26-a) *Art. 164. See No. 1-a, supra.*

(27) *Sch. II, Art. 177—Change of law of limitation—Effect. See CIV. PRO. CODE (1908), No. 55, 7 M.L.T. 115.*

(28) *Art. 181—Whether governs application for order absolute under O. 34, r. 3, C.P.C. (1908). See TRANSFER OF PROPERTY ACT, No. 60, 6 Ind. Cas. 537.*

(29) *Art. 181—Sale of tenure out and out for rent—Re-sale for previous arrears—Application to set aside sale—Limitation. See ACT*

Limitation Act, (1908)—(Concluded).

VIII OF 1885 (BENGAL TENANCY), No. 30, 6 Ind. Cas. 804.

(29-a) *Sch. II, Art. 181—Petition for revision—Limitation. See ACT IX OF 1887 (PROV. SMALL CAUSE COURT), No. 8-a, 92 P.R. 1910 (Civ.).*

(30) *Art. 182—Execution of decree—Application against one of several joint judgment-debtors, effect of, against others.*

Where a decree has been passed jointly against more persons than one, an application for execution made against some of them will keep the decree alive against them all. *Kabir-lal Kunwar (Musammat) v. Raja Rudr Par-tab Sahai, 13 O.C. 48=5 Ind. Cas. 800.*

CHAMIER and EVANS, J.CS.

Reference:—27 C. 210.

(31) *Sch. I, Art. 182—Deposit of diet money or process fee—Step-in-aid of execution—Limitation.*

Mere deposit into Court of the process fee or the diet money cannot be held to be an application to the Court to take a step-in-aid of execution within the meaning of Art. 182, of the Limitation Act. *Bhawani Prashad v. Syed Iftikhar Hussain, 7 Ind. Cas. 759.*

CHAMIER, J.

References:—22 A. 358; 30 A. 179; A.W.N. (1908), 74; 5 A.L.J. 258; 25 B 639; 3 Bom.L.R. 275, F.

(32) *Art. 182—Execution by Collector. See CIV. PRO. CODE (1908), No. 170, 13 O.C. 303.*

Limitation Act (Mysore).

(1) *S. 5—Admission of appeal after time.*

The true rule in regard to the admission of appeals preferred after the prescribed time is, whether the special circumstances are such that indulgence may be shown to the appellant on the ground that he has acted in good faith and that no negligence or inaction is imputable to him (a). *K. Srinivasa Iyengar v. Srinivasa-char, 15 M.C.C.R. 149.*

KPISHNA RAO and SETLUR, JJ.

Reference:—(a) (1895), 28 Cal. 325, F.

(2) *S. 5—Extension of time prescribed for appeal—Presentation to wrong Court—Bona fide mistake.*

An appellant who asks for an extension of time under S. 5 of the Limitation Act, on the ground that he has presented his appeal to the wrong Court, is bound to show that he acted, *bonafide*, that is, under an honest though

Limitation Act (Mysore)—(Continued).

mistaken belief that he was appealing to the right Court (a). **K Srinivasalingar v. Puttannaiah**; 15 M.C.C.R. 258.

STANLEY ISMAÏ, C.J. and KRISHNA RAO, J.

References:—(a) (1907) 84 Cal. 216, *F.*; (1896) 23 Cal. 526, *D.*

(3) Art. 17—When applies. See CIV. PRO. CODE (MYSORE), No. 28, 15 M.C.C.R. 223.

(4) Art. 23—*Mulicious prosecution—Termination of proceedings.*

The expression "the prosecution is terminated" as used in Art. 23, Limitation Act, means that the proceedings must have come to a legal though not necessarily a final and conclusive end. **B. Byrappa v. Tiruvengada Bhattachar**, 15 M.C.C.R. 219.

STANLEY ISMAÏ, C.J. and KRISHNA RAO, J.

(5) Art. 20—Illegal Search and Seizure by the Police—Suit for damages—Limitation See DAMAGES, No. 1, 15 M.C.C.R. 47.

(6) Art. 91, Sch. II—*Suits to cancel a document.*

Art. 91, Limitation Act, can apply only to suits in which the documents sought to be set aside were intended to be operative against the plaintiff or his predecessor in title and would remain operative if not set aside. **A. Neelappa v. Annapurnamma**, 15 M.C.C.R. 75.

STANLEY ISMAÏ, C.J. and KRISHNA RAO, J.

Reference:—(a) (1895) 23 C. 460, *F.*

(7) Arts. 109, 120—*Suits, for profits wrongfully appropriated.*

G and T obtained a decree against N's brother, and in execution attached N's land and subsequently purchased it themselves and took the produce of the years 1900 to 1903. In the meanwhile N filed a suit against G and T, and after a prolonged litigation succeeded in establishing his title to the land in question. In a suit by N against G and T filed on the 6th January, 1906 for profits of the aforesaid four years.

Held, that Art. 109, Sch. I, Limitation Act, applied to the case, and the plaintiff's claim in respect of the produce for the years 1900 to 1902 was clearly barred.

Art. 120 applies only to cases for which no other provision exists in the Limitation Act. **Govindappa v. Nannappa**, 15 M.C.C.R. 93.

NANJUNDAYYA and SETLUR, J.J.

(7-a) Art. 120. See No. 7, *supra*.

Limitation Act (Mysore)—(Concluded).

(8) Art. 178—Application by purchaser for delivery of possession of immoveable property—Limitation. See CIV. PRO. CODE (MYSORE), No. 21, 15 M.C.C.R. 58.

(9) Art. 179—*Expl. 1—Civ. Pro. Code. S. 253—Decree—Application for execution against surety—Limitation.*

Before the passing of a decree, T and N become sureties to prevent the attachment of the defendant's properties before judgment. Decree was passed on 29th March, 1897, and on 24th June, 1903, i.e., more than six years after the date of the decree, execution was taken out for the first time against T and N, the decree having been kept alive by previous application, in which execution was taken out against the judgment-debtors (defendants) only.

Held, that the persons who became liable as sureties under S. 253 of the Code cannot be regarded as parties against whom the decree has been "passed jointly," with those who were defendants in the suit, within the meaning of the last clause in Expl. 1 appended to Art. 179, Sch. II of the Limitation Act, and the application against sureties is clearly barred (a). **Bore Gowda v. Thammanna Gowda**, 15 M.C.C.R. 72.

NANJUNDAYYA and SETLUR, J.J.

Reference:—(a) (1906) 21 B. 50, *F.*

Limitation Act.

See ACT I OF 1900 (PUNJAB).

Lis pendens

(1) *Lis pendens, if applies to property attached in execution of money-decree—Attachment in execution of money-decree, if creates a charge—Revenue Sale Law (Act XI of 1859), S. 54—Attachment, if an incumbrance—Sale for arrears of revenue, if alienation by proprietor.*

The doctrine of *lis pendens* is applicable to sales *in invitum*.

The doctrine is applicable to proceedings to realise the mortgage money, after a decree for sale of the property.

But where a property not mortgaged is attached in execution of a money-decree, the doctrine of *lis pendens* does not apply to the sale of that property.

Where a property was attached in execution of a money-decree, and, in the course of the execution proceedings, was sold for arrears of revenue:

Lis pendens—(Concluded).

Held, that the attachment did not create any title or charge on the property, and did not constitute an incumbrance within the meaning of S. 54 of Act XI of 1859.

Held, further that a sale for arrears of Government revenue cannot be regarded as an alienation made by the proprietor, so as to make the doctrine of *lis pendens* applicable. **Mohadeo Saran Sahur v. Thakur Prasad Singh**, 14 C.W.N. 677 = 11 C.L.J. 528 = 6 Ind. Cas. 40.

HOLMWOOD and CHITTY, JJ.

References:—29 C. 428 = 6 C.W.N. 577; 25 C. 179, R.; 5 C.L.J. 80 = 11 C.W.N. 163, D.

(2) Suit actively prosecuted 'in wrong Court,' returned to proper Court and decreed by latter on compromise—Operation of rule of—See TRANSFER OF PROPERTY ACT, No 18, 14 C.W.N. 322.

(3) Effect of, on subrogation. See MORTGAGE (GENERAL), No. 42, 7 Ind. Cas. 473.

Litigation.

Stranger promoting, if bound by judgment. See PROBATE, No. 3, 12 C.L.J. 91.

Loan.

Acceptance of hundi, whether bars suit on original loan. See NEGOTIABLE INSTRUMENT, No. 3, 6 N.L.R. 125.

Loans Limitation Act.

See ACT 1 OF 1904 (PUNJAB).

Local Boards Act.

See ACT V OF 1884 (MADRAS).

Local Boards.

(1) Contract with --Penalty. See CONTRACT ACT, No. 30-4, 9 Ind. Cas. 565.

Lower Burma Courts Act.

(1) See ACT OF 1900 (BURMA).

(2) See ACT IV OF 1901 (BURMA).

Lower Burma Town and Village Lands.

See ACT IV OF 1898 (BURMA).

Lunacy.

(1) *Effect of, on vested estate—Right of management—Ground for removal of lunatic from trusteeship.*

Lunacy does not divest the estate already vested or the right of management, though it may be a ground for removal of the lunatic from the office of trustee which is hereditary

Lunacy—(Concluded).

K. N. Nilakandhan Nambudripad v. P. K. Sankaran Nambiar, 8 M.L.T. 248.

BENSON and KRISHNASWAMI AIYAR, JJ.

Reference:—(a) 27'M. 468 (446), F.

(2) Manager's powers over estate of lunatic. See ACT XXXV OF 1858 (LUNATICS), No. 1, 6 Ind. Cas. 158.

Lunatics Act.

See ACT XXXV OF 1858.

Mahant.

(1) *Inheritance—Custom—Sadh Sunyasi—Son—Chela—Sunyasi becoming a 'Grihasti'—Presumption of acquisitions—Maintenance.*

Held, that, in the absence of conclusive proof of a custom to the contrary, among Sadh Sunyasis, when the Mahant of an endowed institution becomes a *Grihasti* or in other words abandons the celibate life, marries and has family, his sons born in wedlock have *ipso facto* no right of succession to the institution, even if they are ready to take up the duties of the Mahantship, and the succession goes to a spiritual son or *chela* either nominated by the Mahant himself or elected to that office by the brotherhood (a).

Held, also, that, in the absence of any definite evidence to the contrary, the proper presumption is that the property acquired by a Mahant belongs to the institution.

Held, further, that, in a case of inheritance, the question of maintenance cannot be raised for the first time in appeal, if the plaintiff has failed to claim it in the alternative in the plaint, and consequently it has not been put in issue. **Bawa Sant Bharti v. Ram Ban**, 41 P.W.R. 1910 = 6 Ind. Cas. 643.

SHAH DIN and WILLIAMS, JJ.

Reference:—(a) C. 112 P.R. 1906, D.

(2) *Right of suit—Mohunt of idol—Executor of last mohunt—De facto manager of endowed property—Right to bring rent suit—Plaint, amendment of—"De facto manager" instead of "executor"—Whether character of suit is changed.*

After the death of the last mohunt, the plaintiffs as his executors began to manage the endowed properties and also the *deb sheba* of the idol and as such they were in possession.

Held that they were entitled to act for the idol as long as no mohunt was appointed, and to sue for the rent of the properties.

Mahant—(Concluded).

The plaintiffs brought a suit for rent as "executors furnished with the will of the late *mo-hunt shebst* of the idol." The plaint was amended by substituting the names of the plaintiffs "as *de facto* managers and persons interested in the endowment."

Held, that the amendment did not alter the character of the suit. **Dhanpat Singh Kulari v Johurmal Tusimal** 7 Ind Cas 161

SARFUDDIN AND DAS JJ

(3) Provision for succession of Mohuntship—Power of Superintendent to dismiss successor—Right of Superintendents to apply for probate. See **WILL**, No 1, 5 Ind Cas 149

(4) Property acquired by—Grant of letters of administration. See **LETTERS OF ADMINISTRATION**, No 2 6 Ind Cas 650

(5) Suit against Mahant of a Gaddi—Procedure. See **CIV PRO CODE** 1909 No 42 13 O C 177

(6) Suit for removal of—Sanction under S 539 C.P.C. See **CIV PRO CODE** (1982) No 210 198 P L R 1910

Mahomedan Law.

1 —GENERAL

2 —ACKNOWLEDGMENT

3 —DIVORCE

4 —DOWER.

5 —GIFT

6 —GUARDIANSHIP

7 —INHERITANCE

8 —MARRIAGE.

9.—PREMPTION

10 —TRUSTS.

11 —WAKF

12 —WILL

-1.—(General)

(1) *Kharach* & *pandan* allowance to wife—Agreement by husband & father to pay—Charge upon immoveable property—Wife if may enforce agreement, though no party—Wife living away from husband's home if may claim—English common law, if to be applied in India—Pin money—Unchastity not proved—Suspicion if should be expressed.

Kharach & *pandan* literally "betel box expenses," which is a personal allowance to the wife customary among Mahomedan families of rank, fixed either before or after the marriage,

Mahomedan Law—(Continued).**—1.—General—(Continued).**

and which, when the parties are minors, is arranged for between their respective parents and guardians—stands on a different legal footing from the English pin money. Ordinarily the money would be received and spent in the conjugal domicile, but the husband has hardly any control over the wife's application of the allowance either in her adornment or in the consumption of the article from which it derives its name.

Where the father of the husband agreed with the father of the wife to pay to the wife the sum of Rs 500 a month as *kharach* & *pandan* without any condition that it should be paid only whilst the wife would be living in the husband's home and the agreement specifically charged immoveable property for the allowance.

Held—that the wife's refusal to live with the husband was by itself no ground for depriving her of the allowance.

that the wife though no party to the agreement was entitled to proceed in equity to enforce her claim to the allowance, she being the only person beneficially entitled under it (a)

When a Judge finds a serious charge like that of unchastity against a woman not proved, he should not give expression in his judgment to any mere suspicion he may have regarding her character. **Nawab Khwaja Muhammad Khan v Nawab Husain Begam**, 14 C.W.N. 86, (P.C.) 7 A.L.J. 871 9 M.L.T. 147=12 Bom.L.R. 638 12 C.L.J. 205=20 M.L.J. 614 7 Ind.Cas. 237=31 A.410

JORD MACNAGHTEN LORD COLLINGS
SIR ARTHUR WILSON and MR. AMLER
ALI

Reference —(a) 1 B & S 393 R

(2) *Partnership—Dealing by some members of a Muhammadan family—Inability of their members—Joint family—Partnership among Jews*

Where two Muhammadans borrowed money on a bond in course of a business carried on by them, and it was not proved that their brothers, sisters and mother who were sought to be made liable, had any concern in the business.

Held, that the mere fact of their relationship or even the fact that all of them lived together would not make them members of a joint family in the sense of the Hindu Law, so as to make the latter liable for the debts contracted by the former two.

Mahomedan Law—(Continued).**—1.—General—(Concluded).**

The membership of a joint Hindu family involves a certain legal status which is unknown to Mahommedan Law (a).

The heirs of a Muhammadan, who carried on a business in his life-time either by himself or in partnership, would not become partners in that business after his death, unless they agreed to continue the business or authorised one of them to conduct it on behalf of all (b). **Pakir Mahomed v. South Indian Export Co., Ltd.**, 7 Ind. Cas. 108=8 M.L.T. 253.

ARNOLD WHITE, C.J. and ABDUR RAHIM, J.

References :—(a) 32 M. 276 ; 5 M.L.T. 201 ; 3 Ind. Cas. 876, *applied*; 2 M.I.A. 487 ; 6 W.R. (P.G.) 10 and 19 M. 471, D. (b) 32 M. 276 ; 5 M.L.T. 201 ; 3 Ind. Cas. 876, R.

(3) Suit by a Mahomedan for recovery of share of wife's property—Moveables and immoveables—Article applicable. See LIMITATION ACT (XV OF 1877), No. 76, 20 M.L.J. 288 (F.B.).

(4) Entry by one co-sharer—Effect. See ADVERSE POSSESSION, No. 4, 79 P.W.R. 1910.

(5) Conflict between Abu Hanifa and his two disciples—Views of disciples to be preferred—Distinction between 'Batil' and 'faside', See MAHOMEDAN LAW (MARRIAGE), No. 3, 7 Ind. Cas. 820.

—2.—(Acknowledgment).

(1) *Acknowledgment of a son.*

Under Mahomedan Law, children born of *Zina* (meaning fornication, adultery or incest) cannot be legitimated or entitled to inherit from their father. They cannot be made legitimate by any kind of acknowledgment, where the illegitimacy is a proved and established fact. **Mardansaheb Gansusaheb v. Rajak-saheb Kashimsaheb**, 11 Bom. L.R. 1117 34 B. 111=4 Ind. Cas. 254.

CHANDAVARKAR and HEATON, JJ.

Reference :—10 A. 289, F.

(2) *Acknowledgment of paternity, when sufficient to confer status of legitimacy.*

An acknowledgment of paternity made by a Mahomedan is not in all cases sufficient to establish the fact that the person so acknowledged is of legitimate descent. In every case the question is whether or not the acknowledgment at the time of making the acknowledgment intended to confer upon the person whom

Mahomedan Law—(Continued).**—2.—Acknowledgment—(Concluded).**

he acknowledges as his son the status of legitimacy. **Kasim Hasan Khan v. Batul Bibi and others**, 13 O.C. 255.

LINDRAY, J.C.

References :—21 C. 666 ; 11 M.I.A. 94 ; 9 O.C. 246, R.

—3.—(Divorce).

(1) *Hanafi school—Divorce—Pronouncement of talak by husband, whether should be directly addressed to the wife—Marriage tie, incidents of—Sureeh and Kinayah forms of divorce.*

Marriage, according to Mahomedan law, is a contract which has certain incidents attached to it, such as the right of the husband to connubial services of his wife, and of the wife to the conjugal society of her husband, the duty of the husband to maintain his wife and children, to control her liberty of movement and to inflict corporal chastisement on her in cases of flagrant misbehaviour, etc., etc. Besides these ordinary incidents, it is open to a man and a woman, entering upon marriage to define their future marital rights and liabilities *inter se*, so as to considerably modify the rights and obligations that flow ordinarily from a valid marriage.

The most important privilege of the husband is to dissolve the marriage at his discretion.

Divorce may be effected either by the use of words, which are regarded in law, as *sureeh* or explicit, such as, "I have divorced thee" etc., or by words of equivocal meaning technically called *kinayah*. The distinction between *sureeh* and *kinayah* is this: when a person expresses his legal act, whether it be a contract, release of rights or dissolution of legal relations, in spoken words, the meaning of which is unmistakable, either because the expressions used have acquired a particular significance by long usage or otherwise, the law will take him to mean what his words convey, and will neither permit him to say that he meant something else nor entertain such a question at all. When, on the other hand, the language used is ambiguous, it is open to the person using it to say what he meant, and the circumstances may be taken into account to ascertain his meaning. The Mahomedan law does not, in this matter, pay any regard to the fact of the speech being in the direct or in the indirect form.

According to the principles of the *Hanafi* law, the husband has an absolute right to

Mahomedan Law—(Continued).

3.—Divorce—(Concluded).

dissolve the marriage, and the only condition for the valid exercise of such a right is that he must be major and of sound mind at the time. The wife's consent or absence of consent to the action of her husband is immaterial, and it is not necessary that the words of repudiation should be uttered to or in the presence of the wife to effectuate a valid divorce. *Asha Bibi v. Kadir Ibrahim Rowther*, 3 Ind. Cas. 730 = 6 M L T. 295 = 38 M. 22.

MUNRO and ABDUR RAHIM, JJ

References —4 C. 588, *dis. from*, 30 B 537 and 36 C. 194 = 13 C.W.N 131 = 9 C.L.J 105 = 1 Ind. Cas 740, *approved*.

(2) Divorce during minority of husband—*Legality*—Marriage after divorce to second husband—Effect on legitimacy See MAHOMEDAN LAW (MARRIAGE), No 3, 7 Ind Cas. 820.

—4—(Dower).

(1) *Dower*—Dirhams *May value*

The money value of ten Dirhams in India is something between three and four rupees. *Asma Bibi v. Abdul Samad Khan*, 7 A L J 116 = 32 A. 167 = 5 Ind Cas. 411

KNOX and KARAWAT HUSAIN JJ

(2) *Dower, deferred*—*Transfer of property*—*Consideration*—*Demand for deferred dower*.

Deferred dower can form a valid consideration for the transfer of property during the lifetime of the husband who has not divorced the wife.

A wife is not entitled as of right to demand payment of deferred dower, but the husband is entitled, if he pleases, to pay his wife her dower before it is due, or to discharge and satisfy his obligation in any other legal way. *In re Seth Nemi Chand v. Mussammat Maluk Begam*, 5 Ind Cas 316 = 7 A L J 370

RICHARDS and KARAWAT HUSAIN, JJ.

(3) *Dower*—*Widow in possession*—*Her right against other heirs*—*Proof of consent not necessary*.

A Mahomedan widow, who enters into possession of her husband's property on his death, is entitled to hold the estate against the other heirs until her claim to dower is satisfied. It is not necessary for her to show that the deceased husband or his heirs consented to her getting into possession (2).

Mahomedan Law—(Continued).

—4.—Dower—(Continued).

Per Richards, J.—If a Mahomedan widow obtains possession peacefully and quietly and without fraud, she is entitled to remain in possession until her dower debt is discharged, subject to her liability to account for the profits that she has received whilst so in possession. *Ramzan Ali Khan v. Asghari Begum*, 7 A L J. 614 = 6 Ind. Cas. 405.

RICHARDS and TUDBALL, JJ

Reference —(a) 17 A. 771, *not followed*.

(4) *Dower*—*Right of widow to remain in possession*—*Heritable*.

The right of a Mahomedan widow, who has entered into possession of her husband's property peacefully and without fraud in lieu of her dower debt is a heritable right, and her heirs are entitled to remain in possession until the debt is satisfied. *Ali Baksh v. Allahabad Khan*, 7 A.L.J. 567 = 6 Ind Cas 376.

RICHARDS and TUDBALL JJ.

References —7 A. 353, 17 A. 77, *doubted*.

(b) *Lien of widow for dower*—*Such lien not acquired by widow taking possession against consent of other heirs*

If a Mahomedan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs on his death, to take possession in lieu of dower and thus to obtain a lien for her dower she cannot obtain that lien by taking possession, adversely to the other heirs, of property, to the possession of which they, and she in respect of her share in the inheritance, are entitled. *Bibi Tasliman v. Bibi Kasiman*, 6 Ind Cas. 44.

HOLMWOOD and CHITTY, JJ.

Reference —17 A 77 F

(6) *Dower*—*Interest*—*Liability of widow in possession to account for profits*

Held by the Full Bench that a Mahomedan widow, who has been put in possession by her husband of his estate in lieu of her dower debt, is liable, when called upon by her husband's heirs other than herself, to account for rents and profits received by her during the time of her possession, and is entitled to claim a reasonable interest upon her dower debt.

The liability of the heirs of the husband not being personal, the heir, who sues the widow for possession of his share, is only liable to pay the proportionate part of the dower debt.

Mahomedan Law—(Continued).**—4.—Dower—(Concluded).**

Per Karamat Husain, J.—The fact that dower debt owes its origin to a peculiarity of the Mahomedan Law of marriage, and is not the result of advancing money, can be no reason to divest it of the characteristic of a debt and to put upon it the limitations imposed by the Hanafi Law on Usury. **Hamira Bibi v. Zubeda Bibi**, 7 A.L.J. 1025 (F.B.) = 7 Ind. Cas. 497.

STANLEY, C.J., BANERJI and KARAMAT HUSAIN, JJ.

—5.—(Gift).

- (1) *Hiba-bil-avaz*, "or gift for consideration, requisites of—Consideration—Possession.

Hiba-bil-avaz or gift for consideration resembles but does not correspond exactly in all its conditions, incidents and consequences, with a sale. A sale pre-supposes some proportion between the consideration paid and the thing received; in *hiba-bil-avaz* the consideration is utterly inadequate.

To complete and perfect *hiba-bil-avaz* or gift for consideration, actual delivery of seisin is not in any case necessary, but actual delivery and receipt of the consideration, however small, is essential.

To validate *hiba bil-avaz* or gift for consideration in which possession is not actually given, the Court must be satisfied that the donor intended *in presenti* to divest himself wholly of the possession of the property.

If it is not proved to the complete satisfaction of the Court that it was the donor's intention, at the time of making the *hiba-bil-avaz*, to part there and thence, once and for all, if the donee wished, with the property, then the Court would refuse to accept any specious form of expression in a document. It would look below the words to the intention and meaning of the transaction; and in doing so it would have to be guided chiefly by the subsequent conduct of the parties. **Moosa Adam Patel v. Ismail Moosa**, 12 Bom. L.R. 169 = 5 Ind. Cas. 946.

BEAMAN, J.

- (2) *Power to revoke reserved in the instrument creating the gift—Gift to take effect after the death of the donor—Trust.*

By deed dated 31st July, 1902, E gave the properties therein mentioned to himself and other trustees in trust for himself for life absolutely, and, upon his death, an annuity to his widow and to his daughter, with various

Mahomedan Law—(Continued).**—5.—Gift—(Continued).**

bequests to charitable objects. On the death of the widow, her annuity was to be devoted to other charitable purposes, and, on the death of the daughter, a sum of money was to be given to her son. In the deed E had reserved power to revoke all the bounties at his pleasure, and by another deed he revoked in 1908 the first deed, and his co-trustees re-conveyed to him all the settled properties. He then executed a mortgage of the property comprised in the first deed. He died and receivers were appointed to administer his estate. His daughter brought a suit, contending that the gift contained in the first deed was perfected as he had opened an account of the rents and profits in the name of the trust created by him, and therefore became irrevocable so far as she and her son were concerned, they being within the prohibited degrees of relationship.

Held, that the gift was illegal and invalid.

Gift to private persons may be bestowed in the same deed which creates charitable trusts.

A gift which is only to take effect after the death of the donor, and during his lifetime is expressly declared to be revocable by him, cannot be a valid gift under the Mahomedan Law.

Quere.—Whether private trusts were known to Mahomedan Law. **Jainabai v. R. D. Sethna**, 12 Bom. L.R. 341 = 34 B. 604 = 6 Ind. Cas. 513.

BEAMAN, J.

- (3) *Mahomedan Law—Gift by owner while ousted by a trespasser, validity of—Actual or constructive possession sufficient to support gift—Possession, delivery of—Presumption of possession in favour of title.*

Held, that the presumption of possession in favour of the person who has the title arises only when there is doubt as to the party with whom possession lies.

In the case of a gift by a Mahomedan, it is not necessary to give actual or *khas* possession of property transferred by gift, but the gift can be supported if there is delivery of either actual or constructive possession.

Where the owner of the property is ousted by a trespasser, he has no possession at all, and therefore a gift made by him is invalid (a). **Muhammad Idris Khan v. Iftikhar Ahmad**, 19 O.C. 347.

LINDSAY, J.

References :—(a) 15 Cal. 684; 28 Bom. 682.

Mahomedan Law—(Continued).**—5.—Gift—(Continued).****(5) Muhammadan Law—Mortgage—Gift of equity of redemption—Validity—Foreclosure—Necessity of notice to donee**

Under the Muhammadan law, the gift, by a mortgagor of immoveable property, of the equity of redemption, is valid, places the donee in the shoes of the donor, and necessitates notice on the donee of foreclosure although the donor is still alive **Harnam Singh v. Sajawal**, 86 P R 1910 (Civil)

REID C J and SCOTT SMITH J

References —(a) 6 B C 50, 23 B 682 dis 45 P R 1906, 10 C 412 35 C 1 (P C) 11 A 1, 11 A 460 (P C), 15 I A 81 (P C) 13 B 156, 23 M 70 12 W R 498, 23 W R. 208 ref to

(5) Muhammadan Law—Gift of immoveable property—Written and registered document not required—Transfer of Property Act (II of 1882), Ss 123 124—Musha doctrine of applicability of—Not applicable to share of zemindari co shares in any gift in favour of co share—Delivery of possession—Joint gift to adult and minor—Gift by parent to child—Possession

Under the Muhammadan Law a gift of immoveable property can be made verbally without recourse to a written and registered document

The doctrine of *musha* is applicable only to small plots of lands and houses and does not apply to shares in an unpartitioned *emindari* (a)

The doctrine is wholly undepicted to a progressive state of society and ought to be confined within strict rules (b)

Where a property is held by several co shares any one of them may give his share to any one of the other co shares without the formality of a delivery of possession, and such a gift would not be open to the objection of *musha* (c)

A declaration by the donor in the deed of gift that possession has been given binds his heirs (d)

There is no inherent illegality in a joint gift to an adult and a minor

In the case of a gift made by one of the parents of a minor child in favour of that child, it is not necessary that the formality of a formal delivery of possession should be resorted to, inasmuch as the parent is the *de facto* guardian

Mahomedan Law—(Continued).**—5 —Gift—(Concluded)**

of the minor. **Jahedunnessa Bibi v. Najibul Islam**, 8 Ind. Cas 38

MOOKERJEE and SHARF UD-DIN, JJ

References —(a) 2 I A 87, 15 B.L.R. 67; 23 W R 208, *Rel* (b) 11 A 460, 16 I.A. 205, *Rel.* (c) 15 C 684, 15 I A 81, *F.* (d) 16 I.A. 205, 11 A 460, *I*

(6) Gift to wife by husband—Delivery of possession whether necessary See **MAHOMEDAN LAW (WILL)** No 28 Ind Cas. 431

—6 —(Guardianship).

(1) *Guardian—Infant daughter—Mother married a stranger after first husband's death—Paternal uncle—Full sister—Guardians and Wards Act (VII of 1890), S 17—Fitness of person to be appointed guardian—Welfare of minor considered from stand point of his religion.*

A Mahomedan mother, who, after the death of her first husband has married a stranger, that is to say not related to her minor daughter by her first husband within the prohibited degree is not entitled to be appointed as the guardian of the person of the minor

The minor's full sister, who is of age and able to take charge of her is entitled to be appointed as the guardian of her person in preference to her paternal uncle.

The paternal uncle is not entitled as a matter of right to be appointed guardian of the property of the minor nor is the mother entitled to put forward such a claim (a)

The Court may therefore appoint a suitable person as guardian of the property and the welfare of the minor which is the main consideration must be considered from the stand point of the minor's race and religion (b) **Yakub Sheikh v Nafujan Bibi**, 5 Ind Cas 571—11 C L J 632

• MOOKERJEE and THURON JJ

References —(a) 14 A 373 29 A 10, A.W N (1906) 256 5 A 324 20 B 199, *F* (b) 13 W R 451, *F*

(2) *Mahomedan Law—Agreement not to divide spes successionis—Validity—Powers of guardian*

An agreement not to divide a *spes successionis* is not binding upon the minors

The powers of a Mahomedan guardian in respect of immoveable property are very

Mahomedan Law—(Continued).**—6.—Guardianship—(Concluded).**

restricted. Urgent necessity or clear benefit to the ward must be shown. **Thattoli Kothilan Allamma v. C.K. Kunhammad**, 20 M.L.J. 946.

WALLIS and KRISHNASWAMI IYER, JJ.

References :— 3 B.L.R.A.C. 423; 17 W.R. 289; 11 C. 417; 20 B. 116; 16 C. 627, R.

(3) Minor girl—Right to appoint guardian—Father and maternal grandmother—Preference. See ACT VIII OF 1900 (GUARDIANS AND WARD), No. 3, 66 P.W.R. 1910.

—7.—(Inheritance).

(1) *Mahomedan Law—Limitation—Bulm-quishment—Estoppel—Onus probandi—Custom excluding daughters from succession, effect of.*

A Mahomedan died possessed of property, which passed to his mother, and, after her death, to his two widows in equal shares. On the death of the senior widow, the junior widow took possession of the whole estate and retained it till her death. On her death, mutation of names was made in favour of three sons of a brother in respect of a 12 anna share, and in respect of the remaining 4 annas in favour of a son of another brother of the senior widow.

Held, in a suit brought nine years after the death of the senior widow, by a sister of the senior widow, against her and four nephews and others, to recover her share of the estate, including in that estate a share of the estate said to be inherited by her brother from the senior widow, the period of limitation began to run, at soonest, from the death of the junior widow, and not from any earlier period, and that the suit was not barred by limitation.

Held, also, that it lay upon those (the nephews), who alleged that the plaintiff had relinquished her claim or was estopped from pressing it, to establish their case, and that the lower appellate Court was right in holding that they failed to do so where the two causes of action on which the present suit was based were entirely different from each other and from the causes of action on which the plaintiff's previous suits were based.

Where daughters of a deceased Mahomedan were excluded from inheritance by custom, the daughters should be treated as non-existent, and the exclusion of daughters should operate for the benefit of other persons, who became heirs in default of daughters. **Muhammad**

Mahomedan Law—(Continued).**—7.—Inheritance—(Concluded).**

Kamil v. Mussamat Imtias Fatma, 10 C.L.J. 297 (P.C.) = 11 Bom. L.R. 1210 = 19 M. L.J. 697 = 18 O.C. 188 = 14 C.W.N. 59 = 4 Ind. Cas. 457 = 81 A. 557.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1-a) *Personal law governing matters of succession—Special custom at variance with personal law—Onus of proof—Quraishis of Ferozepore—Special custom allowing widowed daughter-in-law to succeed in presence of near collaterals.*

In matters of succession, the parties are governed by their personal law, unless it is shown they are governed by a special custom at variance with their personal law. The onus of proving such a special family custom, in modification of the personal law in regard to right of succession to the property, lies on the party who sets up such a custom.

Where the parties were Quraishis of the city of Ferozepore, and therefore governed by Muhammadan Law, but a special family custom allowing a widowed daughter-in-law to succeed to the property of her father-in-law, in the presence of a near male collateral of the latter, was not established, *held*, a widowed daughter-in-law would not be entitled to succeed to the property left by her father-in-law, to the exclusion of a male collateral. **Mussamat Aisha Bibi v. Aziz-ud-din**, 50 P.R. 1910 = 71 P.W.R. 1910 = 6 Ind. Cas. 946.

SHAH DIN and CHEVIS, JJ.

(2) *Succession—Persons governed by two systems of law—Descent how regulated.* See INHERITANCE, No. 1, 19 M.L.J. 736.

(3) See JUSTICE OF PUNJAB—(INHERITANCE AND SUCCESSION), No. 3, 120 P.W. R. 1909

—8.—(Marriage)

(1) *Marriage—Living as husband and wife for a long time.*

Held, that, among Muhammadans, a marriage may be proved presumptively by the statement of the parties or their general conduct towards each other, although there is no proof of duly observing the formalities of the Muhammadan Law. So if it can be shown that the alleged husband did, during his life, in distinct terms, assert a certain woman to be his wife, that the

Mahomedan Law—(Continued).**—8.—Marriage—(Continued).**

woman lived with him for a long time as though she was his wife, the Court is fully justified in inferring that they were duly married. *Mussamat Natho v. Bhag Singh*, 54 P.W.R. 1910 = 6 Ind. Cas. 661.

RATTIGAN, J.

Reference:—C. 16 P.R. 1899, F.

(3) *Mahomedan Law—Apostasy—Effect on marriage—Suit for restitution of conjugal rights—Maintainability.*

Under the Mahomedan Law, a wife's conversion from Islam to Christianity effects a complete solution of marriage with her Mahomedan husband. Accordingly if either party to the marriage contract becomes a Christian, a suit for restitution of conjugal right cannot be maintained (a). *Amir Beg v. Saman*, 7 A.L.J. 956 = 7 Ind. Cas. 342

STANLEY, C.J., and BANERJI, J.

References:—(a) 2 N.W.P.H.C.R., 370, 41 P.R. 309, F.

(3) *Hanafi School—Marriage—Divorce during minority of husband—Whether by guardian or by minor—Ineffectual marriage after the divorce to second husband void—Issues—Illegitimacy—Ignorantia juris non excusat—Presumption—Batil and fasid, distinction between—Conflict of opinion between Abu Hanifa and his two disciples—Views of disciples to be preferred—Another's wife—Subject of marriage*

Neither a minor nor his guardian can validly divorce the minor's wife during his minority.

Under the Hanafi law, the ignorance of law is as much excusable as the ignorance of fact, yet, as a rule, the presumption is that a Hanafi brought up in a Muhammadan country knows the laws that govern him.

Under the Hanafi law (a), another's wife is not "a fitting subject of marriage."

(b) A marriage with another's wife, with the knowledge of the fact that she is the wife of another, is void.

(c) The issue of a marriage with another's wife, with the knowledge that she is another's wife, is illegitimate.

R was married to Z, a minor. During Z's minority R was divorced either by Z or by his guardian. After the divorce, R was married to H who knew that she was formerly the wife of

Mahomedan Law—(Continued).**—8.—Marriage—(Continued).**

Z. As a result of the union between R and H, two children P and Q were born; held that P and Q were not the legitimate children of H. (a).

According to Abu Hanifa, as soon as a marriage takes place, sexual intercourse with the woman ceases to be whoredom, in spite of the fact that the man knows the woman to be certainly prohibited. The issues of such marriage are not illegitimate. According to his two disciples, a marriage with a prohibited woman does not take sexual intercourse with her out of the category of whoredom, and is not therefore, sufficient to legitimize its issues.

While there is difference of opinion between Abu Hanifa and his two disciples, the view of the two disciples is to be preferred.

The term *batil* (void) denotes that no legal results flow from it, while the term *fasid* (invalid) denotes that the transaction is not absolutely devoid of legal effects.

In order to determine the legal nature of a marriage contract, one has to look to the time at which it was entered into and not to any subsequent time. *Ata Muhammad Chaudhry v. Saipul Bibi*, 7 Ind. Cas. 820.

KARAWAI LUSAIN, J.

References: (a) (1901) A.C. 195, 70 L.J.P.C. 76, 85 L.T. 289, 50 W.R. 139, 65 J.P. 708; 17 T.L.R. 749, 30 L.A. 114, 5 Bom. L.R. 421, 30 C. 539, 7 C.W.N. 441 (P.C.), 15 A. 396; 23 C. 130, 6 P.R. 1908, R.

—9.—(Pre-emption).

- (1) *Talab-i-istishad—Actual words in vernacular to be taken down—Declaration that right had been asserted when just pre-emptor heard of sale—Tala-bi-mowasibat—Omission fatal.*

In a case of pre-emption, the question depending entirely on the form of words that is to be used at the *talab-i-istishad*, the exact words used by the witnesses should be taken down in the vernacular.

The pre-emptor, in every case, when he makes the demand of *talab-i-istishad*, should make a declaration before witnesses that he asserted his right when he first heard of the sale. *Dookhi Modi v. Debi Prosad*, 6 Ind. Cas. 187.

HOLMWOOD and CHITTY, JJ.

References:—(a) 17 C. 543 (F.B.); 2 Ind. Cas. 207, F.

Mahomedan Law—(Continued).**—9.—Pre-emption—(Continued).**

(2) *Partner—Partition during the pendency of the suit for pre-emption, effect of—Partner at the date of institution but not so at the date of decree—No right of pre-emption*

The plaintiff basing his rights on the Mubammadan Law of pre-emption sued for pre-emption in respect of the sale of a share in his own *mahal*. Pending the suit the village was partitioned and before a decree could be passed in the suit, the share sold constituted a separate *mahal* from that of the plaintiff. Held that as the plaintiff ceased to be a partner of the vendor at the date of the decree, he had no right to pre-empt. **Tafazul Husain v Than Singh** 6 Ind Cas 126=7 A L J 715

RICHARDS and LUDHALL JJ

(3) *Pre-emption—Shafi khalit—Shafi uar—Perfect partition—Vicinage—Lar je estates—Tenants in common—Chupul*

A *Shafi khalit* has a right of pre-emption in a village of large estates inasmuch as he is a partner in the thing sold (i)

In a suit for pre-emption brought on the ground that the plaintiff was *shafi khalit* the evidence showed that the parties had divided the property including the soil of roadways and water course, leaving all public and private rights and rights of tenants in respect to irrigation as before. Held that the plaintiff was not *shafi khalit* of the vendor.

Held, further, that the fact that a tenant, after partition between the landlords, irrigates his field in one *mahal* from his well situated in another *mahal* does not constitute the plaintiff a *shafi khalit* of the vendor nor does the fact that the plaintiff and the vendor are tenants in common of the *chupul* make him a *shafi khalit*. A *chupul* is but a house and may be adopted to any other use to which a house may be put, and the sale of a *remindari* does not include that of a *chaupal*, because the ownership of the latter is distinct and separate from that of the former (b)

When a *mahal* has been perfectly partitioned into two parts, the two new *mahals* stand to each other in the same relation as two separate villages, and no right of pre-emption, under the Mahomedan Law, subsists in favour of the owner of one of the new *mahals*, in respect to the other new *mahal* or any portion of it on

Mahomedan Law—(Continued).**—9.—Pre-emption—(Concluded).**

the ground of vicinage alone. **Munna Lal v Hajira Jan**, 7 A.L.J. 879=7 Ind. Cas. 404.

TUDHALL and CHAMIER, JJ

References —(a) 6 B L R 41, 6 N.W.P., H C R 377, F (b) 15 All 104, referred to.

(4) Suit based on *Wajib ul ariz*—Whether the incidents of Mahomedan Law could be imported into the *Wajib ul ariz*. See PRE-EMPTION, No 24, 7 A.L.J 660

—10—(Trusts)

Validity of private trusts under Mahomedan Law. See MAHOMEDAN LAW (GHT), No. 2, 12 Bom L.R. 341

—11—(Wakf)

(1) *Mutwali in health not to appoint successor in his life time—Limitation Act (XV of 1877) Sch II, Arts 102 124*

The Court in selecting a person for the office of trustee will in the exercise of its judicial discretion have regard to the wishes of the author of the trust expressed in, or plainly deduced from the instrument and if he has declared a particular person not fit to be appointed a trustee the Court will refrain from appointing him, for the Court will not disregard the directions of the founder except for the manifest benefit of the endowment (a)

A claim to office and to property appurtenant thereto may be barred by limitation. If the office is not hereditary, Art 120 of the Limitation Act, 1877 is applicable if the office is hereditary, Art 124 governs the matter (b)

While a Superintendent of a *wakf* may at death commit his office to another he cannot, while alive, and in good health, lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust, and if he, in his life-time and in health, appoint another in his place, the appointment will not be lawful and valid.

Therefore, where a *mutwali* gave up his office and appointed another who remained in possession for more than six years, and the plaintiff, who, as the representative of the founder, was entitled to claim the office, had full knowledge of the circumstance. Held, that his claim was barred by limitation (c).

And time will run, not from the death of the *Mutwali* but from the unlawful appointment of the successor. **Nawab Khajah Salimulla**

Mahomedan Law—(Continued).**—11.—Wakf—(Continued).**

Bahadur v. Abdul Khayer Mohammad Mustafa, 8 Ind. Cas. 419=11 C.L.J. 304.

MOOKERJEE and VINCENT, JJ.

References :—(a) L.R. 1 Ch. App. 485; 14 L. T. 685, *F.* (b) 14 M. 158; 21 M. 278; 23 M. 271; 27 M. 192; *affirmed by P.C.*; 33 I.A. 189; 29 M. 283; 10 C.W.N. 825; 8 Bom. L. R. 498; 16 M.L.J. 265; 4 C.L.J. 189; 3 A.L. J. 707; 6 C.L.J. 621, *F.* (c) 10 I.A. 90; 6 A. 1; 19 C. 776; 26 M. 113, *R.*

(2) *Wakf property, transferability of—Under what circumstances, transfer valid—Permission of Cadi—Retrospective approval of Sub-Judge sufficient—Corpus inalienable but income may be pledged—Interest, rate of Receiver.*

Wakf property cannot ordinarily be sold or mortgaged; but if necessity is established and the permission of the Cadi is obtained, such alienation is valid.

Under the present system of administration, a retrospective approval, by a Subordinate Judge, of the transaction, by which *wakf* property is mortgaged, provided he has jurisdiction over the trust property, is effectual for the purpose of making it valid.

Where the co-sharers of a certain *wakf* property, commenced proceedings for partition and the estate was partitioned, and the Government took statutory steps for realisation of the proportionate share of the costs which fell upon the *wakf* property, and the *mutvati* mortgaged it, as he found it impossible to satisfy the demand from the current income of the properties, to avert the impending sale, and the Sub-Judge found that the mortgage was proper:

Held, that, there being no question as to the absolute necessity for the mortgage and of the undoubted benefit which has been conferred on the endowment by the transaction, the mortgage was valid.

But the income alone and not the *corpus* can be pledged (a).

The High Court reduced the interest from 12 per cent. per annum, with quarterly rests as stipulated for in the mortgage bond to 9 per cent. per annum, simple interest, and appointed a Receiver to realise the amount. **Nemai Chand Adhya v. Mir Lolam Hossain**, 3 Ind. Cas. 358=11 C.L.J. 317.

MOOKERJEE and VINCENT, JJ.

References :—(a) 5 B. 393; 6 B. 546; 27 M. 465 at p. 472. *F.*

Mahomedan Law—(Continued).**—11.—Wakf—(Continued).**

(3) *Right under money decree if can be made the subject of wakf.*

According to Muhammadan law, a right to recover a sum of money under a decree cannot be made the subject of *wakf*. **Kadir Ibrahim Rowther v. Mahomed Rahamdulla Rowther**, 6 M.L.T. 307=33 M. 118=4 Ind. Cas. 136.

BENSON, O.C.J., and MUNRO, J.

References :—10 C.W.N. 449 (494); 9 Bom. L.R. 1337 and 18 M. 201 (209), *F.*; 24 A. 190; 31 B. 250 and 2 C.L.J. 218, *Diss.*

(4) *Distinction between wakf and sadaquah—Fatehas, performance of—Whether valid as object of wakf—Deed conferring benefit on heirs of donors and on 'poor' and also providing for performance of fatehas—Validity as wakf—Donor mentioning several objects of charity—Failure of some—Effect—General charitable intention—Form of expression.*

The only important distinction between a *sadaquah* and a *wakf* is that, by *sadaquah* not only the beneficial interest but also the legal estate is passed to the particular charity to be held by the trustees appointed by the donor.

In a *wakf* the legal estate or 'ownership' is not vested in the trustee or *mutwalli*, but is so to speak, transferred to God. The trustees or the beneficiaries of a *wakf*, therefore, are not authorised to alienate the *wakf* property, unless specially authorised by the settlor or with the sanction of the Court in cases of necessity; and, except in very special circumstances, the corpus of the dedicated property must be left intact, and only the income can be devoted to the designated charitable purpose. On the other hand, when property is given by way of *sadaquah* to some charitable object, the corpus itself or its equivalent if the trustees find it proper or necessary to sell the property given in *sadaquah* and to convert it into some other form of property and not merely the income, is to be devoted to that object.

The performance of *fatehas*, which, so far as it involves the expenditure of money, consists in feeding the poor, is a valid object of *wakf* (a).

The question involved in the suit was whether the disposition of property contained in a document (Exh. I) was valid. Under the document, from 2 shares out of the 3 shares of the income arising out of the property, a salary of Rs. 10-

Mahomedan Law—(Continued).**—11.—Wakf—(Continued).**

per mensem was provided for the trustees, and as regards the remainder of the two shares, the direction to the trustees was as follows—"You should perform annually without failure the customary Patteh (*i.e.* *fateha*), Khuttum, etc., for our ancestors and for us after our decease. You should annually give, in the month of Ramzan, to mesikins or the poor, food, raiment, sadaka, jagath, etc. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence, from generation to generation inclusive of you." The 3rd share of the income, after paying the expenses, is to be utilized in purchasing other immoveable property, which is to be added to the said charity properties and dealt with according to the above terms," and if, in any year, no immoveable property is bought with the one-third of the net income the amount is to be added to the two thirds and divided according to the above particulars.

Held, that, in the above case the benefaction intended for the heirs of the donors would fail, and that the *wakf* is valid, and the income of the property is to be devoted for the benefit of the objects mentioned in it other than the 'heirs' of the deceased.

Held, also, that, as the gift under it should be upheld as a valid *wakf*, the provision for accumulation, which would thus ensure solely for the benefit of charitable purposes, cannot be said to offend against the law of perpetuities.

It is not an objection to the validity of a *wakf* that some provision is made in the deed of *wakf* for the benefit of the donor's family, provided such provisions are not inconsistent with the gift being substantially one for charity and this question has to be decided in each case with reference to the terms of the particular deed. If the provisions for the donor's children and descendants in a deed purporting to be by way of *wakf* exhaust the bulk of the income, and are to last for an unlimited period of time, such a *wakf* would be undoubtedly illusory (b).

Where the donor mentions several purposes as objects of his bounty, and one of those purposes fails, the rule is that, if, in such a case, a general intention can be gathered of dedicating the property to charity, the entire property is to be devoted to the lawful objects of the *wakf*,

Mahomedan Law—(Continued).**—11.—Wakf—(Continued).**

if any, mentioned in the deed, and, in the absence of any such object being specified, to the poor, whether a definite portion of the income has been set apart for the object which fails or not. The expression of a general charitable intention need not be in any particular form of words. *Muthu Kana Ana, Ramanathan Chettiar v. Yada Levvai Marakayar*, 20 M. L. J. 254 = 6 Ind. Cas. 1.

BENSON and ABDUR RAHIM, JJ.

References --(a) 18 M. 201, *E. Pl. & Com. on*, (b) 17 C. 499, 22 C. 619, R.

(5) *Muhammadan Law (Hanafi)—Wakf—Dispute about succession to Tawkiatship cannot be referred to arbitration—Award—Civil Procedure Code (Act of 1908), S. 92, Sch. II, S. 10—Application to file award—Jurisdiction of Court—Public and private charity—Prerogative of the Crown.*

A *wakf* of property by a Muhammadan to defray the expenses of the poor, the *fakirs*, the orphans, the needy and the indigent, and to defray the expenses of other good deeds, creates a trust for public purposes of a charitable nature (a).

The term charity under the *Hanafi* law has a more general import than under the English Law (b).

It is the prerogative of the Crown to protect the interests of infants, lunatics and charities (c).

The appointment of a *mutual* to *wakf* property, in the absence of anything in the deed of *wakf* rests with the *qazi* (d).

A dispute regarding succession to the trusteeship of a public charity cannot be referred to arbitration. Therefore, a dispute as to the right to succeed to the Tawkiat (trusteeship) of a *wakf* cannot be settled by reference to arbitration. If such reference is made and an award is given, the Court has no jurisdiction, under S. 20, Schedule II of the Code of 1908, to entertain an application to file such award (e).

It is not a universal proposition that, whenever a suit can be instituted in a Civil Court, the subject-matter of that suit can also be referred to arbitration. An arbitrator is a tribunal chosen by the consent of parties, and, unless the law allows them to choose such a tribunal in respect of certain classes of cases,

Mahomedan Law—(Continued).**—11.—Wakf—(Continued).**

they have no power to do so. **Nawab Moham-mad Ibrahim Khan v. Ahmad Said Khan**, 6 Ind. Cas. 219—7 A.L.J. 761.

KNOX and KARAMAT HUSAIN, JJ.

References :—(a) A.C. 581; 61 L.J.Q.B. 265; 69 L.T. 621; 55 J.P. 805, *R.* (b) 19 C. 412, *R.* (c) 4 M.I.A. 190, *R.* (d) 1 S.D.A. 17; 9 B.H.C. R. 19, *R.* (e) 11 A. 18; 11 C. 38; 26 M. 450; 88 B. 509; 11 Bom. L.R. 85; 5 M.L.T. 801; 2 Ind. Cas. 701, *R.*; 33 C. 789; 10 C.W.N. 581, *D.*

(6) *High Court—Jurisdiction—Muhammadan Law—Application for sanction to sell wakf property—Procedure—Sanction not to be given on application—Suit to be brought.*

The High Court has no jurisdiction to make an order upon the application of a *mutwali* for sanction of the High to the sale of certain *wakf* property, there being no statutory authority authorising such an application to be made to the Court. The Court cannot deal with this matter unless it is brought before it by means of a suit (a). *In the matter of Waqf executed by Halima Khatoon*, 7 Ind. Cas. 33.

PUGH, J.

References :—(a) 5 B. 154; 9 C.W.N. 79; 82 C. 149; 1 Ind. Cas. 512; 36 C. 21, *not F.*

(7) *Wakf—Inference from findings—No oral dedication—Acquisition of title by adverse possession.*

An oral dedication of property may be inferred from repute and from facts which lead necessarily to the inference that there was such a dedication. Where the finding of the lower Appellate Court was that there was an arrangement by which the property was put under the management of the family with a view to the application of the income in the *Us* and *Fatiha* ceremonies at the tomb of the original owner, *held* that an oral dedication could not be inferred and the property could not be said to be *wakf* property.

If the property is found to be *wakf* property no member of the family can acquire title to it by adverse possession. **Fakhr-Ud-Din Shah v. Kifayat-Ul-Lah**, 7 A.L.J. 1095.

STANLEY, C.J., and BANERJI, J.

(8) *Waqf—Delivery of seisin essential under the Shia law—Possession, actual or constructive, delivery of.*

Mahomedan Law—(Continued).**—11.—Wakf—(Concluded).**

Held, that one of the strict requirements of the Shia Law relating to *Waqf* is delivery of seisin, actual or constructive. Where a *Mutwali* (other than the dedicator himself is appointed, there must be actual delivery of possession to him; when the dedicator appoints himself *Mutwali*, there must be constructive delivery, that is to say, the dedicator being himself in possession must declare that he intends to hold thereafter as trustee and not as owner. **Thakur Ram v. Saiyed Sadik**, 13 O. C. 369.

LINDSAY, J.C.

(9) Persons entitled to use the property—Declaration of rights—Permission to sue. See SPECIFIC RELIEF ACT, No 22, 7 A.L.J. 797.

—12.—(Will).

(1) *Will—Necessity for probate—Admissibility in evidence without probate—Probate and Administration Act V of 1881, S. 4.*

There is no provision of law rendering it obligatory in the case of a Muhammadan will to take probate. After a Mahomedan will is duly proved, it must be admitted in evidence even though no probate has been obtained.

The Probate and Administration Act provides for the consequences and results that will happen if probate is taken of the will of a Mahomedan, and by force of S. 4 of the Act all the property of the testator vests in the executor. **Sakina Bibee v. Mahomed Ishak**, 37 C. 839.

PUGH, J.

References :—(a) 7 B. 266, *not F.*; 8 B. 241 *F.*; 4 C. 455; 4 C. 508; 22 C. 788; 25 C. 108; 6 B. 73, *R.*

(2) *Will by deceased—Consent of heirs on death-bed—Gift—Possession—Gift to wife by husband—Contract Act (IX of 1872), S. 253—Terms of partnership.*

The consent of the heirs of a Muhammadan testator given before his death is not sufficient to validate his Will.

Quere.—Whether the consent given, at the request of the father on the death-bed, by his family, can be an assent voluntarily given?

Under Muhammadan Law, a gift is invalid if it is not followed by delivery of possession. But a gift to a wife by the husband is an exception to this rule.

In the absence of any evidence as to the terms and conditions obtaining in a partnership, all

Mahomedan Law—(Concluded).**—12—Will—(Concluded).**

partners are entitled to share equally in the profits of the partnership business and must contribute equally towards the losses sustained by the partnership. *Bee Jan Bee v. Fatima Beebee*, 8 Ind. Cas. 431

WALLIS, J.

(3) Operation of gift made during death illness. See CIV. PRO. CODE, (1882) No. 165, 7 A.L.J. 1176.

Maintenance.

(1) *Impartible zamindari—Right of junior members to maintenance—Custom in Southern India*

The junior members of a *Raj* or impartible estate are entitled to claim maintenance out of the estate.

Such right is in accordance with the usage prevailing in Southern India. *Chettikulam Prasanna Venkatachalla Reddiar v. Chettikulam Kumara Venkatachalla Reddiar*, 4 Ind. Cas. 902=7 M.L.T. 31.

WALLIS and SANKARAN NAIR JJ.

References.—24 M. 147 (157) and 25 M. 508 R.

(2) *Suit for maintenance—Plaint—Alternative prayers—Cause of action*

In a suit for the recovery of Rs. 3,000 alleged to be due to plaintiff for her maintenance under an agreement executed by first defendant, second defendant was impleaded, as he stood surety for payment of that amount by first defendant.

The plaint set forth that, in pursuance of agreement, the first defendant deposited Rs. 3,000 with second defendant for payment to plaintiff her coming of age, and the plaintiff's father, as plaintiff's guardian, executed a release in favour of first defendant absolving him from liability. Plaintiff repudiated this transaction as unfair and claimed Rs. 3,000 from both first and second defendants.

The District Judge dismissed the suit as against first defendant, holding that there was no cause of action against him.

Held, that the relief for suitable maintenance as against first defendant and an alternative claim against first and second defendants, on the basis of the agreement, disclosed a cause of action against both defendants which should have been enquired into. *Pendala Mahalakshmi alias Yenamma v. Pendala Narasimham*, 4 Ind. Cas. 35=7 M.L.T. 113.

WALLIS and MILLER, JJ.

References.—81 M. 252; 18 M.L.J. 233, R.

Maintenance—(Continued).

(3) *Suit to establish right to—When not barred under Art. 131 Limitation Act (1877)—Non-compliance, whether amounts to repudiation of claim—Debtor and creditor—Unregistered document which is compulsorily registrable—How far admissible in evidence—S. 49, Registration Act*

A suit to establish plaintiff's right to receive maintenance and to recover the arrears of maintenance is not barred under Art. 131 of the Limitation Act, if there has been no express repudiation of the claim (a).

The general rule is that mere non-compliance is not equivalent to a repudiation of the claim.

A debtor, who leaves the demands of his creditors unnoticed, does not thereby, as a rule, intend to deny the right of his creditors to the money demanded. Under S. 49 of the Registration Act an unregistered document, which is compulsorily registrable, can be used to prove a transaction which affects land, so far as the transaction does not affect land. If there is a part of the transaction, separable from other parts which does not affect land, that part can be proved with the aid of the unregistered instrument (b). *Gottimukkala Bangarayya v. Jogi Jagannatha Raju* 7 M.L.T. 278=5 Ind. Cas. 615.

WHITE, J. and MILLER, J.

References.—(a) 15 B. 195, R. (b) 9 C. 520. 17 M.L.J. 370, 17 M. 456, and 17 M.L.J. 218 R. 30 M. 231, R.

(4) *Decree for maintenance—Assignment—Validity—Assignee if may execute for interest as they fall due?*

Where a claim has been merged in an actual judgment, the right under the judgment is assignable whether the original cause of action be alienable or not.

An assignee of a decree for maintenance can therefore execute the decree in the same manner as the assignor.

The assignment of a decree for maintenance is not opposed to public policy because it is likely to be a speculative transaction.

It cannot be laid down generally that a maintenance grant is under no circumstances alienable. *Asad Ali Mokata v. Haldeg Ali*, 14 C.W.N. 918=17 C.L.J. 190=6 Ind. Cas. 826.

MOOKERJEE and CAENDUFF, JJ.

(5) *Maintenance, right to, when attachable—Civ. Pro. Code (Act XIV of 1882), S. 366—Gift, deed of.*

Maintenance—(Continued).

When a question arises whether a right to maintenance is assignable or not, the true test to be applied is, whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee, and consequently inalienable, or whether his intention was to create an interest in property, either a fund or an estate, which should be treated as alienable property.

When a claim has been merged in an actual judgment, ordinarily the right to the judgment is assignable and the nature of the chose in action is immaterial, but this rule is not of universal application. If the right conferred upon the decree holder is essentially of a personal nature, it cannot be transferred by way of alienation or transmitted by inheritance.

Where a father, feeling his duty to make adequate provision for his daughter whom he had given in marriage more from the point of view of social rank than worldly prosperity, executed a deed of gift in her favour which recited that it was the duty of the grantor to bear the burden of maintaining his daughter, the grantee and her children that a similar liability rested upon the son of the grantor according to the family custom that, to make some provision for the maintenance of the grantee with her children, the grantor gave her an annual sum of Rs. 600, which was to be paid out of the income of two specified properties owned by the grantor, and a lump sum of Rs. 1,000 for the acquisition of a suitable site and Rs. 5,000 for the construction of a house, which two sums were made payable out of the estate of the donor, and that the lump sum granted as also the annual payment, were not to be paid till, by reason of disagreement between the grantee and the members of the family of the grantor, the former found it necessary to become separate in mess from them, and that in due course the grantee received from the holders of the estate the sum of Rs. 6,000 with which she purchased land and built a house it was held that her interest in the house and not her right to receive the allowance, was liable to attachment. **Tara Sundari Debi v. Saroda Charan Banerjee**, 12 C.L.J. 146 = 7 Ind. Cas. 80.

MOOKERJEE and CARNDUFF, JJ.

(6) *Maintenance grant, nature of—Death of grantee—Holding over—Suit for resumption—Limitation—Limitation Act (XV of 1877) Sch. II, Arts. 139, 140.*

Maintenance—(Continued).

The grant of lands made by a father to his younger son is a grant of a tenure for the purpose of supporting the grantee out of its profits, such tenure to be held free of rent.

Although a tenancy by sufferance would not by itself make the possession of the holder rightful so as to prevent limitation from running, yet, if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year.

A suit for the recovery of possession of lands given for maintenance, by the grantor after the death of the grantee, falls within Art. 139 of Sch. II of the Limitation Act 1877, where there are indications to show the assent of the grantor to the continuance of the tenancy in the hands of the grantee's heirs. **Ram Chandra Singh v. Raja Sri Sri Bhikambar Singh**, 6 Ind. Cas. 339 = 37 C. 674.

BRI 17 and SHARFUDDIN, JJ.

(7) *Right to—(gharjman—Son in law to be maintained in father in law's family—Implied agreement—Separate maintenance when may be decreed—Cross objection in forma pauperis—(w. Pro Code (Act V of 1906) O. VI, R. 22 Sub R. 5.*

A *gharjman* that is, a son in law to be brought up and maintained in the family of the father in law is entitled to put forward, against the estate of his father-in-law, a claim for the maintenance of himself, his wife and children on the ground that there was an implied agreement that his father-in-law would maintain him.

Ordinarily such right is enforceable only so long as the *gharjman* resides as a member of the family of his father in law, but for very special reasons the Court is entitled to make a decree for separate maintenance.

Where the *gharjman* was turned out of his father in law's house for advising his wife not to consent to a certain sale of land by his mother in law *Held*, that he was entitled to separate maintenance.

An application for leave to file cross-objections in *forma pauperis* may be received by the Court. **Gebinda Rani Das v. Radha Ballabh Das**, 7 Ind. Cas. 118.

MOOKERJEE and TEUNON JJ.

Maintenance—(Concluded).

(8) Payments on account of—Suit in Rent Court—Jurisdiction. See OUDH TALUKDAR, No. 1, 7 A.L.J. 41.

(9) Right to future—Decree for—, whether money decree—Whether can be attached in execution of decree—Proper procedure in execution. See CIV PRO CODE (1882), No. 130, 20 M.L.J. 97

(10) Case of inheritance—Question of, when can be raised See MAHANT, No. 1 41 P W R 1910.

(11) Transfer of right to future—Legality. See TRANSFER OF PROPERTY ACT, No 5, 6 Ind. Cas. 439.

(12) Moplah woman deserting her family house—(claim for separate maintenance See MALABAR LAW, No. 9, 7 Ind Cas. 320

(13) Rate of—Interference by High Court See MALABAR LAW, No 10 8 M L T 443

Majority

Act of the—How far binding on the minority See TRUST No 3 8 M L T 208

Majority Act

See ACT IX OF 1875

Malabar Compensation for Tenants Improvements Act

(1) See ACT I OF 1897 (MADRAS)

(2) See ACT I OF 1900 (MADRAS)

Malabar Law.

(1) *Constitution of a tarwad into a minor tarwad—Acquisition by Anandaram who became karnavan of the branch tarwad—Absence of circumstances to show self acquisition—Presumption*

When there is a gift of property to some of the members of a tarwad by the karnavan and separate enjoyment by the tarwashi of such property for a number of years and separate living by the members of the branch to which the property was gifted, the presumption is that the branch constituted a tarwashi tarwad

Property acquired by the manager of such a branch tarwad, who is only an *anundaram* of the whole tarwad, should be deemed to be the property of the branch, when there is no evidence as to the source out of which the property was acquired and the manager is not able to prove a separate title to it, and was, at the time of acquisition, in possession of the funds of the branch, but none of his own (b). *Mari*

Malabar Law—(Continued).

Yeellil Chathu Nair v. Mari Yeellil Melamadarial Sekharam Nair, 5 Ind. Cas. 143-49 M.L.J. 86=7 M.L.T. 392.

WHITE, C.J., and KRISHNASWAMI Aiyar J.

References —(a) 29 M. 322, D. (b) 8 M. 141 (145) S A. No 970 of 1889 and S.A No. 1168 of 1888, R.

(2) *Malabar law—Hindu family—Tarwad—Karnavan's authority to engage tutor to teach English to the members of the family—Contract binding on the succeeding Karnavan—Family assets liable to pay tutor's wages.*

In a well-to-do Hindu family, a Karnavan, who engages a tutor to teach English to the members of the family, acts within his authority his contract is binding upon his successors and the wages of the tutor are payable out of the assets of the family *Neelakanta Thuruvannu v K S Ananthanarayana Aiyar*, 4 Ind Cas 724—19 M.L.J. 590.

SUBRAMANIAM Aiyar, J.

(3) *Gift to a female member and her children—Contract by mother alone to sell the gifted property without her children's consent—Right to claim specific performance—Nature and incidents of the gift*

First and second defendants who were brother and sister, governed by Malabar law, agreed to sell certain property, which had gifted to them, to the plaintiff. First defendant signed the sale deed, but second defendant refused to sign it. The plaintiff had the document compulsorily registered as against first defendant.

As both first and second defendants subsequently executed a registered deed of the same property to the third defendant, plaintiff brought this suit to enforce the contract for sale in his favour. It having been found that the gift was to second defendant and her children.

Held, (1) that second defendant and her children took the property with the incidents of tarwad property and that the property was not merely impartible, but the donees, though not forming a tarwad with a Karnavan of its own, had the same interests in the property as they would have had if they had formed a separate tarwad and that consequently, every child of the female donee obtained an interest in it at his or her birth (a).

(2) that the first and second defendants had no power to sell the property to plaintiff, and

Malabar Law—(Continued).

plaintiff could not call for specific performance of their agreement to do so. *Katankandi Kona alias Koyamotti v. Thamburan Kandj Sivasankaran*, 4 Ind. Cam. 90±6 M L T. 373—20 M.L.J. 184

WALLIS and MILLER, JJ.

References —(a) 16 M. 201, 29 M 322, R

(4) *Malabar Law—Acquisition of property by a woman and her son—Effect—Whether operates as constitution of separate tavazhi—Rule of English Law as to joint tenancy not applicable—Co-parcenary—Interest taken by each in the property—Attachment in execution of decree obtained against one after death of the other—Effect*

Plaintiff sought to sell certain lands in execution of a decree against the first defendant as the property of his judgment debtor. The property was originally purchased in the name of N, the late Karnavan of first defendant's tarwad as benamidar, with money paid to him by P mother of first defendant. The Karnavan and the junior members assigned their interest to P and first defendant. P is dead. The defendants contend that first defendant has no saleable interest in the property.

Held that the questions, whether the first defendant has an alienable interest and whether he took by survivorship his mother's interest in the property, have to be decided according to the Marumakkattayam Law, not according to the principle of joint tenancy known to English Law (a)

Co-parcenary exists among the members of a Malabar Tarwad.

Held, that property was not purchased for the tarwad.

If the property, for any reason belonged exclusively to P, and the name of the first defendant was inserted in the deed, to enable him to represent the estate before the officials then the property lapses, according to the decisions not to the tavazhi (i.e., her descendants) but to the tarwad who takes it as her heir, subject to the liability of discharging her debts (b)

If the property was purchased for the benefit of the Tavazhi, i.e., P, her children and their descendants in the female line, then it would depend upon the constitution of the Tavazhi whether the first defendant has any saleable interest or not. If the Tavazhi forms a distinct branch from the main Tarwad with separate properties, and its own Karnavan as

Malabar Law—(Continued).

manager of its property and the guardian of the minor members, then, in a Court of Law, it forms a Tarwad though popularly called a Tavazhi, and the incidents of tarwad property will apply to it, and the plaintiff's suit must fail as the first defendant had no interest to be attached and sold (c).

But if P and her descendants or her Tavazhi have not separated themselves from the main Tarwad either by taking their share of the tarwad property or by renouncing their interest therein the mere fact that P and her descendants forming a Tavazhi have acquired property will not by itself deprive the Karnavan, of his rights or discharge him of his obligations towards them, and they will not, for that reason alone constitute themselves into a Tarwad, with its incidents of impartibility and uncontrolled management by Karnavan. This property will become the separate property of the Tavazhi or members thereof, and the interest of the first defendant as in the case of an ordinary Hindu family, will therefore be liable to be sold.

But if any member dies without his interest in the Tavazhi property being alienated during his life time then his interest lapses to the other members of the Tavazhi and cannot be sold (d)

But if the property was acquired solely for the benefit of P and first defendant, then the interest of first defendant in the property is liable to be sold.

P and the first defendant must be treated as tenants in common and first defendant does not take the property exclusively (e) *Ummanga v Appadurai Pattar* 20 M.L.J. 268=5 Ind. Cas. 671

WHITE, C.J., and SANKARAN NAIR, J.

References —(a) 11 M. 258, 23 C 670 (679), *It.* (b) 4 M. 150 R (c) 6 M H C 411, 28 M. 192 (199, 190) (d) 16 M 201, 11 M. 258, 2 I A 7 R. (e) 23 C 670, R

(5) *Karnavan—Former suit declaring possession in favour of Tarwad—Karnavan, a party—Right of Karnavan to claim possession in subsequent suit—Res judicata*

In a prior suit, certain members of a Tarwad sued to recover some properties from the members of a Tavazhi on the ground that the alienation was invalid, and a decree was passed that the plaintiffs were to get possession on behalf of the Tarwad. The plaintiff, who was

Malabar Law—(Continued).

the Karnavan of the Tarwad and who was the thirteenth defendant in the prior suit, brought the present suit, basing his claim on the former decree, and claiming possession as the only person entitled to represent the Tarwad until legally removed by the former decree holders. It was argued that his claim was *res judicata*.

Held, that the claim was not *res judicata*, as no question was raised in the former suit whether the karnavan had forfeited his right to possession and that the present suit, practically based on the right created by the former decree, cannot fail. **Chelakote Ramakurup v. Chelakote Shekharakurup**, 7 M L T 431 = 6 Ind. Cas 268

BENSON and KRISHNASWAMI AIYAR JJ

(6) *Malabar Law—Saswatam right—Document, construction of.*

In a *lanam* instrument it was stipulated that there will be no objection to the land being held by the *lanavan* or the *anandavan* as long as he or they shall live. On its being contended that this created a *saswatam* right in the *tarwad* *Held* that the words "as long as he or they shall live" are not equivalent to "as long as the *tarwad* exists" and that there was no *saswatam* right created by the document **Kolakkott Kunnambu v Kottayath Kishakke Korilokath Kerala Varma Valla Rajah Avergal** 6 Ind Cas 397

MILLER and KRISHNASWAMI AIYAR, JJ

(7) *Malabar Law and Usage—Nambudris of Malabar Self acquisitions of Nambudris, governed by Hindu and not by Marumakattayam law*

The Nambudris of Malabar are governed, as to self acquisitions by the Hindu Law as it prevails in Southern India except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of their settlement in Malabar though now obsolete, or some Marumakattayam usage. The self acquisitions of a member of a Nambudri *ilam* do not lapse to the *ilom*. **Kolathathalilath Vishun Nambudri Karnavan v Melothedathil Chulayakkan Akkamma**, 6 Ind. Cas 583 = 8 M L T 98.

SANKARAN NAIR and KRISHNASWAMI IYER, JJ

References:—25 M. 662, 11 M. 157 (162); 22 M. 351, 2 Ind. Cas. 183, 9 M.I.A. 539; 2 W.R. (P.O.), 31, R.

Malabar Law—(Continued).

(8) *Makattayam Law—Tarwad—Nature of interest of women members—Custom.*

The Makkattayam *tarwad* consists of the male members only, and women married into the family and women born in the family but remaining unmarried have no community of property with the male members, but are only entitled to maintenance during the life time of the male members, and, after the death of the last survivor, to inherit to his estate (a). But, in view of the contrary view taken by the Travancore High Court evidence was ordered to be taken as to the custom. **Narayana Pattar v Easwara Mangalath**, 7 M L T. 388.

BENSON and KRISHNASWAMI IYER, JJ.

References —S. A's 765 and 766 of 1892; S. A 1821 of 1897, R, 12 T L R 46; 6 T.L.R. 143, 12 M L J. Journal, p 173, R.

(9) *Marumakattayam Law—Moplah tarwad—Custom—Waste of stridhanam granted to a married woman—Right to claim further amount—Maintenance—Women deserting her family house—Claim for separate maintenance*

A married woman belonging to a Marumakattayam Moplah *tarwad*, to whom land was granted as *stridhanam*, cannot claim grant of land of equivalent value, on the ground that the land originally granted has been wasted away

A woman belonging to a Moplah *tarwad* and living away from the family house is not entitled to claim separate maintenance **Mahomed Hajee Kunhamma v Mussa Hajee**, 7 Ind. Cas. 320

BENSON and ABDUR RAHIM, JJ.

(10) *Malabar Law—Maintenance—Rate—Junior members—Karnavan.*

Ordinarily the High Court will not interfere in a matter as to the rate of maintenance, especially when both the Courts below are agreed in fixing a certain rate.

But in the case of a Malabar *tarwad*, the payment to each member of a sum little short of what is reserved to the *Karnavan* himself, cannot be justified.

The *Karnavan* is not in the position of an equal sharer with the rest. He has the responsibility and labour of management and has to maintain a certain position in the public estimation and before the authorities.

Malabar Law—(Continued).

H. K. Sankunni Vaidyan v. N.K. Cheethamma alias Ammu Amma, 8 M.L.T. 448.

ABDUR RAHIM and KRISHNASWAMI AIYAR, JJ.

(11) *Putravakasan property—Karnavanship—Management of properties—Senior male or senior female.*

Tavashi properties are generally held by the *Tavashi* with the incidents of *Tarwad* management, and it is the rule in Malabar that the senior male manages the *Tarwad* properties, though the earlier and original rule was managed by the senior female. The older rule survives in South Canara and among the descendants of Royal families in Malabar.

The inquiry as to custom in Malabar is generally an inquiry as to what is the law and not as to what is the usage. Much less evidence than in cases in which the usage is opposed to the well-established law of the country ought to be sufficient. **Kunhi Ramah v Kunhi Parvathi**, 8 Ind. Cas. 367.

BENSON and KRISHNASWAMI AIYAR JJ

(12) *Marumakattayam Law—Gift to females—Exclusion of males—Stri Sothu.*

Where an instrument limited the descent of property to the female line and excluded males, and also forbade partition. *Held* that the gift was of the class known as "*stri sothu*," that the intention was that the property should be held by the female class jointly as a *Tavashi* with *marumakattayam* incidents, and that the estate given was one known to *marumakattayam* usage and, therefore, not invalid. **Kunhalikandeagath Pudiyapurayil Bivi Umah v. Knoch Cheriyah Kuttil**, 8 Ind. Cas. 567.

COLLINS, C.J., and PARKER J.

(13) *Malabar Law and Usage—Makkathayam tarwad—Rights of female members—Whether females have community of property with male members*

Quere.—Whether a *makkathayam tarwad* in Malabar consists of male members only and whether women married into the family and women born in the family but remaining unmarried have community of property with other male members, or are only entitled to maintenance during the life-time of the male members, and, after the death of the last survivor, to inherit his estate. **Narayana Patter v Thethi Brahmani Ammah**, 8 Ind. Cas. 679.

BENSON and KRISHNASWAMI IYER, JJ.

References :—S.A. Nos. 765 and 766 of 1892 and S.A. No. 1821 of 1897 (unreported), R.; 12 T.L.R. 46; 9 T.L.R. 148, R.

Malabar Law—(Concluded).

(13-a) *Malabar Tarwad—Karnavan—Whether suit for his removal lies—Karnavan depriving separate members of tavashi of their property.*

A suit lies for the removal of the eldest male member of the family from the position of a karnavan (manager). A karnavan, who has endeavoured to deprive the separate members of a tavashi of their property, ought not to be allowed to remain in the position of a manager. **Parvathi Kathilammah v Ramachandra Ejaman**, 7 M.L.T. 273.

WALLIS and MILLER, JJ.

References .—29 M. 322, 16 M. 201, R.

(14) Parties governed by two systems of law—Succession how determined. See **INHERITANCE**, No. 1, 19 M.L.J. 736.

(15) Agreement by Karnavan—Suit upon agreement against his successor. Necessity of joinder of other members. See **CIV. PRO. CODE** (1908) No. 45, 7 M.L.T. 102.

(16) Suit for declaration that alienation by Karnavan is not binding on the Tarwad—Cause of action, accrual—Knowledge or ignorance of plaintiff is immaterial in the absence of fraudulent concealment. See **CIV. PRO. CODE**, (1882), No. 62, 33 M. 31

(17) Death of diawee without endorsing the pro note in favour of any one—Right of members of the Tarwad to sue upon the note. See **PROMISSORY NOTE**, No. 2, 8 M.L.T. 85.

(18) Decree against Karnavan—Right of mandravan to void the decree. See **CIV. PRO. CODE** (1882), No. 70, 8 Ind. Cas. 485.

Malicious prosecution

(1) *Action for—What constitutes—Complaint made but no process issued—Prosecution, when commences.*

To found an action for malicious prosecution, it is not enough, that a complaint should have been laid before a Magistrate. It is essential that the defendant should have set the Magistrate in motion and that process should have issued.

Until the issue of a summons or warrant, the prosecution could not be said to have commenced.

So, where it was alleged that a complaint was laid by A before a Magistrate, who thereupon sent the case to the Police for enquiry and report without issuing any process, *held*, an action for malicious prosecution does not

Malicious prosecution—(Continued).

lie against A. De Rozario v. Gulab Chand Anundgee, 37 C. 858=6 Ind. Cas. 877.

FLETCHER, J.

References:—*Yates v. The Queen*, (1885), L. R. 14 Q.B.D. 648 (661), *F.*; *Thrope v. Priestnall* (1897), 1 Q.B. 159, *R.*; and *Clarke v. Postan* (1884, 6 C. & P. 423) (28 B. 226, *not F.*)

(2) *Malicious prosecution, suit for—Reasonable and probable cause, what is—Conviction in first Court—Acquittal in appeal—Plaintiff what to prove—Malice, inference of, from absence of reasonable and probable cause—Prosecution originally not malicious may become so during pendency—Circumstances of suspicion—Question of absence of reasonable and probable cause, is mixed question of fact and law—Imitation—Bengal Municipal Act (III B.C. of 1884) S. 363.*

The fact that the plaintiff has been convicted by a competent Court, though he may subsequently have been acquitted on appeal, is evidence of the strongest possible character, if unrebutted, against the plea of want of reasonable and probable cause (*a*).

But if the conviction at the original trial has been procured by the defendant by false or fraudulent testimony, or other unlawful means, and such conviction is subsequently reversed by a higher Court and the plaintiff is acquitted and discharged, the fact of conviction ought not to be treated as conclusive proof of probable cause.

Reasonable and probable cause is an honest belief, based upon a full conviction founded upon reasonable grounds, in the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person was probably guilty of the crime imputed (*b*).

In a suit for compensation for malicious prosecution, before the plaintiff can succeed, he must establish that the prosecution was both without reasonable and probable cause and malicious (*c*).

The mere absence of reasonable and probable cause does not justify the conclusion, as a matter of law, that the prosecution was malicious, though it is quite conceivable that the evidence, which is sufficient to prove absence of reasonable and probable cause, may also establish malice (*d*).

Malicious prosecution—(Continued).

A prosecution, though in the outset not malicious and commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malò animò* in the prosecution with the intention of procuring *per nefas* a conviction of the accused.

Circumstances of suspicion cannot be treated as evidence of reasonable and probable cause as a defence to an action of a malicious prosecution (*e*).

The question of the absence of reasonable and probable cause or the presence of malice, is a mixed question of fact and law; and whether, from the facts found, absence of reasonable and probable cause or presence of malice can be inferred, is a question of law for determination by the Court alone (*f*).

Where the decision of the Court in the Criminal proceedings in favour of the plaintiff was given on January 3, 1905, the notice on the defendant Municipality was served on November 29, 1905, and the suit for malicious prosecution was commenced on January 4, 1906, and it was found that the act of which the plaintiff complains was done in good faith and that there was reasonable and probable cause for the criminal prosecution: *Held*, that the suit was clearly barred under S. 363 of the Bengal Municipal Act. **Shama Bibi v. Chairman of Baranagore Municipality**, 6 Ind. Cas. 675.

MOONERJEE and CARMUFF, JJ.

References:—(*a*) 10 W.R. 439; 13 W.R. 276; *relied upon*. (*b*) 8 Q.B.D. 167; 51 L.J. Q.B. 268; 30 W.R. 545; 46 L.T. 127; 46 J.P. 420; 10 Q.B. 252, 74 R.R. 287; 16 L.J.Q.B. 158; 6 Jur. 346; L.R. 6 Ex. 329; 25 L.T. 337; 40 L.J. Ex. 201; 24 A. 363, *relied upon*. (*c*) 11 B.L.R. 321; 17 W.R. 283; 11 A.C. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659, *F.* (*d*) 10 C.W.N. 253 *R.* (*e*) 28 B. 226; 5 Bom. L.R. 940, *R.* (*f*) 7 H. and N. 56; 30 L.J. Ex. 389; 7 Jur. (N.S.) 851; 4 L.T. 805; 9 W.R. 808; 18 Q.B. 372; 21 L.J.Q.B. 265; 16 Jur. 886 L.R.; 4 H. L. 521; 39 L.J. Ex. 177; 23 L.T. 269; 19 W. R. 9. *It.*

(3) *Suit for damages—Small Cause Court—Jurisdiction—Appeal.*

When actual pecuniary damage is shown to have resulted, a suit to recover damages for

Malicious prosecution—(Continued)

malicious prosecution is within the jurisdiction of a Small Cause Court (a)

When a Judge invested with small cause jurisdiction tries a small cause suit under his ordinary jurisdiction, the character of the suit is not thereby altered and the decree is not appealable (b) **Subbe Gowda alias Chenne Gowda v Mudugallachari** 15 M C C.R. 154

STANLEY ISMAI, C J, and KRISHNA RAO J

References —(a) (1900) V Mys. C C R 101 (1880) 5 Cal 925, and (1897) 10 All 49 1' (b) (1900) 25 Bom 417, and (1903) 5 Bom L R 898, F

(4) *Malicious prosecution—Complaint filed but no process issued—Cause of action*

Where, in a suit for malicious prosecution the plaintiff stated that a complaint had been laid by the defendant against the plaintiff before a Magistrate, who sent the case to the police for report, and who after receiving the report refused to issue process on the ground that the case was a Civil one.

Held, that the plaint disclosed no cause of action (a) **Golap Jan v. Bhole Nath Khetry** 7 Ind Cas 255

PUGH J

References —(a) 37 C 358 6 Ind Cas 877 F

(5) *Whether the name of a particular person should appear as prosecutor in cases of*

It is not necessary for a case of malicious prosecution that the name of a particular person should appear as that of the prosecutor. The question is one of fact, whether the defendant did substantially act the part of prosecutor even though it was the police that formally prosecuted. If a prosecution is really instigated by the defendant and he keeps himself in the background leaving it to the police to have the formal conduct of the case, or even if, prosecution having been originally started by the police, the defendant subsequently assumes the conduct of it, he must be deemed to be a prosecutor for the purpose of the action for malicious prosecution **Tammala Nagabushanam v. Madunuru Venkataratnam**, 8 M L T 242

BENSON and KRISHNA SWAMI AYYAR, JJ
Reference —30 A 525 (532), R

(6) *Suit for—Essentials—Malice—Burden of proof.*

Malicious prosecution—(Concluded).

The plaintiff must show, first, that he was prosecuted, *secondly*, that the prosecution determined in his favour, *thirdly*, that it was without reasonable and probable cause and *fourthly* that it was malicious

Malice is not to be considered in the sense of spite or hatred against an individual, but of *malus animus* and as denoting that the party is actuated by improper and indirect motives — (a).

It is necessary to prove malice in addition to want of reasonable and probable cause, and the onus of proving both essentials lies on the plaintiff **K.B. Banurji v Port Commissioners**, 9 Ind Cas 459

ROBINSON J.

References —(a) 5 B and Ad 588 at p. 595 2 N and W 301 3 L J K B 35 *Hel.* 24 A 363 A W N (1902), 62 1'

(7) *Termination of proceedings* See LIMITATION ACT (MYSORE) No 4, 15 M C C R 219

Malikana

Person entitled only to—Right to pre-emption See LIMITATION No 36 7 Ind Cas 70

Maps

(1) *Thak Map—Survey map—Evidentiary value* See ACT NO 1891 (MURSHIDABAD), No 1 6 Ind Cas 392

(2) *Boundary—Thak or survey map—Presumption* See BOUNDARY, No 2, 12 C L J 216

Marriage

(1)—of a Hindu Satri with a Christian woman converted to Hinduism—How far valid—Marriage according to usage—Marriage recognized by community as valid—Validity of—Marriage opposed to usage—Validity of—Effect of non observance of ceremonies prescribed for See HINDU LAW (MARRIAGE), No 1, 7 M L T. 17

(2) *Presumption of from long cohabitation—Nature of presumption* See LEGITIMACY, No 1, 14 C.W N 690.

(3) *Marriage, breach of promise of—Procuring of—Malice, effect, of—Mother procuring breach.* See CONTRACT, No 2, 7 M L T 394

(4) *Meaning of dissolution of* See RES JUDICATA, No, 8, 59 P W R 1910

Marriage—(Concluded).

(5) Unreasonable expenses incurred on, of a life tenant—**Legality.** See CUSTOMS (PUNJAB-ALIENATION), No. 10, 71 P.W.R. 1910.

(6)—between persons of different castes—**Marriage of persons of hybrid caste—Validity—Effect of recognition by family.** See HINDU LAW (MARRIAGE), No. 5, 13 O.C. 375.

Master and servant.

- (1) *Contract of service—Deposit of security—Deposit made with a third person under the master—Servant dismissed from service—Cash balance with the servant—Servant asking the master to recover the balance from the deposit—The person holding the deposit acknowledging the deposit held on master's behalf—Notice of assignment to the person—Master failing to recover deposit—Suit to recover balance from the servant—Debtor and creditor.*

The plaintiff, the Maharaja Scindia of Gwalior, appointed the defendant on the 28th of January, 1897, as an agent at Poona to supervise the estate, which the plaintiff possessed in the Bombay Presidency. About the time of his appointment the defendant deposited a sum of Rs. 3,000 as security with one Apte, a First-class Sardar of Gwalior. In October, 1898, Apte passed an acknowledgment stating that he held Rs. 2,982-15-11 in deposit for the defendant and was to retain the same in his custody as long as the defendant occupied the agent's position. The defendant was dismissed from the service in 1901; and on the 9th December of that year he furnished accounts to the plaintiff's new agent, which showed that a sum of Rs. 3,136-15-4 was with the defendant as cash balance of the accounts. When he gave over the charge to the new agent, the defendant gave to the latter a letter authorizing him to recover the balance due out of his deposit with Apte, to whom also he gave notice of the assignment. The plaintiff filed this suit in 1902 to recover from the defendant the amount that may be found due from him on taking accounts. Apte died in 1905 during the pendency of the suit. The Subordinate Judge took the view that the money was held by Apte for his security as the guarantor of the fidelity of the defendant, and that the deposit was not made at the plaintiff's desire or with his cognizance or knowledge. He, therefore, held that the plaintiff was entitled to recover Rs. 3,901-14-6 from the defendant. On appeal:

Master and servant—(Concluded).

Held, (1) that the defendant, by directing the plaintiff's servants to apply virtually the whole of the deposit in satisfaction of the balance due on the agency account and by giving notice of this direction to Apte, had put it out of his power to deal with the deposit in any way and had passed the property therein to the plaintiff;

(2) that as Apte was shown to have had the money; to have been in communication with the plaintiff about it; and to have offered to pay it to the defendant if permitted to do so by the plaintiff, he would have had no answer to a claim by the plaintiff fortified by the defendant's letter of assignment;

(3) that, as the money was held by Apte as a stake-holder and was validly assigned by the defendant to the plaintiff in satisfaction of the balance due on the agency account, being the purpose for which it was agreed to be held by Apte, and as the plaintiff, having been able to recover the amount so assigned, neglected to do so, was chargeable with the amount.

It is a well-recognised principle that, where a creditor has the control of a security, he is chargeable with what he might have received from it but for his wilful default (*n*). **Ganpat-rao Balakrishna Bhide v. H.H. The Maharaja Madhavrao Sinde**, 12 Bom. L.R. 780.

SCOTT, C.J., and BATCHELOR, J.

References:—(a) (1824) 1 S. and S. 581; (1878), 8 Ch. D. 424; (1863), 32 L.J.C.P. 266; and (1878) 3 C.P.D. 330.

Maxim.

- (1) *Marim—Actio personalis moritur cum persona—Applicability of the maxim—Contractual liability—Tort—Master and servant—Government employing a shroff to pass Babashahi coins—The shroff passing Shikkai coins instead—Mint officers accepting the coins—Estoppel, acquiescence or ratification by Government—Loss to Government—Measure of damages.*

A shroff was appointed by Government as an expert to pass Babashahi silver coins, on the occasion of withdrawing the Babashahi currency. The shroff worked for about a month, during which he accepted and passed as Babashahi 12,170 Shikkai coins. Those coins were finally passed on to the mint. The Shikkai coins had long before that date ceased to be current and had only bullion value. Government having alleged that, by the shroff's action, they

Maxim—(Continued).

suffered a loss of Rs. 1,758-15-1, the shroff paid them a sum of Rs. 1,095. Government, however, being of opinion that they still suffered a loss of Rs. 663-15-1 by the Shroff's action, filed a suit to recover the excess from him. The shroff filed a cross suit to recover Rs. 1,095 which he alleged were wrongfully recovered from him. The District Judge dismissed both the suits, holding that what Government recovered from the shroff was a full measure of compensation of their loss. Both parties appealed to the High Court. During the pendency of the appeals, the shroff died and his son was brought on the record as his legal representative.

Held (1) That the maxim "*actio personarum moritur cum persona*" had no application, since here the action rested on an obligation implied by law. As the shroff undertook to pass only Babashahi coins, it was an implied term of the contract that, if he passed any other and Government suffered loss he should make it good (S 271, Indian Contract Act).

(2) That the fact that Government kept and had the benefit of the Shikkai coins, did not by itself raise any presumption of either estoppel or acquiescence or ratification.

(3) That the Mint officers were agents of Government to receive Babashahi coins; they were not agents to contract for and on their behalf in the matter. Their action could not bind Government, except so far as Government had derived benefit from the action of the Mint officers. That benefit made them liable only so far that it was to be taken into account in measuring the damages for the loss sustained by Government in consequence of the shroff's deviation from the directions given to him and the purpose of his employment.

(4) That in estimating the loss to Government only the bullion value of the Shikkai coins must be taken into account.

Nominal damages are allowed only where there is failure to prove any appreciable damage in fact.

The application of the maxim "*actio personarum moritur cum persona*" is limited to actions in which remedy is sought for tort, or for something which involves, at any rate the notion of wrong doing. It does not apply to actions in which compensation is claimed for injury to property on the strength of an express or implied contract. It is not only where there is an express contract that a suit, grounded on

Maxim—(Concluded).

some default of the person whose representative is sued, can be maintained, but if the position of the parties was such that the law of England would imply a contract from that position, then on assumption the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken to one another. **Chunilal Ishwardas v The Secretary of State**, 12 Bom L R 769.

(CHANDAVARKAR and HEAFON, JJ)

Medical certificate.

(1) When admissible in evidence. See HINDU LAW (ADOPTION), No 8 a, 8 Ind Cas. 713.

Melcharath

Melcharath—Melcharath—Receipt of rents for over twelve years—Validity of melcharath—Bar of limitation.

Where the defendants have been in receipt of rents as *melcharath* for more than twelve years held that the plaintiffs are barred from disputing the validity of the *melcharath*. **Ram Nair v Pannagat Chandu Kuttu Nair**, 7 M. L. J. 181.

(LIVSON and RAJSHYAMSAMI AIYER JJ.)

Ref case—J M. 244 *Rel on*

Merger

(1) *Merger Doctrine of—Merger not possible here as it would be prejudicial to the person in whom both rights are vested—Suit for establishment of under proprietary rights—Jurisdiction—Rent—Tel (Oudh)*, S 108, Cl (10).

7 obtained a decree for under proprietary rights in S and A two hamlets of a village A. At the settlement The Taluqdar mortgaged the Taluq to the Allahabad Bank in 1881. She died in 1898 and the estate was inherited by B. In 1899 in execution of a money decree all the rights of B in the hamlets S and A were put up for sale and purchased by plaintiff who also obtained possession. In the same year the Allahabad Bank brought a suit on its mortgage and obtained in February, 1907 a decree for sale of all the rights of the deceased mortgagor in the estate at the date of the mortgage. The defendant respondent purchased the village K G in execution of the Bank's decree, took possession and dispossessed the plaintiff. This was a suit by the

Merger—(Concluded).

plaintiff for possession and establishment of his under-proprietary rights in the two hamlets

Held, that one estate will not be held to have merged in another, where the merger would be plainly prejudicial to the person in whom both estates are vested

Applying this principle to the case, *held*, that the under proprietary rights in these hamlets did not pass to the respondent at the execution sale (a)

Held, further that the suit was in reality one not so much for the recovery of occupancy land from which an under proprietor has been dispossessed, as for establishment of the rights of the appellant as under proprietor and therefore the suit was not barred by S 108 cl (10) of the Oudh Rent Act (1) **Mata Prasad v Razawand Singh**, 13 O C 35 (B) 5 Ind Cas 446

CHAMBER, J.C. and PRIGGILL, J.C.

References —(a) 11 O C 183 *D. and Doubt ed*, 12 O C 97 *R* (b) 12 O C 90, *D*

Mesne profits

(1) *Mesne profits assessment of Revenue sale—Encumbrance and under tenure if ipso facto avoided—Joint and several liability—Joint tortfeasors liability of Increase of one wrong doer if releases all—Doctrine, applicability—Splitting up claims—Joint decree, if can be passed*

An encumbrance or under tenure is not ipso facto avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale. The law does not require any notice as a necessary preliminary to a suit to avoid an under tenure, but the option of the purchaser may be exercised by the institution of a suit within the time allowed by law (a)

Where no notice was given by the purchaser before the commencement of the suit for ejectment, the tenure or encumbrance was not annulled till the date of the institution of the suit, for the period antecedent thereto, the auction purchaser is entitled only to such sum as represents the rent payable by the tenure holders of the first degree. A decree for this sum can be made only against such of the defendants as held the tenure directly under the defaulting proprietor, and not against all the tenure-holders jointly and severally

The liability of wrong doers in tort is, as a general rule, joint and several. The rule of

Mesne profits—(Continued).

joint liability is inapplicable where the general principle that, where acts of several persons, by design or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable is not applicable. Hence the tenure holders of different grades (defendants) who held possession of the property under the defaulting proprietor till the purchaser (plaintiff) made his election and who had not combined or conspired to keep the purchaser out of possession, are not jointly and severally liable for the mesne profits which must be apportioned according to the liability of the various defendants *ie*, according to the share of the profits intercepted by each defendant.

A release of one without any intention to release the other joint tortfeasors, but only as a partial satisfaction discharges the other only *pro tanto* (b)

The doctrine that release of one joint tortfeasor operates as a release of all, applies only in cases of joint liability

Where the plaintiff has released some of the wrong doers from liability, his claim against the others has been split up by his own conduct, and consequently a joint decree cannot be passed against all the defendants (c) **Ram Ratan Kapali v Aswini Kumar Dutt**, 11 C L J 503=6 Ind Cas 69=14 C W N. 849 57 C 559.

MOOKLJEL and TILUNON, JJ.

References —(a) 9 C. 683, 2 C W N 229, 31 C 393, 6 C L J. 472 (484), *R*. (b) 8 W R 132, *R* (c) (1863), 2 Hry 299, *R*

(2) *C P C. (Act XIV of 1852), S. 586—Suit for mesne profits—Valuation of claim by plaintiff—No leave asked to increase valuation—No offer to pay additional Court fee—Value of suit, what to be taken as—Court Fees Act (VII of 1870), Ss. 7, 11—Suit Valuation Act (VII of 1857) S. 6—Civil Courts Act (VII of 1887), S. 21.*

In a suit for recovery of mesne profits, the plaintiff valued his claim at Rs. 300 for the purposes of ascertainment of the jurisdiction of the Court and the amount of the Court-fee payable. He stated that, if the amount of mesne profits was found to be greater than Rs. 300, he might be awarded a decree for the excess amount after payment of additional Court-fee. A Commissioner was appointed to ascertain the rates at which rent was payable in respect of the different classes of land. He submitted

Mesne profits—(Continued).

his report that if the mesne-profits were assessed at a certain rate, the plaintiff would have been entitled to a decree for Rs 580. But the plaintiff made no application for the amendment of the plaint nor did he ask for leave to increase the valuation of his claim or offer to pay any additional Court fee. The first Court gave him a decree for Rs 223 and he appealed to the Sub Judge and valued his appeal at Rs 357, that is, the balance of Rs 580. The appeal was dismissed and the plaintiff filed second appeal.

Held that the mere circumstance that the plaintiff chose to value his appeal at Rs 357 did not show that the value of the suit was raised to Rs. 580, for such an alteration could not be made without a proper application to the Court in that behalf, and even if such an application were made it could not be granted unless the plaintiff paid the additional Court fee and that consequently the value of the suit must be taken to be Rs 300 and the second appeal was incompetent. **Kali Kamal Maitra v Fazlur Rahman Khan Chowdhry** 7 Ind Cas 775

MOOKERJEE and SHARI UD DIN JJ

References—11 C 169 *Rel n* 34 C 354 6 C L J. 255, 11 C W N 1133 (F B) A.

(3) *Order ascertaining mesne profits—Power of appellate Court to add interest.*

Where the lower Court's order ascertained the amount of mesne profits but did not award interest the appellate Court has no power to allow interest. **Muthu Subrahmaniam Chettiar v. Muthu Varadarajulu Chetty**, 8 M L L 356

WALLIS and KRISHNASWAMI IYER JJ

References—6 C L J 462 1 33 C 29 D

(4) *C.P.C. (1st V of 1908) O XLIII lit 1 Cl (4)—Claim for mesne profits—Order of remand by appellate Court—Appeal against order of remand whether lies—Provincial Small Cause Courts Act (IX of 1867), Sch II Cl 31—F judgment decree—Claim for mesne profits after decree—Form of action—Damages for trespass—Limitation Act (XV of 1977) Sch II, Arts 39, 109 and 120*

Plaintiff, who obtained an ejectment decree against defendant sued him for mesne profits. The first Court dismissed the suit as barred. On appeal the District Judge held it was in time and remanded the suit for disposal on the merits. On second appeal to the High Court:

Mesne profits—(Continued).

Held (1) that, as the claim for mesne profits is exempted from the cognizance of the Small Cause Court under cl 31 of Sch II of the Provincial Small Cause Courts Act, and an appeal would have lain if the suit was decided on the merits an appeal lay to the High Court against the order of remand.

(2) that the suit was not governed by Art 109 of Sch II of the Limitation Act but being in the nature of an action for damages for trespass Art. 39 applied to the case. **Ramasami Reddi v Authi Lakshmi Ammal**, 6 Ind Cas 162

ABDUR RAHIM and KRISHNASWAMI IYER JJ

References—27 L.A 111 at p 124 27 C 55, 11 W R 25 11 W R 83 2 B I R A C 67 12 C W N 650 A 21 C 413 Vol 4 pp

(5) *Mesne profits—Liability of zamindar and tenure holder—Dispossession—Complaint in title*

A plaintiff alleged that the dispossession was an act of the tenure holders and the landlords were not alleged to have taken any part in the trespass. It was found that the landlords were cognizant of the attempt of the tenure holders to dispossess the plaintiff.

Held that unless it is established that the landlords combined with the tenure holders in dispossessing the plaintiff they cannot be made jointly and severally liable for the mesne profits, and unless combination is proved the liability will have to be apportioned and that in the present case there was no such combination. **Salimullah v Sib Sundari** 6 Ind Cas 707

MOOKERJEE and COXE JJ

References—6 Ind Cas 63 37 C 559 11 C L J 30 11 C W N 849 *Rel on*

(6) *Mesne profits—Antecedent to suit and pendente lite—Jurisdiction of Court—Amount when exceeds Court's pecuniary jurisdiction—Course to follow C.P.C. (1st V of 1887), Ss 211 212—Bengal Civil Courts Act (XII of 1887), S 18, et seq*

Mesne profits antecedent to the suit and mesne profits pendente lite stand on very different grounds. As regards the latter there is no cause of action at the time of the commencement of the suit and it is only by means of statutory provisions framed with obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued

Mesne profits—(Continued).

subsequent to the institution of the suit. A Munsiff cannot entertain the application for investigation of mesne profits *pendente lite*, when the claim is laid at over Rs. 1,000, and the proper course to follow in such a case is to direct the return of the plaint, in so far as it embodies a prayer for assessment of mesne profits *pendente lite*, for presentation to the Court of the Subordinate Judge.

But mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit, and the amount can be mentioned approximately. When, therefore, a plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit. In such a case if the plaintiff subsequently puts forward a claim in excess of the jurisdiction of the Court, he may justly be required to remit the excess, because he has, with his eyes open, brought his suit deliberately in a Court of limited pecuniary jurisdiction. **Bhupendra Kumar v. Purna Chandra**, 8 Ind. Cas. 31.

MOOKERJEE and TEUNON, J.J.

References :—1 Ind. Cas. 86; 13 C.W.N. 493; 9 C.L.J. 367; 5 M.L.T. 360, F.; 7 Ind. Cas. 385, *dissenting from*.

(6-a) Appeal to Privy Council—Valuation—Addition of mesne profits. See **APPEAL TO PRIVY COUNCIL**, No. 4, 14 C.W.N. 872.

(7) Pre-emptor not entitled to, in execution of decree. See **PRE-EMPTION**, No. 26, 6 Ind. Cas. 648.

(8) Claim for, between date fixed for redemption and actual date of delivery of property—Whether separate suit maintainable. See **MORTGAGE (REDEMPTION)**, No. 13, 6 Ind. Cas. 336.

(9) Future—from date of plaint, whether Court-fee payable for. See **COURT FEES ACT (VII OF 1870)**, No. 12, 20 M.L.J. 98.

(10) Execution of decree—Assessment of—Decree for—Not proceeding in execution—*Res judicata*—Remedy open to defendant. See **CIV. PRO. CODE (1882)**, No. 19, 5 Ind. Cas. 387.

(11) Application for assessment of, nature of. See **CIV. PRO. CODE (1882)**, No. 174, 5 Ind. Cas. 272.

Mesne profits—(Concluded).

(12) Redemption of Kanom mortgage right to mesne profits from date of suit. See **(ACT I OF 1900) MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS**, No. 1, 6 Ind. Cas. 889.

(13) Order allowing, to pre-emptor—Decree—Appeal. See **CIV. PRO. CODE (1908)**, No. 4, 44 P.L.R. 1910.

(14) Suit for—S. 47, C.P.C. (1908). See **ACT IX OF 1887 (PROVL. S.C. COURTS)**, No. 2, 7 Ind. Cas. 487.

(14-a) Cause of action for—When arises. See **COURT FEES ACT**, No. 18, 11 C.L.J. 541.

(15)—in S. 2 (12), C.P.C. (1908), include interest thereon. See **MORTGAGE (REDEMPTION)**, No. 11, 5 Ind. Cas. 529.

(16) Suit for possession—Subsequent suit for—not barred. See **CIV. PRO. CODE (1908)**, No. 101-a, 8 Ind. Cas. 445.

Mineral rights.

See **UNDER-GROUND RIGHTS**, No. 1, 14 C.W.N. 746.

Minor.

(1) *Cr. Pro. Code, Act V of 1898, S. 491*—*Habeas Corpus—Minor's capacity to bind himself by contract—Whether action lies against minor for breach—Contract with guardian—Remedy on breach—Parental authority—Delegation—Whether revocable—Power of Court to revoke—Welfare, meaning of the term.*

Where the defendant had no personal interest in the children whom the plaintiff sought to be delivered up to himself, or in their services, and no right to their custody, and where the only object of the defendant was to send back the children to their parents or natural guardians, the proceedings should be treated as on *Habeas Corpus* under S. 491, Cr.P.C. for the purpose of determining the custody of the children. A minor may bind himself by a contract of apprenticeship, if it be for his benefit, but no action will lie against him for failing to serve as such. If such a remedy is desired, it is necessary to get a covenant from the guardian on which the guardian himself may be made liable (a).

The delegation of parental authority is revocable at any time, and it is the duty of the parents and guardians to revoke it, if used to the detriment of the children. It is also open to the Court, within whose jurisdiction the children are found, to revoke it at any time.

Minor—(Continued).

if sufficient cause be shown for interference, especially when the parents have it out of their power to interfere themselves for the protection of their children by sending them touring round the world in the custody of strangers.

The main consideration for the Court to be acted upon in the exercise of such power is the benefit or "welfare" of the child. The term "welfare" must be read in the largest possible sense (*b*). **A.H. Pollard v F. Rousse**, 8 M.L.T. 47=6 Ind. Cas. 754=33 M. 288.

WALLIS, J.

References:—(*a*) (1890) 43 Ch.D. 430, R. (*b*) (1889) 2 Q.B. 232 (248); (1893) 1 Ch. 143 (148); (1889) 4 A. & E. 643 and (1899) 1 Ch. 719, R.

(2) *Minority, plea of, raised for the first time in appeal—Remand—Ex parte decree set aside—Civil Procedure Code (Act XIV of 1884), S. 208—Suit tried de novo.*

A brought a suit on mortgage against B, C, L and S. A decree was passed, against which B and C appealed and A preferred an objection. L and S, however, were not parties to the appeal. The case was remanded. The Court of first instance again passed a decree in favour of A against all the defendants, the decree being *ex parte* as against L and S. S died, and so J, the representative of S and L applied under S. 109 C.P.C., 1882, to get the decree set aside. The *ex parte* decree was set aside and a fresh decree was passed. L and J appealed. In appeal for the first time, they raised the plea that S was minor at the time of the execution of the mortgage:

Held, that they could not raise the plea of minority at that stage.

Held, further, that, after the *ex parte* decree was set aside, the whole case was re-opened as against the applicants under S. 108, and the case had to be tried *de novo*. **Musamat Jey Devi v. Mahadeo Prashad**, 6 Ind. Cas. 373.

STANLEY, C. J., and BANERJI, J.

(3) *De facto manager's power to bind minor's estate—Bona fide encumbrances.*

The right of a *bona fide* encumbrancer, in whose favour the *de facto* manager of a minor's property has created a charge on the minor's lands, honestly, for the purpose of saving the estate or for the benefit of the estate, is not affected by the want of union of the *de facto* with the *de jure* title (*a*). **Nagappa v. Mahomed Usuff**, 15 M. C.C.R. 18.

NANJUNDAYYA and SETTLUR, JJ.

Reference:—(*a*) (1956) VI M.I.A. 322, F.

Minor—(Continued).

(4) *Agreement to sell land—Agreement on behalf of—Contract not for purposes binding on—Specific performance. See SPECIFIC RELIEF ACT, No. 9, 5 Ind. Cas. 79.*

(5) *Decree against minors not duly represented, void or voidable—Strangers if may challenge. See TRANSFER OF PROPERTY ACT, No. 18, 14 C.W.N. 322.*

(6) *Title by adverse possession when complete against a. See ADVERSE POSSESSION, No. 1, 5 Ind. Cas. 84.*

(7) *Non-citation of minor reversionary heir—Effect. See PROBATE, No. 1, 5 Ind. Cas. 164.*

(8) *Joint debt of father and son—Pro-note by minor son—Liability of father. See HINDU LAW (DEBTS), No. 5, 7 A.L.J. 459.*

(9) *Decree against minor—Respondent not represented by guardian—Effect. See APPEAL (GENERAL), No. 2, 55 P.W.R. 1910.*

(10) *Suit by, under S. 539, C.P.C.—Maintainability. See CIV. PRO. CODE (1882), No. 209, 6 Ind. Cas. 119.*

(11) *Competency of, to make will. See WILL, No. 10, 6 Ind. Cas. 6.*

(12) *Transfer by mother during minority of son—Son died and mother succeeded—Right of reversioner. See HINDU LAW (ALIENATION), No. 7, 6 Ind. Cas. 37.*

(13) *Agreement to re-unite on behalf of—Validity. See HINDU LAW (RE-UNION), No. 2, 6 Ind. Cas. 441.*

(14) *Application under S. 195, Crim. Pro. Code, presented by—Procedure. See SANCTION TO PROSECUTE, No. 4, 6 Ind. Cas. 367.*

(15) *Reunion to which minor is party—Validity. See HINDU LAW (RE-UNION), No. 3, 15 M.C.C.R. 96.*

(16) *Suit against—Stay of suit during minority—Practice and procedure. See SPECIFIC RELIEF ACT, No. 23, 12 Bom.L.R. 697.*

(17) *Grant of probate—Whether minor bound. See PROBATE, No. 4, 14 C.W.N. 1068.*

(18) *Sale by—Suit by, for recovery of possession—Refund of price—Equity. See SPECIFIC RELIEF ACT, No. 17, 76 P.R. 1910.*

(19) *Right to relief on ground of fraud. See EX PARTE DECREE, No. 2, 47 P.L.R. 1910.*

(20) *Next friend making default in appearance—Absence of pleader—Effect. See CIV. PRO. CODE (1882), No. 193, 99 P.L.R. 1910.*

Minor—(Concluded)

(21) How far, bound by award See AWARD, No 6, 12 Bom L R 984.

(22) Setting aside ex parte decrees—Right of minor See LIMITATION ACT (1908), No 24, 8 Ind Cas 543

(23) Plaintiff a minor—Amendment of plaint by inserting prayer for damages See CIV PRO CODE (1882) No 114 a 2 3 Ind Cas 258

(24) Minor—Mortgage of his property—Remedy barred by statute

See MORTGAGE (GENERAL) No 56 8 M L T 141

(25) Partition by arbitration when binding on See PARTITION No 114 8 Ind Cas 143

Minors Act

See ACT XV OF 1898

Mis-joinder

(1) Misjoinder of parties—Objection as to be taken—Misjoinder of causes of action—Misjoinder not affecting merits—Pleading—Practice

An objection as to misjoinder of parties should be taken at or before the framing of issues. It cannot be taken at a later stage. Where the misjoinder of causes of action does not affect the merits of a case it is no good ground for setting aside the decree of the lower Court. **Sivasankaram Pillai alias Doraiswamy Pillay v Perumal Nayakkar** 4 Ind Cas 106 7 M L L. 78

WALLIS and MILLER JJ

(2) Of causes of action effect of—When a decree can be reversed in the ground of

Misjoinder of causes of action is not a ground on which a decree can be reversed. **Yenkata muniappa Chetty v Goddomb Chandappa** 7 M L T 364 5 Ind Cas 166

MILLER and SANKARAN NAIK JJ

Reference—36 C 780 (P C) I

(3) Misjoinder of causes of action—Suit in ejectment—Plaintiffs owning separate parcels of land—Prescriptive Title by adverse possession—Irregularity—Civ Pro Code (Act XIV of 1882) S 578—Civ Pro Code (Act V of 1906), S 99

Where plaintiffs, four in number who owned and enjoyed separate parcels of land, sued to eject defendants alleging that they trespassed on the lands at the same time

Held (1) that the suit was bad for misjoinder of causes of action

Mis joinder—(Continued).

Each person being separate in the eye of law, any act of the defendant affecting the separate right of each, gives to each a separate cause of action. When the right of each plaintiff is separate, the cause of action must be held to be separate although defendants have trespassed on the property at the same time (a),

(2) that the misjoinder was not a mere irregularity that was cured by S 578 C P O, 1882,

(3) that the misjoinder was such as to have prejudiced the defendants

(4) that as the plea of misjoinder was not raised in the written statement or at the settlement of issues the suit was not liable to be dismissed

The suit was remanded for findings as to title of each of the plaintiffs. **Aiyaru Muppan v Vellaya Nadan** 6 Ind Cas 15 2 M L T 6

BENSON and KRISHNASWAMI IYER JJ

References (1874) A C. 411 63 L J Q B. 737 6 R 209 71 L R 157 43 W R 113 7 Asp M C 485 25 M 61, (1875) L R A C 661, 64 I I P C 146 11 R 504 73 L T 37, 8 Asp M C 23 (1896) L R 2 Q B 113 65 L J Q B 537 71 L L 744 44 W. R. 566, 60 J P 581 3 M 361 11 C 524 18 A 131 R 96 I A 103 3 Ind Cas 382 6 A L J 567 10 C L J 58 13 C W N 120 5 M L R 123, 11 Bom L. R 833 36 C 140 19 M L J 548, 93 P R 1303 D.

(4) Misjoinder of causes of action—Fructu—Suit by reversioner against different transferees from Hindu widow—Successive trial of issues—Civ Pro Code (Act XIV of 1882), S 42

When a reversioner, after the death of a Hindu widow sues in ejectment against several defendants who as transferees from the widow have various titles to different portions of the estate there is no misjoinder if he sues in a single suit (a)

But there must be successive trial of the issues separately affecting the different defendants (b)

Where the plaintiff as reversioner alleges that certain *lobakas* were executed by a Hindu widow to various people, at various dates, of various isolated portions of the estate left by her husband and further the plaintiff seeks to set aside the alienations made, after the widow's death, by his own father and brother, during his minority, and he has brought one suit in ejectment and to set aside the alienations

Mis-joinder—(Concluded).

Held, that it is far better to admit each of the cases in separate number and try them as separate cases. **Hari Ballabh Rai v. Gopal Lal Singh**, 6 Ind. Cas. 577.

HOLMWOOD and SHARF-UD-DIN, JJ

References :—(a) 24 C. 831; 29 C. 871, *Appr.*
(b) 33 B. 293; 11 Bom. L.R. 34; 5 M.L.T. 230; 1 Ind. Cas. 120, *relied on*.

(5)—of causes of action, if ground of appeal. See **HINDU LAW (WIDOW)**, No. 9, 6 Ind. Cas. 248.

(6) Waiver of objection on the ground of—Whether objection may be entertained on appeal or revision. See **ACT XVIII OF 1879 (LEGAL PRACTITIONERS)**, No. 9, 11 C.L.J. 513.

(7) One suit for possession of lands in tenant's holding and those obtained by encroachment on *Khas* land of landlord—No misjoinder. See **ACT VIII OF 1885 (BENGAL TENANCY)** No. 56, 7 Ind. Cas. 86.

Mistake.

(1) *No prayer in plaint for rectification—Form of relief—Evidence admissible to show mistake.*

Where the plaint alleges a mutual mistake of fact but does not contain a prayer for rectification, the omission of such a prayer is, at most, a matter of form; and extrinsic evidence is admissible to show the mistake. **Mahadeva Iyer v. Gopala Iyer**, 8 M.L.T. 289.

ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

Reference :—30 M. 397, *F*.

(2) Court to correct its own mistakes *suo moto*. See **STAMP ACT**, No. 7, 12 Bom. L.R. 166.

(3) Inherent power of Court to rectify. See **CIV. PRO. CODE (1908)**, No. 32, 7 Ind. Cas. 91.
Mohant.

(4) Grant of sanction by Collector for removal of. Revision. See **CRIM. PRO. CODE (1842)**, No. 210-a, 104 P.R. 1910.

Money.

(1) Suit for, due under agreement—Nature of suit. See **LIMITATION ACT (1877)**, No. 53, 12 C.L.J. 423.

Mortgage.

1.—GENERAL.

2.—BY CONDITIONAL SALE

3.—CONTRIBUTION.

4.—FORECLOSURE.

5.—REDEMPTION.

6.—SUB-MORTGAGE.

7.—USUFRUCTUARY.

Mortgage—(Continued).**—1.—(General.)**

(1) *Mortgagees—Rights of—Inter se—Sale under a third mortgage—First mortgage paid off by third mortgagee—Right of purchaser to set up first mortgage as shield.*

A property was mortgaged first to A, then to B and then to C. C discharged A's mortgage and then brought the property to sale. M purchased the property. B brought this suit for sale upon his mortgage. **Held** that M could set up A's mortgage as a shield, and B could not sell the property unless he paid off that mortgage. **Mati-lal Khan v. Banwari Lal**, 7 A.L.J. 61, Cr.=5 Ind. Cas. 132 32 A. 138.

STANLEY, C.J., and BANERJEE, J.

(1-a) *Mortgage decree—(Construction—"Date of payment" meaning of.*

The ordinary meaning of the words "date of payment" is the date on which payment is made, and ought not to be construed as meaning the date on which payment ought to be, but is not made.

Therefore, where a mortgage decree directed that interest should be paid at the bond rate up to "the date of payment."

Held, that the interest up to the date of actual payment must be paid and not up to the date of preliminary decree only. **Radhika Mohem Ghose v. Brojendra Kumar Saha**, 11 C.W.N. 125 5 Ind. Cas. 61.

SHARF-UD-DIN and COXE, JJ.

References :—9 C.L.J. 288; 4 Ind. Cas. 56; 23 A. 181; 24 I.A. 35 and 33 C. 846, *R*.

(2) *Joint mortgagees—Discharge of debtor by one—Whether binding on co-mortgagee.*

One of two joint mortgagees cannot give a good discharge of the entire mortgage debt without the consent of the other mortgagee. **Ram Chandra v. Rajjan Lal**, 7 A.L.J. 99 =5 Ind. Cas. 129 - 32 A. 164.

STANLEY, C.J., and KNOX, J.

Reference :—25 All. 155, *F*.

(3) *Prior and puisne mortgagees—Third mortgagee advancing money to pay off first mortgage—Preferential right of third mortgagee over the second mortgagee—Money advanced to pay off prior mortgage—Presumption*

The presumption, generally speaking, in the absence of any evidence to the contrary, is that a person, whose money goes to satisfy a prior mortgage, intends to keep alive that prior mortgage for his own benefit (a).

Mortgage—(Continued).**—1—General—(Continued)**

So where a third mortgagee advanced some money which was devoted to paying off the first mortgage held, he would have a preferential right over the second mortgagee and he would be entitled to a mortgage lien on the property in respect of the amount advanced by him **Soobramanian Chetty v Aga Rajat Ally Khorasani** 51 B R 138

FOX C J and IOWIS J

References —(a) 10 C 1035 (P C) 3 C W N 153 and 4 C W N 469 *Ionian v Steere* 18 Meer 210 R

(4) *Contribution—Mortgage sale—Sale set aside by consent on one of co mortgagors paying off decree—Liability of other co mortgagors to contribute—Fiduciary—Contract Act (IV of 1872) S. 62—Charges*

Where a mortgage decree having been passed against several persons a sale of the mortgaged property took place and then one of the mortgagors paid off the decree holder and by consent the sale was set aside

Held, in a suit by him against the other mortgagors for contribution that, although the defendants were not liable under S. 69 of the Contract Act the plaintiff not having paid the money to prevent the sale the defendants who kept the property were bound in equity to pay their share of the money which the plaintiff had paid to release the property

The amount was decreed to be a charge on the shares of the defendants **Sri Maharaja Parbhu Narain Singh Bahadur v Babu Beni Singh** 14 C W N 361 5 Ind. Cas 779

STEPHEN and CHATTERJI JJ.

(c) *Mortgage suit by second mortgagee making first mortgagee party—Right of first mortgagee to pay off mortgage debt*

There is nothing in the law to prevent a first mortgagee who is made a party to the suit by the second mortgagee on his mortgage from claiming his right to pay off the second mortgage and so save from sale the property which stands as security for his mortgage debt **Bhojohari Maiti v Gajendra Narain Maiti**, 5 Ind. Cas 142=97 C 282=14 C W N 672

BRETT and SHARFUD DIN, JJ

Reference —S A No 2088 of 1906, *relied upon*.

(6) *Mortgage—Mortgagee tenant of mortgagor—Agreement to set off interest against*

Mortgage—(Continued).**—1.—General—(Continued).**

rent—Non payment of rent by mortgagee—Presumption that excess amount was in part satisfaction of debt

A mortgagee was the tenant in respect of the mortgaged property under the mortgagor, and it was agreed that the mortgagee, instead of paying the whole of the amount of rent Rs. 96 a year should retain in his hands Rs. 18 a year which the mortgagor was liable to pay as interest on his mortgage. The mortgagee did not pay any rent at all for more than three years

Held that the presumption was that the mortgagee retained the money in part satisfaction of the debt due to him, that an account should be taken of what was due to the mortgagee and that the mortgagor landlord would be entitled to credit for any rent not received in that amount for by his mortgagee tenant **Gangadhar Shagan v. Ram Prosad Sahu**, 5 Ind Cas 26

HARRINGTON and CHATTERJI, JJ

(7) *Implication of larger interest by the mortgagor after the date of the mortgage—Mortgagee not entitled to such larger interest—Reg VI of 1927, Ss. 19 and 20—Transferred to Part IV of 1882, S. 43.*

A mortgagee of Deshgat Vitan knew that the property which was being made over to him in mortgage was land appurtenant to an hereditary office and was therefore inalienable beyond the life of the incumbent under Ss. 19 and 20 of Reg. XVI of 1927. Subsequent to the mortgage the mortgagor became entitled to enlarged estate. The mortgagee claimed to hold the enlarged estate against the mortgagor

Held that the mortgagee took merely such estate as the mortgagor was capable of conveying at the date of the mortgage. **Gangabal v. Basvant Ballappa** 12 Bom L R 118=34 B 175 3 Ind Cas 466

SCOTT J., and BATCHELOR J

(b) *Mortgage—Joint mortgagors—Co mortgagor satisfaction by—Subrogation, extent of right—Interest—Tender—Part-payment Deposited in Court—Appellate Court determining a larger sum to be due—Interest*

When one of several mortgagors redeems the whole mortgage, he acquires a charge on the share of each of his co mortgagors for his proportion of the expenses properly incurred in redeeming the property. He is, however, not

Mortgage—(Continued).**—1.—General—(Continued).**

entitled as a matter of right to claim interest on the redemption money at the mortgage rate, from the date when he makes the payment to the date of realization. The right of subrogation is founded on equitable principles, and the extent to which subrogation would be carried in any particular case must be determined on equitable considerations.

The principle that a mortgagee is not bound to accept any sum in part satisfaction of his decree applies only to cases where there is no dispute as to what is due (b)

Where a mortgagor brought into Court the whole sum found due by the Court of first instance, and, upon an appeal by the mortgagee, the appellate Court determined a larger sum to be due

Held, that the sum deposited operated as a payment *pro tanto* and interest would run after deposit only upon the difference. **Digambar Das v. Hazendra Narain Panday**, 11 C L J 226=5 Ind. Cas. 165 11 C W N. 617

MOOKERJEE and PRUNON, JJ

References —(a) 26 A 482 33 I A 51, 1 pp1 (b) 16 B 141, 1 Ch. 1, 4 pp1.

(9) *Mortgage decree—Sale for arrears of revenue pending suit—Attachment of sale proceeds, if satisfaction*

Where the surplus sale proceeds in the hands of the Collector, of a mortgaged property sold for arrears of revenue after the preliminary decree passed in the mortgage suit, was attached in execution of that decree and subsequently the decree was made absolute

Held—That, so soon as the decree was made absolute, the sum attached became available to the decree-holder, and to that extent the decree was satisfied to that date (a) **Gopi Krishna Mandol v. Ram Lal Mandol**, 14 C W N 494 =5 Ind. Cas. 524.

MOOKERJEE and PRUNON, JJ

References —(a) 33 C. 816, D 10 C L J. 160, R.

(10) *Merger of mortgage in previous money decree—Cause of action—Ss 18, 41, C P C., 1882—Relationship of landlord and tenant—Jurisdiction of Civil Courts—Findings of fact—Estoppel.*

B. S., a usufructuary mortgagee, sub-mortgaged to G. S. in August 1888, the terms being that the latter should be put into possession,

Mortgage—(Continued).**—1.—General—(Continued).**

and that the former should be personally liable for the mortgage money. In August 1900, within limitation, G. S. sued for the principal and interest alleging that he had never been put into possession. G. S. obtained a decree for the principal against the property mortgaged, and his appeal against so much of the decree as dismissed the suit for interest, was dismissed. In consequence of the enactment of the Land Alienation Act (XIII of 1900) G. S. did not execute his decree. In 1907, G. S. brought the present suit for possession on the ground that B. S. denied his title in 1905. The lower Courts found that G. S. had obtained constructive possession of the mortgaged property through tenants till 1905 and that there was not a new agreement between the parties in 1901 and decreed the plaintiff's claim. *Held* that G. S.'s allegations in the suit of 1900 did not estop him from alleging, in this suit that he was in possession of the property up to within twelve years of the present suit and that the suit was within limitation. *Held* also that the mortgage did not merge in the decree obtained by G. S. in 1900, and a cause of action survived on the mortgage, and that Ss 13 and 43, C. P. C. 1882 did not bar the suit. *Held* also that the facts found did not establish the relation of landlord and tenant between the parties, and therefore the Civil Courts had jurisdiction. *Held* also that no further appeal lay as the value of the suit and appeal for purposes of jurisdiction was less than Rs 1000. **Bahadur Shah v. Ram Singh** 32 P R 1910=50 P. W R 1910 6 Ind. Cas. 655

RIID C L and CH VIB, J

References 3 P. R 1887, 47 P. R 1884, 66 P R 1854 129 P R 1889 (F B), 27 M 102, R

(11) *Mortgage—Right to question validity of auction purchase—Property sold subject to mortgage.*

While, in execution of a decree, property is sold subject to mortgage, an auction purchaser, not being the decree holder, who purchases the right title and interest only of the judgment-debtor, is not entitled to raise any question as to the validity or otherwise of the mortgage. **Ram Charan Misir v. Bhagwan Das**, 7 A. L. J. 199=5 Ind. Cas. 874.

ALSTON, J.

Mortgage—(Continued).**—1.—General—(Continued).**

- (12) *Transfer of Property Act* (IV of 1862), S. 59—*Indian Evidence Act* (I of 1872), S. 68—*Registration Act* (III of 1877), S. 49—*Personal covenant to pay debt contained in unregistered or unattested mortgage deed—Whether a registered or unregistered mortgage not attested at all or attested by only one witness is admissible as evidence of personal covenant contained therein.*

A registered mortgage deed, which has not been attested at all or has been attested by only one witness, is admissible as evidence of a personal covenant to repay debt.

Likewise, an unregistered deed of mortgage, which has not been attested at all or has been attested by only one witness, is admissible as evidence of a personal covenant to pay (a). **Pulaka Yeetil Muthalakulan Gara Kunhu Moldu v. Thiruthipalli Madhava Menon**, 1 Ind. Cas. 1 (F.B.) = 32 M. 410 = 19 M.L.J. 584.

WALLIS, MUNRO and SANKARAN NAIR, JJ.

References:—(a) 18 M. 29, overruled; 26 C. 78; 26 C. 222; 30 M. 284, *Appr. and F.*; 15 M. 253; 9 C. 520; 30 M. 251, R.

- (13) *Mortgage of an occupancy holding—Usufructuary—Relinquishment by mortgagor's representative—Mortgagor's suit for declaration that relinquishment void—Mortgagee dispossessed by zemindar through Revenue Court during pendency of suit—Maintainability of the declaratory suit.*

Where, prior to the passing of the Tenancy Act, 1901, an usufructuary mortgage of his occupancy holding was made by a tenant, and that tenant's representative subsequently gave up cultivation and relinquished his holding in favour of the zemindar, *held*, a suit having been brought in the Civil Court by the mortgagee for a declaration that the relinquishment was void as against him, and the mortgagee having been dispossessed by the zemindar through the Revenue Court during the pendency of the suit upon the strength of the relinquishment, that such a suit was maintainable, that a declaratory decree could be made, and that it was not necessary to go into the question whether the relinquishment had been obtained by collusion between the tenant and the zemindar. **Suba Bibi v. Raghobir Singh**, 7 A.L.J. 291 = 6 Ind. Cas. 284.

AIKMAN, J.

Mortgage—(Continued).**—1.—General—(Continued).**

- (14) *Mortgage—Interest—Whether mortgagee entitled to interest at Court rate or contract rate.*

Mortgagees are entitled to interest calculated according to the mortgage deed, and not according to the decree (a). **Yenkatasami Naicken v. Ramanathan Chettiar**, 7 M.L.T. 194 = 5 Ind. Cas. 916.

MUNRO and SANKARAN NAIR, JJ.

References:—(a) 18 C. 164 (P.C.) F; 5 C.L.J. 315; 31 M. 258, R.

- (15) *Construction of mortgage-deed—Deed partly of the nature of a usufructuary and partly of a simple mortgage—Right to bring the property to sale—Presumption of English Law as to satisfaction of mortgage debt, whether applicable in British India—Attachment of mortgaged property in execution of money decree—Right to sue for sale in satisfaction of this claim and of any claim under the mortgage—Transfer of Property Act, Ss. 99 and 67.*

The intention of the parties is to be looked to in construing mortgage-deeds, and where a deed is partly of the nature of a usufructuary and partly of a simple mortgage, the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed (a).

Words of hypothecation have always been understood to import the right of the mortgagee to bring the property to sale for the satisfaction of the claim (b).

It is only a usufructuary mortgagee "as such" that is debarred from suing for sale by S. 67 of the Transfer of Property Act.

Where there were a distinct hypothecation of property and also a distinct personal covenant to pay the mortgage-debt, though the mortgage itself was described as one with possession, *held*, the mortgagee would be entitled to bring the property to sale in satisfaction of the debt for which it was hypothecated.

The presumption of English law that, over twenty years having elapsed since the execution of the mortgage-deed, it should be deemed to have been satisfied, does not apply to mortgages in British India (c).

A mortgagee, who attaches the mortgaged property in execution of a money decree against the mortgagor, but is precluded by S. 99 of the Transfer of Property Act from bringing it to

Mortgage—(Continued).**—1.—General—(Continued).**

sale save by a suit under S. 67 of the Act, can sue for sale of the property in satisfaction of such claim, as well as of any claim under the mortgage, in respect of which he has a right to sue for sale (d). *Fida Ali v. Ismailji*, 6 N.L.R. 20=5 Ind. Cas. 701.

SKINNER, A.J.C.

References:—(a) 21 A. 4, F.; 28 A. 157 and 10 Bom. L.R. 126, R. (b) 12 C.P.L.R. 26 (33), R. (c) 1 Cowp. 102 (109), R. (d) 10 C.P.L.R. 21; S.A. 364 of 1905; S.A. 360 of 1906 and 29 M. 424, F.; 16 A. 415 and 17 A. 520, not F.; and Gour's Transfer of Property Act, 2nd Ed., p. 1040, R.

(16) *Mortgage—Future crops—Agreement to assign—Vague and uncertain bond cannot be enforced.*

Future crops can be hypothecated. A mortgage of future crops operates as an agreement to assign. Such an agreement, in order to be enforceable, must be an agreement which a Court of Equity would enforce. An agreement, the terms of which are vague and uncertain, cannot be enforced. *Dip Chand v. Radha*, 5 Ind. Cas. 373

RICHARDS and TUDHALL, JJ.

(17) *Mortgage—Subrogation, principle of—When applies—Covenant for discharge of prior incumbrance—Discharge of puisne incumbrance by payment out of purchase money—Presumption of intention to keep alive—Rebuttal.*

The rule as to subrogation only applies when the purchaser has not covenanted to discharge the previous incumbrance.

As the principle of subrogation by payment to the prior incumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne incumbrancer, it is safe to hold that that presumption is rebutted when the transaction in question contemplates the discharge of the puisne incumbrancer by payment, out of the purchase-money. *Gorindasami Thevan v. T. M. Doraisami Pillai*, 20 M.L.J. 380=6 Ind. Cas. 781=8 M.L.T. 132.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—(1) 10 C. 1035; 2 C.L.J. 288 (298); 6 C.L.J. 134; 17 M. 62 (64) and 30 M. 67, R.

(18) *Mortgage—Subject-matter, distinct definition of—Deeds relating to land, how to*

Mortgage—(Continued).**—1.—General—(Continued).**

be described—Sub-mortgages, suit by—Parties—Original mortgagors not necessary parties—Document—Interpolation—Interest at bond rate up to what period—Civil Procedure Code (Act V of 1908), O. XLI, R. 20—Adding respondent—Interested in the result of appeal—Cross-objection—Limitation.

A mortgage must define its subject-matter with distinctness.

Where the mortgaged property consists of deeds relating to land, they are sufficiently described by setting out the sums of money with which they are concerned, the dates of execution and the names of the persons bound by them.

Although a sub-mortgagee can join the original mortgagors, when suing on his sub-mortgage, yet it is not necessary for him to do so, and his suit will not fail if he does not make the original mortgagors parties to it.

When a document with certain additions or interpolations is admitted by all the executants before the Registrar, the interpolations cannot be considered to be such as to avoid the document.

A mortgagee is entitled to interest at the bond rate up to the date fixed in the decree for payment, and after that at the Court rate (a).

A Court of appeal is competent to add a respondent at the hearing of an appeal under O. XLI, r. 20 of the Civ. Pro. Code, if the presence of such respondent is necessary for the purpose of properly deciding the appeal and cross-objection, provided such respondent is interested in the result of the appeal as brought and the cross-objection so far as the original appellants are concerned (b).

A respondent can be brought on the record even after the period of appealing against him has run out (c).

Where the plaintiff wanted to make defendants Nos. 5 and 10 liable also on the bond sued upon, but the Court below made a decree against the other defendants and exonerated defendants Nos. 5 and 10, and those other defendants appealed but did not make defendants Nos. 5 and 10 parties to it, and the plaintiff filed cross-objections in due course, and at the hearing of the appeal made an application under O. XLI, r. 20, for making defendants Nos. 5

Mortgage—(Continued).**—1.—General—(Continued).**

and 10 respondents on the ground that they were interested in the result of the plaintiff's cross objection

Held, that the defendants Nos 5 and 10 could not be added as respondents **Bhoneswar Ram v. Ram Khelawan Sahoo**, 5 Ind. Cas 654—12 C L J. 187.

STEPHEN and CHATTERJEE, JJ

References —(a) 34 C 150 (P C), 4 A L.J. 109; 11 C W N 249 5 C L J 106 17 M L J. 43, 9 Bom L R 304 2 M L T 75, F (b) 15 W R. 26, 25 C 56F 2 C W N 42 26 C 109, 3 C W N 76, 26 C 114 31 C 64 35 C 538 2 C W N. 720 R (c) 9 C 355 11 C L R 430, F 12 C W N 625 R

(19) *Mortgage—Two houses and one well mortgaged—Renewal of mortgage by mortgagor's son—Gift of moiety of the well by mortgagor to stranger—Conveyance of the houses mortgaged and the entire well by mortgagor's son to mortgagee—Prior suit between the stranger and the vendor for recovery of moiety of well Dismissal Subsequent suit by the vendor for declaration of title to the entire well and injunction restraining stranger from using the well—Effect of the sale—1 extinguishment of the debt—Effect upon subsequent encumbrance on equity of redemption—Res judicata*

A owned three houses, Nos 1, 2 and 3, and a well. She mortgaged houses Nos 1 and 2 and the well to K the plaintiff. R, the adopted son of A renewed the mortgage. Subsequently A made a gift of house No 3 and a half of the well to the first defendant. K instituted a suit for recovery of certain rooms forming part of No 2 against the 1st defendant and his tenant and for an injunction against the latter restraining him from using the well, and got a decree as prayed for. R sued the 1st defendant for recovery of the house No 3 and the well and his suit was dismissed. R then conveyed all his rights in houses Nos 1 and 2 and the entire well to the plaintiff K. K now sued for a declaration of his right to the entire well and an injunction against the 1st defendant and another claiming under her.

Held, that the 1st defendant's claim to one half of the well became *res judicata* by reason of the decision in the suit between R and the 1st defendant. The plaintiff, as purchaser from R, is not in a better position than R, and is bound therefore to recognise the 1st defendant's equity of redemption in a moiety.

Mortgage—(Continued).**—1.—General—(Continued).**

The mortgage security came to an end by the conveyance executed by R in favour of the plaintiff, who thereafter passed to be in possession as mortgagee. *Held*, also, that the conveyance passed only a moiety of the well, and that the mortgage interest in the other moiety was extinguished by the discharge of the debt, and not transferred to R.

The equity of redemption having been parted with R would only be a trustee for the 1st defendant, a mere conduit pipe to pass the possession to him. (See S 94, Indian Trusts Act)

The discharge of the mortgage merely enlarges the security of the subsequent encumbrancer or adds to the interest of the owner of the equity of redemption (a)

Held that though the 1st defendant was merely the owner of the equity of redemption in a moiety under the gift, and though the right to possession was outstanding in the mortgagee at the date of the gift, the mortgagee having become discharged, she is entitled to possession of the moiety and cannot be prevented from using the well as owner of such security. **Ponnamal v. Kallithitta Mudali**, 7 M L T 405=6 Ind. Cas 764

BENSON and KRISHNASAWMI AIYAR, JJ

References —(a) 1 M D and De Ex 339.

(20) *Mortgage Person acquiring interest in mortgaged estate since mortgage—Arrangement—Proportionate abatement—Mortgagee not a trustee—Equity of redemption purchase of, by mortgagee, effect of—Debt, apportionment of—Release by mortgagee in favour of subsequent purchaser of portion of mortgaged property, effect of.*

As a general rule, the rights of persons, who have acquired an interest in the mortgaged estate since the mortgage cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If, therefore, a mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage-debt as against such purchaser. But this rule does not apply where the mortgagee releases a portion of the mortgaged property before the residue is transferred to third persons. If he does so release, he

Mortgage—(Continued).**—1.—General—(Continued).**

diminishes his own security; but, as subsequent purchasers can only take subject to the mortgage, the mortgagee may throw the whole burden of the mortgage debt on the residue.

It is not open to subsequent purchasers of mortgaged property to compel the mortgagee to grant them a proportionate abatement of the mortgage-debt, unless it is established that such a defence would have been available to the mortgagors themselves (a).

The effect of the purchase of part of the mortgaged property by the mortgagor is not to extinguish his mortgage security in its entirety (b).

The relation between the mortgagor and mortgagee is not so far analogous to that between a trustee and *cestui que trust*, as to preclude a purchase of the equity of redemption by the mortgagee. This rule is subject to the qualification that the Courts, if called upon to scrutinise the transaction, will look upon it with jealousy, and will set aside a purchase made by the mortgagee, when, by the influence of his position or by constructive fraud, he has gained an unconscionable advantage and has purchased the property for such a low price as may be taken to be fairly indicative of fraud or undue influence (c).

The effect of a transaction is to be judged by its nature. If the sale was intended to be one of the equity of redemption merely, the mortgagee acquired the property subject to his mortgage, and in such a contingency, while there is no extinguishment of his right to enforce the mortgage against the remainder, the mortgage is extinguished to the extent of the amount fairly chargeable upon the property purchased by him. If, on the other hand, the sale was of the property freed of the mortgage, and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the mortgage-debt and the purchase-money should be applied in reduction of his dues, the mortgagee will not be bound to apportion the debt. In this latter contingency, unless the purchase might be successfully impeached on the ground of fraud or undue influence, the mortgagee is not bound to allow credit for a larger sum than what was deliberately settled as the price of the portion purchased by him. Cases on the subject reviewed.

A mortgagee may, at an execution sale, purchase a portion of the mortgaged property free

Mortgage—(Continued).**—1.—General—(Continued).**

of his mortgage. The distinction is not so much between a private sale and an execution sale, as between a purchase of the equity of redemption and a purchase of the entire interest in the property (d).

As between the mortgagor and mortgagee, the latter is entitled to release a portion of the hypothecated property and diminish his own security to that extent. It is not obligatory upon him to proceed against all the properties rateably or to exhaust them for the satisfaction of his debt.

A mortgagee who has security upon two or more properties which, he knows, belongs to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privy and consent of the persons affected. But this doctrine has no application to a case where the release took place at a time when the purchaser of the mortgaged properties had not purchased any interest in the mortgaged premises, and the mortgagors alone were affected by the release. **Mir Eusuff Ali Haji v. Panchanan Chatterjee**, 11 C.L.J. 639=6 Ind. Cas. 842.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 10 C.L.J. 150, R. (b) 20 A. 23, R. (c) (1806) 2 Sch. and Lef. 661; L.R. 8 Eq. 461, R. (d) 24 M. 97; 27 Bom. 297; 28 A. 593; 29 A. 233; 4 C.L.J. 317; 34 C. 13; 4 C. L.J. 573, R.

(21) *Possession of mortgaged property by mortgagee—Covenant to pay by mortgagor—Decree for sale, right to sue for.*

When an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent, and the mortgagee may sue for sale, although he may have given up possession (a). **Pitambar Purkait v. Madhu Sudhan Mandal**, 6 Ind. Cas. 153.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 24 C. 677, D; 21 M. 476; 28 A. 157; A.W.N. (1905), 226, R.; 6 C.L.J. 143; 5 Ind. Cas. 130; 11 C.L.J. 136, F.

(22) *Prior mortgagee suing on one of his several mortgages is not bound to satisfy his claim under a subsequent mortgage out of the surplus sale proceeds.*

A executed a mortgage in favour of B in respect of two villages S and O in 1879. He executed another mortgage in favour of D in 1892,

Mortgage—(Continued).**—1.—General—(Continued).**

in respect of one of the villages C only. He again executed another mortgage in 1895 in favour of B in respect of both the villages S and C. B sued on his mortgage of 1879, and obtained a decree, in execution of which the village S was sold in 1896. The sale proceeds yielded a surplus of Rs. 400 which was paid over to the mortgagor. B again brought a suit on his mortgage of 1895 and sought to obtain a decree against the village C. D contended that B ought to have applied the sum of Rs. 400 surplus in satisfaction of his second mortgage of 1895.

Held, that B was not bound to so apply the surplus. **Hulasi v. Kalka Prasad**, 6 Ind. Cas. 160.

RICHARDS and GRIFFIN, JJ.

(23) *Registration Act (III of 1877), S. 17—Endorsement on mortgage—Non-extinction of mortgage—Compulsory registration—Transfer of Property Act (IV of 1882), Ss. 74, 85—Civil Procedure Code (Act XIV of 1882)—S. 43—Subsequent mortgage—Payment of prior mortgages—Suit on subsequent mortgage—Claim for payments of prior debts.*

A subsequent mortgagee paid off the amounts due on two prior mortgages, and obtained a receipt from the prior mortgagee.

Held: the receipt was not compulsorily registrable, but came under clause (n) of S. 17 of the Registration Act.

Held also: In his suit to enforce his own mortgage, the subsequent mortgagee was bound to join any further claim which he had against that property, by reason of payments made by him under S. 74 of the Transfer of Property Act, the sum so paid being treated as an addition or accretion to the claim on his original mortgage. Not having done so, a subsequent suit to recover the sum so paid out of the properties was barred under S. 43, Civ. Pro. Code (1882). **Hari Narain Banerji v. Shama Sundari Dassi**, 11 C.L.J. 551=6 Ind. Cas. 159=37 C. 589.

BRETT and SHARFUDDIN, JJ.

(24) *Appeal—Interlocutory order—Examination of account of Receiver—Decree—Mortgage suit—Preliminary decree made by appellate Court—Application for order absolute to be made where—Receiver—Mortgagee appointed Receiver of mortgaged*

Mortgage—(Continued).**—1.—General—(Continued).**

property—His liability to account—Moneys received to be applied towards discharge of judgment-debt before order absolute made.

An interlocutory order for the examination of the accounts of a Receiver is not a decree and is not appealable.

If the preliminary decree in a mortgage suit has been made, in modification of an order of the Court of first instance, by a Court of appeal, the application for an order absolute must be presented to the first Court, and not to the Court of Appeal (a).

Where a mortgagee consents to act as Receiver of the mortgaged properties, in his suit to enforce the security, he is liable to account, and the sums if any received by him must be applied towards the discharge of the judgment-debt, before he can obtain an order absolute for sale. **Shamal Dhone Dutt v. Lakhimont Debi**, 6 Ind. Cas. 923.

MOOKERJEE and TEUNON, JJ.

References:—(a) 23 A. 88; 31 A. 328; 6 A.L.J. 25; 2 Ind. Cas. 220; 23 M. 521, F.; A.W.N. (1906), 203; 3 A.L.J. 828, *dissented from*.

(25) *Document, construction of—Sale or mortgage—Condition to re-transfer.*

Where all the *indicia* of the debtor and creditor relation are present, an instrument will not operate as a sale, merely because there is a stipulation in the deed that the alienor would re-transfer the property to the alienor, if the debt would be paid up by the alienor, within a stipulated period. **Madho Koro v. Gopa Bandhu Nippako**, 6 Ind. Cas. 512=8 M.L.T. 100.

BENSON and KRISHNASWAMI IYER, JJ.

(26) *Hindu Law—Alienation—Antecedent debt—Sons liable unless the debt tainted with immorality—Res judicata between co-defendants—Mortgage—Mortgaged property sold in execution of prior mortgage decree—Acution-purchaser re-selling it to the mortgagor—Suit on subsequent mortgage—Property not liable to be sold—Pleading—Finding of fact not challenged in the first appellate Court cannot be agitated in second appeal—Practice.*

The first Court found certain facts against the appellants. They did not challenge it in

Mortgage—(Continued).**—1.—General—(Continued).**

the lower appellate Court. *Held*, that they could not challenge them in second appeal.

The sons and grandsons of a Hindu are bound by the mortgage created by the father, in lieu of antecedent debts which were not contracted for immoral purposes.

In a suit brought by a prior mortgagee, both the mortgagor and the subsequent mortgagee were made parties.

Certain issues were decided as between the prior mortgagee and the mortgagor.

Held, that the issues could not be *res judicata* as between the mortgagor and the subsequent mortgagee, in a suit brought by the subsequent mortgagee, on the strength of his mortgage.

A suit was brought by a prior mortgagee, and the subsequent mortgagee was made a party. The subsequent mortgagee, was given an opportunity to redeem the prior mortgage but he failed to do so. The property was put to auction free from all incumbrances and was purchased by a person who sold back the property to the heir of the mortgagor. *Held* in a suit brought by the subsequent mortgagee, that the property thus purchased by the mortgagor ceased to be security for the mortgage debt of the subsequent mortgagee, and was, therefore, not liable for that debt. **Sahdeo Rai v. Ram Sewak Rai**, 6 Ind Cas 331.

RICHARDS and TUDHALL, JJ

(27) *Mortgage decree—Payment to decree holder before and after order absolute. Execution—Civil Procedure Code (Act XIV of 1882), S. 251—Limitation Act (XV of 1877), Sch. II, Art 173-A*

Where the mortgagee makes on application for an order absolute, and the mortgagor has previously made any payments towards satisfaction of the judgment debt, it is open to him to urge that an order absolute ought not to be passed for the entire sum, or that an order absolute ought to be passed for a smaller sum than what is mentioned as due in the decree nisi. When a decree has once been made, it is conclusive between the parties (a).

S. 258, C.P.C. (1882), applies to proceedings in execution of mortgage decrees. Hence any payment alleged to have been made to the decree-holder and not certified by him within the time prescribed by Art. 173-A, of the Limitation Act (XV of 1877) cannot be considered

Mortgage—(Continued).**—1.—General—(Continued).**

by the execution Court (b). **Nistarini Das v. Kazim Ali**, 12 C.L.J. 65=7 Ind Cas. 258.

MOOKERJEE and TEUNON, JJ.

References—(a) 8 C.W.N. 102, 29 C. 810, R. (b) 7 C.L.J. 581, 25 C. 703, 8 C.W.N. 102, 24 M. 412, D.

(28) *Suit to recover money secured by a mortgage deed found to be invalid—Limitation Act, Arts 97 and 116.*

Where a mortgagee was dispossessed under a decree obtained by certain person, on the ground that the mortgagors were members of a joint Hindu family and had no authority to make the mortgage, and the mortgagee brought a suit for recovery of, amongst other sums, the money secured by the mortgage *held*, that the suit was governed not by Art 116 but by Art 97 of the Limitation Act. **Ram Pal Jhan v. Mahadeo Prasad** 13 O.C. 155

CHAMBER, J.C.

(29) *Joint property mortgaged—Subsequent partition. Property mortgaged not falling to mortgagor's share—Mortgagor becoming entitled to other properties—Substitution of securities—Mortgagor's right—S. 61 (a) Transfer of Property Act, 1882*

A mortgage of an undivided share in common property or of one of the joint properties, before partition from one of the sharers, is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or is in fraud of the mortgagee (a). **Muthia Raja v. Appala Raja**, 20 M.L.J. 393 = 8 M.L.T. 133

BINSON and KRISHNASWAMI Aiyar, JJ.

References—(a) 23 B. 365, D., 1 L.A. 106 20 C. 533, 35 C. 368 and 6 C.L.J. 46, L.

(30) *Mortgage—Private sale of mortgaged property—Consolidation left with purchaser for discharge of two mortgages—First mortgage alone discharged—Suit by second mortgagee—Priority—Subrogation—Should—Intention of parties—Position of purchaser*

In all cases, where a subsequent purchaser claims priority over a puisne mortgagee by reason of his having discharged a prior mortgage, the question is always one of intention, i.e., whether it was the intention to keep the prior mortgage alive as against the puisne mortgagee (a).

Mortgage—(Continued).**—1.—General—(Continued)**

Where the purchaser undertook to discharge not only the prior, but also the puisne mortgage, and paid off the former but not the latter, he was not entitled to hold up as a shield, the mortgage which he had paid off, as against the debt which he undertook to pay but which he did not discharge

Semle—that where a vendor leaves the consideration for the sale with the vendee for payment to the former & mortgagee creditor and the vendee makes such payment he can not in the matter of the payment be deemed to have acted as the agent of the vendor mortgagee **Muhammad Sadik v Ghaus Muhammad**, 7 A L J 914 (F B) 7 Ind Cas 200

STANLEY C J BANERJI and CHAMBERLAIN.

Reference—(a) 10 C 1035 1046 (P C) R

(31) *Mortgage—In mortgage accepting a Zuri peshgi lease—Priority over subsequent mortgages—Intention to keep alive the prior mortgage—Holding it up as a shield*

Where a prior mortgagee obtains a decree upon his prior mortgage and in lieu of the amount of that decree he obtains a subsequent mortgage of the same property from the mortgagee the prior mortgage enures to his benefit, and he can hold it up as a shield against a puisne mortgage whose mortgage is of a date subsequent to that of the prior mortgage

If it is to the benefit of the prior mortgagee to keep alive that mortgage it would be presumed that he kept it alive. The mere fact that *Zuri peshgi* lease was executed does not indicate a contrary intention (a) **Kanhaya Lal v. Chhida Singh**, 7 A L J 984 = 7 Ind. Cas 468

STANLEY C J and BANERJI

Reference—(a) 28 All. 778 applied.

(32) *Mortgages successive in favour of same mortgagee—Suit to enforce earlier mortgages without joining the claim under the latest mortgage—Maintainability*

There is nothing in law to prevent a person, who has several mortgages over the same property, from bringing a suit on the earlier mortgages without joining in that suit his claim under the latest if he does not in such a suit pray for the sale of the property subject to the

Mortgage—(Continued)**—1.—General—(Continued).**

latest mortgage (a). **Gobinda Prasad v. Lala Hari Har Charan**, 14 C.W.N. 1058

BRETT and VINCENT, JJ

References—(a) 30 Bom 156 (1905), 25 Mad 108 (1901), 26 All. 14 (1908), and 30 Mad. 353 (1907), R.

(33) *Mortgage—Covenant to compensate the mortgagee—Dispossession of mortgagee—Liability of mortgagee—Transfer of Property Act (II of 1882), S 68 (a).*

A executed a usufructuary mortgage in favour of C and C in his turn executed a sub-mortgage in favour of B. C in his sub mortgage covenanted that if during the period of the mortgage, the property mortgaged, in any year, by any reason, should pass out of the possession of B, or the mortgage deed for any reason should be declared to be invalid he would be liable to pay the loss sustained by the mortgagee. A applied under the Bandilkhand Encumbered Estates Act. C took no steps to realize the money B preferred a claim, but his claim was rejected. B was ejected from the property. *Held*, that it was open to B to rely upon the absolute covenant contained in his mortgage deed and to hold C responsible for the loss which he had sustained by reason of his dispossession. **Gaya Prasad v Ganga Bishun** 6 Ind Cas 898

STANLEY C J and GRIFFIN, J

(34) *Mortgage—Subrogation—Presumption of intention—Legal and equitable claim, if both may be urged together*

The principle of subrogation is one based on a presumption of intention which may be supported by circumstances or evidence of assignment or agreement or both

Where a debt on a mortgage decree obtained by N was paid off by money paid by plaintiff, for which the defendant executed a fresh mortgage bond at an increased rate of interest, which recited the necessity for paying off the decretal debt, and which whilst actually mentioning one of three mesne mortgages falsely stated that the property was otherwise free from encumbrance

Held—That the plaintiff stepped into the shoes of N on the principle of subrogation and had priority over the mesne mortgages

Subrogation by intention confers an equitable right and subrogation by agreement a legal claim. It is therefore open to a party to base

Mortgage—(Continued).**—1.—General—(Continued).**

his claim on both intention and agreement (a)
Tara Sundari Debi v. Khedan Lal Sahu, 14
 C W N. 1089

HOLMWOOD and SHARFUDDIN, JJ

References—(a) 5 C L J 611 (1907), *D*, 6
 C L J 184 (1907), *R*.

(35) *Mortgage—Subrogation—Presumption
 of intention—Interest—Costs if part of
 decree.*

Where the kobala by which mortgaged pro-
 perties were sold recited certain mortgages
 which were paid off out of the purchase money,
 and the mortgage bonds were preserved by the
 purchaser

Held that there was a presumption of subro-
 gation of the purchaser to the rights of the
 mortgagees,

Held further—that, in order to establish right
 by subrogation, it was not necessary for the
 purchaser to prove any intention or agreement
 to subrogate and the presumption from the
 circumstances would be in his favour

Where the contract rate of interest is not
 proved to be a penalty or unconscionable the
 Court should not disturb it

Costs form a part of the entire decree and
 carry Court rate of interest **Prayag Narain
 Kafri v Chedi Rai**, 14 C W N 1093

HOLMWOOD and SHARFUDDIN JJ

(36) *Mortgage bond—Construction—Lis pendens
 in mortgage of two properties—Mortgagee
 purchasing one of them in execution of a
 decree on a prior mortgage—Liability of
 the other property to pay the whole mort-
 gage debt—Mortgagee undertaking to pay
 the Government revenue—Suit to redeem
 the other property by purchasers of equity
 of redemption—Mortgagee's right to tack
 on the amount of Government revenue paid
 —Laches—Equity.*

Where two properties are mortgaged under
 a second mortgage and one of them is swallowed
 up by a prior mortgage, the whole burden of
 the second mortgage falls on the remaining
 property entirely

Where the second mortgage deed contained a
 covenant that the mortgagee should pay the
 Government revenue on two properties which
 were separately assessed, from the rents and
 profits of the properties mortgaged, retain
 certain fixed amount for interest and pay the
 mortgagor a certain yearly sum as *mukhana*,

Mortgage—(Continued).**—1.—General—(Continued).**

and if the Government revenue was enhanced
 the mortgagor was to be liable for the amount
 of the enhancement

Held that the mortgagee had undertaken
 the duty of meeting the Government demand,
 and it was his duty to pay the Government
 revenue for both properties, that the mortgagee
 could not be allowed to throw the burden of,
 his own laches on the property for which the
 revenue was not paid, and that any equity
 that might have been invoked against the
 mortgagor who was not seeking redemption,
 did not arise against the purchaser of the
 equity of redemption **Bohra Thakur Das v.
 The Collector of Aligarh**, 12 C L J 271 (P C)

14 C W N 1031—8 M L T 276=7 Ind.
 14 732 7 A L J 1132—12 Bom L R 1005.

**LORD ALKINGTON LORD SHAW, SIR
 ARTHUR WILSON and MR AMBER
 ALI**

(37) *Sale—Mortgaged properties—Order in
 which to be sold—Discretion of Court—
 Right of decree holder to execute against
 any mortgaged property whether absolute*

Properties A and B were mortgaged and after
 the mortgage the property A was sold to R
 The mortgagee brought a suit on his mortgage
 against the mortgagor and R and obtained a
 decree for sale He then applied for the sale
 of both the properties A and B but the Court,
 in the exercise of its discretion directed that
 property B should be sold first The decree
 holder then applied that his petition for execu-
 tion may be dismissed and it was dismissed.
 He again applied for the sale of property A
 alone

Held that the decree holder was not abso-
 lutely entitled to execute his decree against any
 of the mortgaged properties he pleased, for in
 that case it would result in this that the
 inherent power of the Court conferred by law
 to decide in what order the mortgaged pro-
 perties are to be sold would be altogether
 abrogated at the option of the decree holder (a)

The present petition should be dismissed un-
 less amended by adding the property B to the
 application so as to leave it in the discretion of
 the Court to order the properties to be sold in
 any order it may see fit **Mahomed Siddik v.
 Ram Lal Mandar**, 7 Ind Cas 4

HOLMWOOD and SHARFUDDIN, JJ.

References —(a) 34 C 13, *dictum* at p. 17 ;
 4 C L J 573, *doubted*.

Mortgage—(Continued).**—1.—General—(Continued).**

- (38) *Mortgage—Decree—Time fixed for payment of a prior mortgage—Payment not made within time, effect of—Transfer of Property Act (IV of 1882), S. 93—Civ. Pro. Code (Act V of 1908), Ss. 148, 151—Extension of time fixed in a decree.*

A mortgage decree was passed in 1898. The decree fixed a time within which the decree-holder has to pay a certain sum to a prior mortgagee. In case he failed to pay, the decree further provided that the suit would stand dismissed. The decree-holder did not pay within the time fixed. He, however, deposited the money in Court after the expiry of the time, and the Court allowed the prior mortgagee to withdraw it. Some six years after, the decree-holder applied for a decree absolute.

Held, (1) that the action of the Court in accepting the money deposited by the decree-holder after time and giving it to the prior mortgagee was purely mechanical. It did not extend the time for payment to the prior mortgagee;

(2) that the effect of non-payment to the prior mortgagee within time was, under the decree, to let the whole suit stand dismissed against all the parties, the mortgagor and the subsequent mortgagees including (a);

(3) that, under S. 93 of the Transfer of Property Act, 1882 the Court was not bound to extend the time fixed for payment of the decretal amount;

(4) that the High Court could not extend time, under S. 148 or S. 151 of the Code of Civil Procedure, 1908, as S. 148 relates only to proceedings antecedent to the passing of a decree and was not intended to enable the Court to extend time in pre-emption and redemption cases, and S. 151 has no application to the present case. **Batuk Nath v. Munni**, 7 Ind. Cas. 36.

KARAMAT HUSAIN and CHAMIER, JJ.

References:—(a) 19 M. 249; 23 I.A. 32; 13 A. 492, R; A.W.N. (1902) 125; 24 A. 44; A.W.N. (1907) 187; 29 A. 481; 4 A.L.J. 447, D.

- (39) *Suit for sale on mortgage—Interest of puisne mortgagees and purchasers not set out in the plaint—Dismissal of suit.*

A suit by a mortgagee for sale of the mortgaged property should not be dismissed, because the plaintiff has failed to set out in his plaint the interests of parties in possession in the

Mortgage—(Continued).**—1.—General—(Continued).**

mortgaged property. **Sudallamuthu Pillay v. Muthusawmi Pillay**, 7 Ind. Cas. 49.

BENSON and KRISHNASWAMI IYER, JJ.

- (40) *Mortgage suit—Suit by assignee of mortgage—Parties to the suit—Execution of mortgage deed admitted—Consideration denied—Burden of proof as to consideration.*

D, the assignee of a mortgage, brought a suit on the mortgage, and made the original mortgagor and the original mortgagee parties to the suit. The mortgagor admitted the execution of the deed, but denied the receipt of consideration.

Held, that the original mortgagee was rightly impleaded in the suit and that the plaintiff was entitled to ask for a relief against him if he failed to obtain a decree against the mortgaged property:

Held, further, that the onus to prove the want of consideration lay on the mortgagor, **Ding Singh v. Manbhar**, 7 Ind. Cas. 69.

STANLEY, C.J., and GRIFFIN, J.

- (41) *Mortgage suits Interest—Rule of damdupat.*

In mortgage suits the relation of debtor and creditor continues down to the passing of the decree. Under the ordinary circumstances, the mortgagee is entitled to interest at the contract rate until the date fixed for realization; but the rule of *damdupat* applies to interest accruing due after the institution of the suit (a). **A. C. Devaraja Urs v. Hotte Ranganna**, 15 M.C.C.R. 227.

STANLEY ISMAI, C.J. and KRISHNA RAO, J.

References:—(a) (1906) 38 Cal. 1269; (1898) 26 Cal. 39, (1899) IV M.C.C.R. 53, F.

- (42) *Mortgage—Priority—Subrogation—Lis pendens—Keeping alive earlier mortgage—Intention—Presumption.*

Where the plaintiff's mortgage was subsequent to, and taken during the pendency of, the mortgage suit instituted by defendant No. 4, but the money lent on the plaintiff's mortgage went towards the payment of the prior mortgages, which though subsequent to the mortgages of the defendant No. 4, were prior to the mortgage suit of the defendant No. 4; *held* that there was no new transaction nor dealing with the property during the pendency of the suit, that all that happened was that the plaintiff took over mortgages which had come into existence prior to the mortgage suit

Mortgage—(Continued).**—1.—General—(Continued).**

of defendant No. 4 and thereby became subrogated to the rights of those mortgagees, who obviously could not have been bound by the doctrine of *lis pendens*, and that the plaintiff also could not have been so bound,

Held, also, that, in the absence of evidence to the contrary, the presumption is that the plaintiff intended to keep those earlier mortgages alive for his benefit **Tara Prosad Mandal v. Kristo Prosad Panda**, 7 Ind Cas 473

WOODROFFE and TEUNON, 11

(48) *Estoppel—Mortgage—Prior and subsequent mortgages—Sale of part of mortgaged property to mortgagee—Redemption of previous mortgage—Prior mortgagee not setting up his purchase as defence—Right of subsequent mortgagee to possession*

When the sub mortgagees purchase the shares of some of the heirs of the mortgagor in the property mortgaged and all the heirs sue for redemption of mortgage and, pending suit for redemption, the property is mortgaged with third parties and out of consideration for this latter mortgage the sub mortgagees are paid up and redemption of the previous mortgage is allowed the sub mortgagees are estopped from setting up their purchase from some of the heirs of the mortgagor against the claim for possession made by the subsequent mortgagees. Their acceptance of the whole mortgage money constitutes an admission that the redeemed land had not been sold to them. **Bala Bakhsh v. Lohri**, 39 T.L.R. 1910.

REID, C J, and JOHNSTONE, J

(44) *Mortgage of occupancy holding—Void mortgage—Mortgagee put in possession—Mortgagor's right to recover possession without paying the mortgage money*

Where a mortgagee of an occupancy holding has been put in possession of the holding by the mortgagor, the mortgagor cannot recover possession, without paying the mortgage money, on the ground that the transfer is void. **Digpal Sing v. Surat Upadhia**, 7 Ind Cas 738.

KARAMAT HUSAIN, J.

References —A W N. (1888) 128, 11 Bom. L.R. 695; 3 Ind Cas 761, *F.*, 7 A L J 330, 32 A. 393; 5 Ind. Cas. 557, D.

(46) *Mortgage—Rule of damdupat, applicability of, after the enforcement of the*

Mortgage—(Continued).**—1.—General—(Continued).**

Transfer of Property Act—Right of mortgagee to sue for interest is a right arising from contract.

A Hindu mortgagor can claim the application of the rule of *damdupat* when the original mortgagee is also a Hindu, notwithstanding by subsequent assignment the person who claims the principal and interest due on the mortgage is a Parsee.

The Transfer of Property Act has not affected the application of the rule of *damdupat* in the case of a Hindu mortgagor

The right of a mortgagee to sue for his principal and interest is a right arising from a contract and must be taken to be made subject to the usages and customs of the contracting parties **Jeevanbai v. Manordas Lachmandas**, 12 Bom L.R. 992

MACLUD J.

(46) *Execution suit—Mortgage—Different conditions of payment in several mortgage-deeds—When last supersedes the previous ones—Conditional sale—Right of suit—Mortgagee after the Punjab Alienation of Land Act has come into force—Its section 9 (2)—Cause of action—P.P. Act (IV of 1894) S. 65*

Held that —

(1) A plaintiff, whose right to sue had not accrued at the date of institution of suit, can not claim a decree simply on the ground that his right to sue has become complete during the pendency of the suit

(2) That a recital in the last mortgage deed that the mortgagor shall pay the amount due under the previous mortgage deed at the time of redemption supersedes the stipulation made therein fixing the time of payment by the mortgagor of the mortgage money

(3) A mortgagee's suit to recover the mortgage money due on a mortgage deed in which the mortgagor agrees to pay it within a certain number of years is not maintainable before expiry of those years

(4) A mortgagee of revenue paying land with conditional sale is not entitled to get its possession in case of mortgagor's default. The only remedy left for him is now the one provided under S. 9 (2) of Act I of 1900, the last proviso of S. 68 of Act IV of 1882 cannot help him in

Mortgage—(Continued).**—1.—General—(Continued).**

the least (a). **Nanak Chand v. Mehr Jawata**, 137 P.W.R. 1910.

SHAH DIN and CHEVIS, JJ

Reference.—(a) 29 P.W.R. 1910.

(47) *Mortgage decree—Order absolute—Payment out of Court before and after order absolute—C.P.C. (1st XI) of 1882, S. 258—Limitation Act (XV of 1877), Sch II, Art 173 A*

Before an order absolute has been made in a mortgage decree, it is the duty of the Court to determine in respect of what sum the decree-holder is entitled to an order absolute. On this footing, the Court is bound to consider any allegations of payment by the defendant after the date of the decree and before the date of the application for an order absolute (a).

Different considerations, however, apply when a payment or an adjustment is alleged to have been made subsequent to the order absolute in answer to an application by a mortgagee decree-holder to bring the mortgaged properties to sale. The execution Court can be invited to determine the question only under S. 258 of the C.P.C. 1882 (b).

If an adjustment has not been recorded within the period of limitation under, Art 173 A of the Limitation Act 1877, it cannot be taken notice of by the executing Court. **Hiramony Biswas v. Musa Khan**, 7 Ind. Cas. 625

MOOKERJEE and SHARFUDDIN, JJ

References.—(a) 9 C.W.N. 102, 29 C. 651, relied upon 1 Ind. Cas. 677, 10 C.L.J. 91, R. (b) 4 Ind. Cas. 402, 11 C.L.J. 91, 26 M. 473 (F.B.), 15 M.L.J. 126, followed 12 C.W.N. 495, distinguished, 7 Ind. Cas. 55, referred to.

(48) *Mortgage—Order absolute—C.P.C. (1st V of 1908), Order XXXI, r. 5—High Court, Original Side—Practice*

Where, after an order for payment of the mortgage-money, the mortgagee dies, there should be a fresh order upon the defendants mortgagors to pay the money into Court before there is a final decree for sale. Previous practice of the High Court, original side, in these cases, discussed. **Sarat Coomari Dassi v. Hari Charan Pal**, 12 C.L.J. 596

PUGH, J

(49) *Mortgage suit—Paramount title, when may be investigated—Hindu law—Direction for accumulation—Direction not perpetual—Present gift—Bequest to wife of son when married, whether valid.*

Mortgage—(Continued).**—1.—General—(Continued).**

The rule that the question of paramount title cannot be properly investigated in a mortgage suit is subject to exceptions.

Where the defendant is the legal representative of the mortgagor, and if the property really belonged to the mortgagor, she, the defendant, would be the proper person to be sued, it is open to her, when sued by the mortgagee upon that assumption, to set up her own title to the mortgaged property.

The substance of a disposition by will was that D, the eldest son of the testatrix, would take possession of the estate upon the death of the testatrix, that he would get his brother S married in the course of ten years, that, if S married within this period, the estate would be taken by his wife, but that if S did not marry within ten years upon the expiry of that period, D would sell the properties and apply the proceeds for certain specified religious purposes. The will concluded with a statement that D would be the executor till the marriage of S, when his wife would succeed to the office of executor.

Held, that the true position of D was no higher than that of an executor who had clearly no power to spend the income, that he was to accumulate the income for a period which might extend to ten years or might be shorter, if S should be married in the meanwhile, that this trust for accumulation, not being one for perpetual accumulation, was good as there was a present gift to support the direction for accumulation, that the bequest to the wife of S was valid in Hindu law, and that the estate vested in the wife of S as soon as she was married.

Therefore, a mortgage of the estate by S before his marriage did not pass any title to the mortgagee. **Nafar Chandra Kundu v. Ratnamala Debi**, 7 Ind. Cas. 921.

MOOKERJEE and TEUNON, JJ.

(50) *Mortgage decree—Purchase of mortgaged property by the decree-holder—Sale by mortgagor of part of mortgaged property prior to decree—Purchaser not impleaded as party to mortgage suit—Right of private purchaser to redeem his own share—T.P. Act (IV of 1882), S. 60—Right of mortgagee to claim interest according to mortgage deed—Interest.*

Where, in the execution of a mortgage decree, the mortgagee decree-holder purchased in

Mortgage—(Continued).**—1.—General—(Continued).**

Court sale some of the items of the mortgaged property, and one of these items was sold before the date of the decree by the mortgagor to the appellant, who was not impleaded as a party in the mortgage suit.

Held (1) that the sale in Court auction must be treated as valid and that the mortgagee must be taken to have split up his security and precluded himself from objecting to an appointment.

(2) that the appellant was entitled to redeem his own share only on payment of the proportionate amount, which the item sold to him was liable to contribute rateably to the debt secured by the mortgage

(3) that on the said amount the mortgagee was entitled to interest according to the mortgage-deed and not according to the decree **Yenkataswami Naicken v. Ramanathan Chettiyar**, 8 Ind Cas 153 8 M L T. 409

MUNRO and SANKARAN NAIR JJ

References —18 C 164=17 I.A. 201 31 M 259=18 M L J 344=4 M L T 293 F 5 C L. J. 315=11 C W N 403 not F

(51) *Stipulation as to payment of compound interest in default—Whether penalty—Rate of interest allowable between date of mortgage decree and date fixed for payment—S 86, Transfer of Property Act*

A stipulation in a mortgage deed as to the payment of compound interest in default is not a stipulation by way of penalty and the mortgagee is entitled to recover the compound interest

Even if S. 86, T P Act, does not bind the Court to award the contract rate of interest for the period between the date of the mortgage decree and the date fixed for payment the Court may in its discretion award that rate especially in a case like the present where the mortgagee cannot enforce payment before the time fixed. **Yeera Reddi v Subbanna Setti** 8 M.L.T. 387

WHITE C J, and SANKARAN NAIR J

Reference —21 M 365 F.

(52) *Decree—Order directing distribution of sale proceeds between several mortgagees if decree—C.P.O (Act V of 1908), Ss 2 cl. (2), 47 (1)—Distribution of sale proceeds between prior mortgagees—Interest to run till date of confirmation—Transfer of Property Act (IV of 1882), Ss. 83, 84*

Mortgage—(Continued).**—1.—General—(Continued).**

An order directing the distribution of sale proceeds between the first mortgagee and the second mortgagee, who were made parties to a suit by the third mortgagee to enforce his security, is an order within the scope of S 47, sub S. (1) of the C P C, of 1908, and is, therefore, a decree within S 2 sub S. (2), and is appealable as such

In directing the distribution of the sale proceeds the Court should proceed upon the assumption that each of the prior encumbrancers was entitled to interest at the contract rate up to the date of the confirmation of the sale, which was the earliest date on which money became actually available for distribution amongst the different mortgagees. **Benode Lal Bando padhya v Srikrishna Chuckerbutty**, 8 Ind Cas 4

MOOKERJEE and TEUNON, JJ

(53) *Mortgage debt paid by third party—Subrogation—Third party's right—Right to stand in mortgagee's shoes—Taking mortgage bond if necessary—Title of purchaser at auction sale—Sale by judgment debtor after auction sale but before issue of sale certificate—If title of auction purchaser defeated—C P C (Act XIV of 1882), S 316*

When a mortgage debt, for the payment of which a sale has been ordered is satisfied by a third party who when he makes the advance to satisfy the debt obtains a security over the mortgaged property the security created by the original mortgage debt is not extinguished, and the original encumbrance, in respect of which the sale was ordered enures to the benefit of the party making the payment (a)

But if the third party, when advancing the money fails at the time to take any charge on the mortgaged property as security for his loan, but subsequently takes a mortgage over the same property he is not entitled to claim that the second mortgage is a mortgage in continuation of the original mortgage which he has discharged, and the result is that he is not entitled to step into the shoes of the original mortgagee.

And if, in the interval, that is, between the advance made by him and the taking of the security subsequently, the property is transferred, his rights must be subject to that transfer.

Mortgage—(Continued).**—1.—General—(Continued).**

The title of an auction purchaser cannot be defeated by any transfer made by the judgment-debtor between the date of the sale and the date of the confirmation of the sale (b). **Ram Saran Singh v. Khakhan Singh**, 8 Ind. Cas. 657.

BRETT and CHITTY, JJ.

References:—(a) 28 A. 778; 3 A.L.J. 630; A.W.N. (1906) 230; 29 M. 37, *relied upon*; (b) 15 C. 546; 24 A. 475; A.W.N. (1902), 145, R.; 2 C.W.N. 589; 7 C.L.J. 1, P.

(54) *Mortgagor and mortgagee—Subsequent possession of mortgagee not necessarily evidence of outright sale—Burden of proving subsequent outright transfer on mortgagee—Entry in register—Possession over 13 years insufficient—Burden of proof.*

Where, after mortgaging the properties, the mortgagors remained in possession at first and subsequently made over possession to the mortgagees, who alleged that possession was made over outright and not in usufruct, the burden of proving the outright transfer is on the party asserting it (a).

An entry in Register No. 1 showing an outright transfer for consideration, coupled with the fact of possession for over thirteen years, is not sufficient to shift the *onus*, especially where there is no entry in Register IX of the corresponding year, and the possession is as consistent with the transaction being an usufructuary mortgage as with its being an outright transfer. **Ma Hnin v. Ma Le Me**, 8 Ind. Cas. 610.

FOX, C.J., and FARLETT, J.

Reference:—(a) 1 L.B.R. 215, *app.*

(55) *Mortgage—Prior suit—Plaintiff in subsequent suit joined as representative of one mortgagor—Title paramount to that of mortgagor—Failure to set up—Whether res judicata in later suit.*

Where, in a prior mortgage suit in which a decree for foreclosure was passed, the plaintiff in the subsequent suit was joined as a defendant, and he failed to set up, in the prior suit, a title paramount to that of the mortgagor by way of defence. *Held*, that it cannot be said that he ought to have set up such title, and his omission to set up such title will not render the question of title, in the later suit, *res judicata*. **Hanuman Singh v. Mannulal**, 6 N.L.R. 156.

SKINNER, A.J.C.

References:—12 C. 414 (421, 422); 20 C. 79 (85); 32 C. 746; 33 C. 425 (432); 5 C.L.J. 95 and 13 A.W.N. 482, R.

Mortgage—(Continued).**—1.—General—(Continued).**

(56) *Mortgage—Minor's property—Remedy against such property barred—Benefit to minor—Validity.*

Where the maternal uncle of certain minors borrowed money on a pro-note and discharged with that money certain debts of the deceased father of the minors, and where, after the lapse of five years i.e., at a time when the remedy against minors' property became barred, he executed a hypothecation bond mortgaging the minors' property in lieu of the pro-note, *held* that the uncle was not the legal guardian and that the mortgage was not for the minors' benefit and was not binding upon them. **Perumal Nalcker v. Kadir Ibrahim Rowther**, 8 M.L.T. 444.

ABDUR RAHIM and KRISHNASWAMI
AIYAR, JJ.

(57 & 58) *Mortgage—Property in Calcutta mortgaged—First mortgagee's suit for sale—Second mortgagee holding security of mofussil property also, added as party—Right of latter to surplus sale proceeds—Right to obtain sale of mofussil property—Whether exists—Transfer of Property Act, 1882, S. 85 A. Seq. Incorporation of, as O. XXXIV, C.P.C., 1908—Effect—Mortgagor not appearing—Scale of costs.*

A was the first mortgagee of a certain immoveable property in Calcutta. B held a second mortgage over the same property and some other property in the mofussil. A sued on the original side of Calcutta High Court upon his mortgage and impleaded B as a defendant in his suit: B prayed for a decree in his favour for the amount of his claim, and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and his own, the mofussil property may be sold by the Calcutta High Court.

Held that, in A's suit, B could only obtain any surplus sale proceeds of the property in that suit, and could not obtain any relief respecting the mofussil property (a).

The effect of the incorporation of the sections of the Transfer of Property Act, 1882, as O. XXXIV of the C.P.C., 1908, is to put an end to any independent practice on the original side of the High Court based on the old procedure, and that the original side should follow the provisions of the Transfer of Property Act which have been imported into the C.P.C., as O. XXXIV. Although as a rule a decree is on

Mortgage—(Continued).**—1.—General—(Continued).**

scale No. 1 as against a defendant who does not appear, the first mortgagee was held entitled to obtain costs on scale No. 2. **Sarat Chandra Roy Chowdhry v. M. M. Nahapiet**, 37 C. 907.

PUGH, J.

References :—(a) 22 C. 100; 24 C. 190; 1 C. W.N. 106; 27 Ch. D. 246, D.

(59) Deed of mortgage execution by mortgagor, mortgagee and surety—Stamp duty payable. See STAMP ACT, No. 4, 15 P.R. 1910.

(60) Suits for sale and redemption are subject to the rule of *Lis pendens*. See TRANSFER OF PROPERTY ACT, No. 19, 13 O.C. 50.

(61) Mortgage in favour of one member of undivided Hindu family—Payment of entire mortgage money to one of several members after the family became divided—Rights of other members. See HINDU LAW (PARTITION), No. 7, 5 Ind. Cas. 343.

(62) Entry of mortgage in Muntkhib Khewat signed by one of two mortgagees—Whether an acknowledgment. See LIMITATION ACT (1877), No. 22, 35 P.W.R. 1910.

(63) Decree for sale upon mortgage passed before 1908—Passing of Code of 1908—Effect—No curtailment of right to execute. See CIV. PRO. CODE (1908), No. 34, 7 A.L.J. 420.

(64) Mortgage decree—Sale held without the representatives of a deceased defendant entitled to redeem, brought on record—Validity. See EXECUTION OF DECREE, No. 11, 7 M.L.T. 270.

(65) Mortgage deed reserving right of way—Transferee—Mortgage—Right to object. See EASEMENT, No. 4, 7 M.L.T. 289.

(66) Post diem interest on mortgage money. See INTEREST, No. 2, 56 P.W.R. 1910.

(67) Applicability of S. 258, C.P.C., to mortgage decree. See LIMITATION ACT (1877), No. 120, 6 Ind. Cas. 43.

(68) Unregistered sale deed—Registered mortgage bond for consideration money, validity of. See CONTRACT ACT, No. 14, 5 Ind. Cas. 581.

(69) Mortgagee's possession is that of mortgagor—Mortgagor can maintain a suit for declaration. See SPECIFIC RELIEF ACT, No. 21, 6 Ind. Cas. 166.

(70) Acknowledgment by one two mortgagees in a deed of transfer—Acknowledgment

Mortgage—(Continued).**—1.—General—(Continued).**

valid as against the representatives of that mortgagee. See LIMITATION ACT (1877), No. 23, 6 Ind. Cas. 190.

(71) Mortgagee during partition suit—Right of mortgagee. See CIV. PRO. CODE (1882), No. 217, 6 Ind. Cas. 196.

(72) Suit for declaration of title as owner—Second suit as mortgagor—*Res judicata*. See CIV. PRO. CODE (1882), No. 12, 6 Ind. Cas. 696.

(73) Relinquishment of holding by mortgagor in favour of zamindar—Mortgage not affected. See OCCUPANCY HOLDING, No. 5, 6 Ind. Cas. 705.

(74) Mortgagor and prior mortgagees—Co-defendants—*Res judicata*. See CIV. PRO. CODE (1908), No. 14, 6 Ind. Cas. 375.

(75) Mortgage of future rents of value of over Rs. 100—Registration—Position of mortgagee who had taken unregistered document. See REGISTRATION ACT (1877), No. 1, 6 Ind. Cas. 504.

(76) Life tenant under will—Whether can mortgage the interest of devisee. See WILL, No. 11, 6 Ind. Cas. 533.

(77) Previous indebtedness of mortgagor to mortgagee—Undue influence. See CONTRACT ACT, No. 7, 7 A.L.J. 729.

(78) Suit for sale partly decreed—Certain share exempted—Objections by mortgagee asking for sale of exempted share—*Advalorem* fee. See COURT FEES ACT, No. 8, 7 A.L.J. 942.

(79) Registered and oral mortgage—Priority—Notice. See REGISTRATION, No. 1, 5 L.B. K. 184.

(80) Mortgage of family property made by managing member—Decree for sale—Suit by son and other members to recover the family property. See HINDU LAW (JOINT FAMILY), No. 8, 7 A.L.J. 945.

(81) Mortgage of undivided share—Suit for partition by mortgagor's co-sharer—If mortgagee necessary party—Rights of mortgagee. See PARTITION, No. 12, 6 Ind. Cas. 829.

(82) Attestation—Co-executant if may attest execution by others. See TRANSFER OF PROPERTY ACT, No. 38, 14 C.W.N. 1046.

(83) Application of S. 291, C.P.C., 1882, to mortgage sales. See CIV. PRO. CODE, 1882, No. 142, 14 C.W.N. 1019.

Mortgage—(Continued).**—1.—General—(Continued).**

(84) Unconscionable bargains in — Duty of Court. See PLEADINGS, No. 4, 12 Bom. L.R. 79b.

(85) Mortgagee's right to costs. See CIV. PRO. CODE (MYSORE), No. 8, 15 M.C.O.R. 155.

(86) Mortgagor and mortgagee—Relationship of landlord and tenant—Suit by mortgagee for possession—Jurisdiction. See LANDLORD AND TENANT, No. 30, 110 P.W.R. 1910.

(87) Same person holding two mortgages over same property—Suit on first mortgage without disclosing the second—Subsequent suit on second mortgage—Effect. See CIV. PRO. CODE (1908), No. 16, 4 S.L.R. 82.

(88) Breach of condition of mortgage—Mortgagee entitled to arrears of kassur and possession on breach—Suit for kassur decreed—Subsequent suit for possession barred. See CIV. PRO. CODE (1882), No. 47, 31 P.L.R. 1910.

(89) Liability of the mortgagee in possession. See TRANSFER OF PROPERTY ACT, No. 52, 6 N.L.R. 109.

(90) Applicability of doctrine of *Lis Pendens* to mortgage transactions. See TRANSFER OF PROPERTY ACT, No. 22, 6 N.L.R. 140.

(91) Mortgagee in possession—Whether trustee of mortgagor. See CO-SHARERS, No. 8, 7 Ind. Cas. 772.

(92) Meaning of "defendant"—Defendants benefited by mortgage—Personal liability. See TRANSFER OF PROPERTY ACT, No. 69, 7 Ind. Cas. 784.

(93) Auction purchaser whether can acquire absolute interest from mortgagee. See LIMITATION ACT (1877), No. 85, 7 Ind. Cas. 570.

(94) Representation that sale deed would not be enforced as sale deed—Mortgage deed—Proof. See EVIDENCE ACT, No. 20, 12 Bom. L.R. 972.

(95) Decree for sale—Father representing sons—Registration—Notice. See TRANSFER OF PROPERTY ACT, No. 63, 12 Bom. L.R. 940.

(96) Auction purchaser—Bonami purchaser—Mortgagee of auction-purchaser—Right of mortgagee to claim protection under S. 317, C.P.C.—See CIV. PRO. CODE (1882), No. 164-a, 12 Bom. L. R. 1044.

(97) Surplus collection made by mortgagee—Mortgagor's right to recover—Limitation. See CIV. PRO. CODE (1882), No. 48, 7 A.L.J. 1201.

Mortgage—(Continued).**—1.—General—(Continued).**

(98) Suit for declaration that mortgage is not valid—Plaintiff in possession of some items—Maintainability. See SPECIFIC RELIEF ACT, No. 25, 8 M.L.T. 358.

(99) Validity of mortgage by guardian—Rights of mortgagee. See GUARDIAN AND MINOR, No. 1, 11 C.L.J. 197.

(100) Suit on legal or equitable mortgage—Interest in arrears and property insufficient to pay incumbrances thereon—Jurisdiction to appoint a receiver. See CIV. PRO. CODE (1908), No. 143, 5 L.B.R. 135.

(101) Two simple mortgages—Suit on first mortgage—Second mortgagee not impleaded—Part of hypothecated property sold—Second suit for sale of remainder not barred against second mortgagee. See CIV. PRO. CODE (1882), No. 16, 7 A.L.J. 29.

(102) Adverse possession as against mortgagor—Effect upon mortgage. See LIMITATION ACT (1877), No. 42, 8 M.L.T. 377.

(103) Suit by mortgagee—Impeachment by decree-holder's assignee of mortgage on grounds urged in claim proceedings and found against. See CIV. PRO. CODE (1882), No. 188, 8 M.L.T. 381.

(104) Deposit paid to mortgagee—Balance promised—Whether a full discharge. See TRANSFER OF PROPERTY ACT, No. 55, 7 A.L.J. 65.

(105) Whether the mortgagor's widow after re-marriage could represent the mortgagor's estate—Effect of mortgage decree obtained against person wrongly sued as legal representative of mortgagor. See ACT XV OF 1856 (HINDU WIDOW RE-MARRIAGE), No. 1, 14 C.W.N. 346.

(106) Ostensible mortgage found in reality to be a sale—Right of pre-emptor. See PRE-EMPTION, No. 1, 157 P.W.R. 1909.

(107) Execution of mortgage decree—S. 104, Transfer of Property Act, S. 248, Civ. Pro. Code (1882)—Effect. See CIV. PRO. CODE (1882), No. 116, 5 Ind. Cas. 101.

(108) Mortgage of decree by decree-holder—Attachment of decree on same date by decree-holder's creditor—Subsequent attachments by other creditors—Priority—Rateable distribution—Rights of mortgagee—Lien—Burden of proof. See CIV. PRO. CODE (1882), No. 105, 5 Ind. Cas. 92.

Mortgage—(Continued).**—1.—General—(Concluded).**

(109) Inclusion of property to which mortgagor has no title—Registration. See REGISTRATION ACT (1877), No. 21, 5 Ind. Cas. 127.

(110) Former suit by mortgagee to enforce his rights—Subsequent suit by his sons and reversioners to protect their interests—Opposite findings in two cases illegal—Duty of Judge. See CUSTOM (PUNJAB—ALIENATION), No. 1, 139 P.W.R. 1909.

(111) Vendor and purchaser—Mortgage for balance of consideration—Inability of vendor to put purchaser in possession of entire property—Reduction of consideration for mortgage *pro tanto*. See VENDOR AND PURCHASER, No. 6, 8 Ind. Cas. 91.

(112) When no personal liability in mortgage transactions. See CONSIDERATION, No. 2, 8 Ind. Cas. 302.

(113) Joint mortgagees—Effect of payment to one. See CONTRACT ACT, No. 28, 8 Ind. Cas. 416.

(114) Proceeds of sale of mortgaged property—Appropriation—Costs—Principal and interest. See TRANSFER OF PROPERTY ACT, No. 70, *8 Ind. Cas. 32.

—2.—By Conditional Sale.

- (1) *Sole remedy of mortgagee extinguished by Legislature—Special Legislative remedy—Punjab Alienation of Land Act, 1900, S. 9 (2)—Refusal to accept—Right to a money decree.*

Under the terms of the contract, the sole remedy of a mortgagee by conditional sale, for the enforcement of his right under the mortgage, was to foreclose under Reg. XVII of 1806. But this right was not enforced till the enactment of the Punjab Alienation of Land Act, 1900, which rendered the conditional sale clause in a mortgage deed null and void. And the mortgagee afterwards applied to the Deputy Commissioner for the special remedy provided by S. 9 (3) of the Punjab Alienation of Land Act, but refused to accept a farm of the mortgaged land for eight years, which was offered to him by the Deputy Commissioner, and brought a suit for money decree, against the mortgagor personally.

Held, when the sole remedy given by the contract between the parties is put an end to by the intervention of the Legislature, and a special remedy has been substituted in lieu thereof, it is only open to the mortgagee to

Mortgage—(Continued).**—2.—By Conditional Sale—(Concluded).**

accept the special legislative remedy, and he is not entitled in law to a money decree, pure and simple, for that amount. *Dula Singh v. Dial Singh, 22 P.R. 1910=29 P.W.R. 1910=5 Ind. Cas. 902.

RATTIGAN and SHAH DIN, JJ.

Reference :- 22 C. 434 (P.C.), R.

- (2) *Document—Interpretation of—Sale subject to agreement executed on the same day—Reserving right to vendor to repurchase—Documents to be read together—Mortgage.*

Where a document purporting to be an out and out sale is made "subject to the terms of the deed of agreement executed by the vendee" on the same day, and the latter document promises to reconvey the property to the vendor or his representatives upon payment of the purchase money within a certain time, *held* that the two deeds must be read together as constituting a mortgage by way of conditional sale (a). *Wajid Ali Khan v. Shafkat Husain*, 7 A.L.J. 998.

STANLEY, C.J. and GRIFFIN, J.

Reference :- (a) 12 All. 387, D.

- (3) *Tenant executing conveyance of holding—Refusal to add purchaser as party—Revision.* See CIV. PRO CODE (1908), No. 92, 11 C.L.J. 426.

(4) *Sale—Right of re-purchase given under a separate document—Not enforced within time allowed—Nature of document—Maintainability of suit for redemption.* See LIMITATION ACT (1877), No. 101, 7 A.L.J. 484.

(5) *Notice—Defects in—Demand of interest that was not due—Effect.* See REGULATION XVII OF 1806, No. 1, 134 P.L.R. 1910.

—3.—Contribution.

- (1) *Contribution—Purchasers of different items of property—One paying cash and others agreeing to pay towards mortgage—Payment of whole mortgage amount by purchaser paying cash—Method of calculating amount of contribution between the purchasers—Transfer of Property Act, S. 41—Applicability.*

A mortgaged three items of property for Rs. 1,300 to S, and sold subsequently two items to the defendants for Rs. 1,200 and one item to the plaintiff for Rs. 500. Plaintiff paid cash for his purchase, but the others undertook to pay

Mortgage—(Continued).**—3.—Contribution—(Concluded).**

the price to the mortgagee towards the mortgage. It was not found that the property was sold to the plaintiff free of incumbrances. The assignee of S, the mortgagee, brought to sale the property purchased by the plaintiff, and the plaintiff, to save it, paid up part of what was due on the mortgage. Plaintiff now sued for contribution and contended that the other purchasers, being bound to pay Rs. 1,200 towards the mortgage, must be held liable for that amount, and that rateable distribution over all the property should be made only for the balance. *Held*, that the contribution must be calculated on the putting that all the properties were liable for the full amount (a).

S. 40, Transfer of Property Act, will not apply, because there was no contract between the plaintiff and his vendors, that the lands sold to others should be liable for Rs. 1,200 of the mortgage money. *Seshagiri Aiyar v. Vythilinga Pillai*, 33 M. 211.

MILLER and MUNRO, JJ.

References:—(a) 177 Mass. 318, 320 and 174 Mass. 521 *cons. and expl.*

(2) See MORTGAGE (GENERAL).

—4.—Foreclosure.

(1) *Decree absolute—Foreclosure decree—Amendment of application for order absolute—Granting application ex parte—Irregular.*

An amendment of an application for an order absolute for foreclosure ought not to be granted *ex parte* without notice to the judgment-debtor (a).

* If it is granted without such notice, the party affected is entitled to have the order discharged in an appropriate proceeding, namely, by an application under S. 108, Civ. Pro. Code, 1882, to set aside the order, or an application for review of judgment or an appeal. *Abhoy Churn Gain v. Naba Kumar Dutt*, 6 Ind. Cas. 306.

MOOKERJEE and TEUNON, JJ.

References:—(a) 32 C. 253 (F.B.); 10 C.W.N. 306; 35 C. 767, *relied on*.

(2) *Foreclosure—Conditional sale—Defective notice—Appellate Court when bound to proceed under S. 9 (3) of Act XIII of 1906—Regulation XVII of 1806, S. 8.*

A foreclosure notice is bad in law and the proceedings thereunder are null and void, if it

Mortgage—(Continued).**—4.—Foreclosure—(Concluded).**

is issued in respect of two mortgage-deeds, only one of which is in the form of a conditional sale.

An appellate Court has no jurisdiction to make a reference under S. 9 (3) of Act XIII of 1906, and the Deputy Commissioner has no power to proceed under its sub-section (2), if the foreclosure notice is effectual, but if it is not, the appellate Court is bound to act upon the said section and can only dismiss the suit if the mortgagee refuses to accept a mortgage in one of the authorized forms. *Jiwan Ram v. Bhani Ram*, 6 Ind. Cas. 657=51 P.W.R. 1910.

SHAH DIN, J.

(3) *Gift to equity of redemption—Validity under Muhammadan Law—Notice to donee of foreclosure.* See MUHAMMADAN LAW (GIFT), No. 4, 86 P.R. 1910 (Civil).

—5.—Redemption.

(1) *Mortgage—Sale of equity of redemption—Discharge of prior mortgage—Right of puisne mortgagee.*

M purchased the equity of redemption in the property which was under a mortgage with R. There was also a prior mortgage on the same property which M redeemed. On a suit for sale being brought on the basis of R's mortgage, *held*, that it must be taken to have been intended to keep the first mortgage alive for his benefit and R could not sell the property without redeeming the first mortgage. *Maharaj alias Mahua v. Ramji Lal*, 7 A.L.J. 15=5 Ind. Cas. 177.

BANERJEE and TUDRALL, JJ.

References:—(1907) A.W.N. 85, D.; 10 C. 1035 and A.W.N. (1896), 128, F.

(2) *Decree in favour of mortgagee based on compromise under which he was to lose interest on certain contingency—Right of mortgagee to claim interest at redemption—Mortgagee's right to be repouped the expenses on repairs and improvements—Merger—Construction of decree.*

One G, a mortgagee obtained a decree on the 6th January, 1896, against the mortgagor K based on a compromise, under which G was to lose interest on the mortgage-debt on his not paying a certain amount to K, by a certain date.

K sued G for redemption, afterwards alleging that as G had not performed his part

Mortgage—(Continued).**—5.—Redemption—(Continued).**

under the decree he was not entitled to any interest. G denied this and claimed *inter alia* certain additional sums as spent by him on repairs and improvements.

The Divisional Court held that the mortgage had merged in the decree of the 6th January 1896, and that therefore the mortgagee was entitled to no more than his mortgage money.

On appeal to the Chief Court :

Held (1) that the decree did not operate as a merger and that it did not take away the mortgagee's right to be recouped for expenses alleged to have been incurred by him on repairs and improvements of the mortgaged premises.

(2) That the decree must be construed with reference to the judgment and to the written *sulenamah* on which that judgment is based, and that on their true construction the mortgagee G must be held to have made the required offer within the period allowed, and that it was K, and not G who failed to carry out the terms of the compromise and that G was consequently entitled to the interest claimed on the mortgage.

Case remanded as being decided on a preliminary point. **Gai Mal v. Sri Ram**, 164 P. W.R. 1909.

RATTIGAN and SHAH DIN, JJ.

(3) *Suit for redemption—Relief about surplus in the hands of the mortgagee—Jurisdiction determined by the amount of mortgage money only.*

Where the plaintiff in a suit for redemption asserted in his plaint that on taking the account, a large sum of money would be found due to him from the mortgagee, and asked that it might be awarded to him, without making any definite prayer for a decree for either a definite or an estimated sum of money independently of the claim to redemption, *held*, that the jurisdiction of the Court to try the suit was determined by the amount of the mortgage-money, and the claim for the surplus could not be taken into account in determining the question of jurisdiction. **Muhammad Husain v. Mussammat Intiaz-un-nissa**, 18 O.C. 32 = 5 Ind. Cas. 444.

CHAMIER, J.C.

(4) *Mortgagee, position of—Whether a trustee—Power to grant leases or make other dispositions of mortgaged property in his own*

Mortgage—(Continued).**—Redemption—(Continued).**

favour—Grant of the property to undivided son—Presumption—Trusts Act, S. 90—Right of mortgagor on redemption.

A mortgagee is in the position of a trustee and cannot grant leases or make other dispositions of the mortgaged property in his own favour, and of such a kind as to give rise to a possible conflict between his interest and his duty.

Where a person in the position of a trustee makes a grant of the trust property to his undivided son, the relation of the parties is sufficient to raise the presumption that he is himself interested, and to bring the case within the mischief of the rule. **Yenkata Charlar v. Srinivasa Aiyangar**, 7 M.L.T. 148.

WALLIS and MILLER, JJ.

(5) *Malabar Law—Suit to redeem Kanom—Sub-mortgage in their favour set up by certain members of tarwad—Claim of title as mortgagees—Limitation Act, 1877, Sch. II, Art. 134.*

Plaintiff (karnavan) sued in 1904 to redeem a kanom of 1957. Certain members of the plaintiff's tarwad, set up a sub-mortgage of 1891 in their favour by the tarwad, and claimed to have acquired title as mortgagees against the plaintiff under Art. 134, Limitation Act.

Held, that it cannot be said that the members of the tarwad who set up the sub-mortgage, are purchasers for value of the property mortgaged, as distinguished from the mortgage interest, and that the plaintiff was entitled to redeem (a). **Kurumathoor Illath Parameswaram Nambudripad v. Keethathath Aleema**, 7 M.L.T. 187 = 5 Ind. Cas. 932.

WALLIS and KRISHNASWAMY IYER, JJ.

Reference :—(a) 24 M. 471, D.

(6) *Court-sale at the instance of sub-mortgagee—Failure to describe property as mortgage interest—Effect—Suit by owner of equity of redemption to redeem—Whether equity of redemption subsists.*

A, the purchaser of certain property from the original mortgagor, sued B to redeem the property. B was a sub-mortgagee, who brought a suit on his sub-mortgage and bought the property in a Court-sale held in execution of the decree. The decree in B's suit failed to describe the property as mortgage interest, and the vagueness in the description was retained in the sale proclamation and the sale certificate.

Mortgage—(Continued).**—5.—Redemption—(Continued).**

B contended that he became the absolute owner, of the property and that A was not entitled to

Held, that the decree passed in B's suit must be construed as one against the mortgage interest (a); that the sale certificate ought to be read as comprising only the mortgage interest; (b) and that A was entitled to redeem. *Ana Pattar v. Swaminatha Pattar Kariakar*, 7 M.L.T. 191 = 5 Ind. Cas. 935.

BENSON and KRISHNASWAMY AIYAR, JJ.

References:—(a) 29 M. 84; 22 A. 442, R. (b) 22 W.R. 408; 27 B. 334, R.

(7) *Transfer of Property Act (IV of 1882), S. 99—Equity of redemption purchased by mortgagee—Sale voidable not void—Mortgagor, if may redeem without setting aside sale—Mortgagee, trustee for mortgagor—Indemnity, right of mortgagee to, and to credit for amount paid for purchase.*

It is a well established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor, and that he does not (unless there has been a release of the equity of redemption or other circumstance which in law would bar his right to redeem) acquire an irredeemable title (a).

The right to redeem which, according to this principle, would still subsist in the mortgagor, has not been affected by the decision of the Full Bench in *Ashutosh Sikdar v. Behari Lal* (b) where it was held that a sale in contravention of the terms of S. 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on proof that the terms of the section have been contravened.

The mortgagor is under no necessity to have the sale set aside first, in order to be entitled to redeem the property. He may sue for redemption within the period of limitation allowed by law, but, in such a case, the mortgagor would have to pay to the mortgagee the amount given credit for by the latter in respect of the sale, (c) and the mortgagee would further be entitled to be reimbursed and to add to the mortgage-debt the amount which he has expended for the protection and preservation of the property. *Pancham Lal Chowdhury v. Kishan Pershad Mitter*, 14 C.W.N. 579 = 6 Ind. Cas. 47.

WOODROFFE and CASPERSZ, JJ.

References:—(a) 32 C. 296 (312); 9 C.W.N. 403, R. (b) 35 C. 61; 11 C.W.N. 1011; (c) 22 M. 47, R.

Mortgage—(Continued).**—5.—Redemption—(Continued).**

(8) *Limitation Act (XV of 1877), Sch. II, Art. 144—Civil Procedure Code (Act XIV of 1882), S. 13—Suit to declare a mortgage not binding on plaintiff and for possession of mortgaged property—Decree that mortgage was binding on plaintiff to the extent of a certain amount—Dismissal of suit on plaintiff's failure to deposit said amount—Subsequent suit for redemption—Adverse possession—Res judicata.*

In a previous suit, the plaintiff mortgagor sued for the cancellation of his mortgage and for possession of the property. The Court declared that the mortgage was good to the extent of Rs. 300, but the plaintiff being unwilling to pay that amount, his suit was dismissed. Then the plaintiff brought this second suit for redemption on payment of Rs. 300. The lower Courts found that, as the plaintiff had ignored the mortgage in the previous suit, the defendant became a trespasser from the date of the mortgage, and that plaintiff's present claim was barred:

Held, that the plaintiff's claim in the prior suit to declare the mortgage bad did not have the effect of enabling the defendant prescribe for title by adverse possession from the date of the mortgage to the extent of the interest, and that the present suit was not barred under Art. 144 of Sch. II of the Limitation Act.

Held, also, that the present suit was not barred as *res judicata* by reason of the previous suit. *Sangamma Nalcker v. Ramasawmy Nalcker*, 5 Ind. Cas. 478 = 8 M.L.T. 252.

WHITE, C.J. and KRISHNASWAMY IYER, J.

References:—26 M. 760; 27 M. 102; 27 M. 380; 28 M. 406; 29 M. 153; 16 M.L.J. 48; 31 M. 395, R.

(9) *Decree on puisne mortgage—Sale subject to prior mortgage—Whether decree-holder bound to redeem prior mortgage, before bringing properties to sale.*

Where a second mortgagee has obtained a decree for sale subject to the prior mortgage.

Held that the decree cannot be construed as compelling the decree-holder to redeem the prior mortgage, before taking steps to sell the property. *Aravamutha Iyengar v. Kumarasamy Chetty*, 7 M.L.T. 230 = 5 Ind. Cas. 490.

MILLER and ABDUR RAHIM, JJ.

References:—25 M. 529; 24 M. 471, D.

Mortgage—(Continued).**—5.—Redemption—(Continued).**

(10) *Redemption—Usufructuary mortgage—Mashrut-ul-raham—Charge—Covenant to pay the money under two mortgage deeds simultaneously—Clog—Construction of document.*

A executed a usufructuary mortgage in favour of B. Subsequently B advanced a further sum to A, to secure which A executed a *Mashrut ul rahan* bond, which recited the fact of the previous mortgage and that the mortgagee was in possession of the property mortgaged under the former usufructuary mortgage. It was also stated that the mortgagor had taken a further advance and covenanted that he would not redeem the usufructuary mortgage unless he would also pay the money under the second bond. *Held*, that the second bond created a charge upon the property, and that in face of the covenant contained in the bond, the mortgagor was not entitled to redeem the first mortgage, unless and until he would pay the money due under the second bond. **Musammatt Pracheo v Deo Karan**, 6 Ind Cas 165

GRIFFIN and TUBBALL, JJ

Reference —1 W N (1906) 267, *relied upon*

(11) *Civil Procedure Code (Act V of 1908), S. 9 (12)—Mesne profits—Interest on mesne profits—Mortgage—Redemption decree—Transfer of Property Act (IV of 1882), Ss 76, 83—Tender of mortgage money—Laches in instituting suit for redemption—Mortgagee's liability for mesne profits—Interest from date of deposit—Collection charges from date of deposit—Mortgagor and mortgagee*

The mortgagors deposited the mortgage money under S 83 of Act IV of 1882, on the 25th of June, 1896. They brought the suit for redemption on the 16th of October, 1901, and obtained a decree, with a direction that the mesne profits should be determined by the execution Court. Application for ascertainment of mesne profits was made in October 1907. The judgment-debtors objected, among other things, that the decree holders, being guilty of laches in instituting the suit, were not entitled to interest on mesne profits prior to the institution of the suit, and that they (the judgment-debtors) were entitled to a deduction of collection charges from the gross profits. *Held*, that the definition of mesne profits, in S 2 (12) of Act V of 1908, included also the interest on mesne profits, and that the decree-holders were

Mortgage—(Continued).**—5.—Redemption—(Continued).**

entitled to interest on mesne profits from the date of the deposit of the mortgage money in Court to the date of realization

Held, further, that, under S. 76 (a) of the Transfer of Property Act, 1882, the mortgagee-judgment-debtors were liable to account for the gross receipts from the mortgaged property from the date of the deposit and were not entitled to any deduction on account of collection charges. **Beni Prasad Tewari v Narain Das**, 5 Ind Cas 529

KNOX and KARAMAT HUSAIN, JJ.

(12) *Redemption, clog on the equity of—Two mortgage—Covenant to pay the second mortgage before the first—Consolidation—Amending plaint in second appeal*

If the parties to a mortgage transaction agree so to consolidate the mortgage securities as to preclude the mortgagor from redeeming one without redeeming the other, their contract in that respect would be enforced. Where the mortgagors, while executing a second mortgage of their property in favour of prior mortgagees covenanted that 'we shall repay the amount due under this bond before payment of the mortgage money due under the earlier mortgage', *held* that the covenant was valid and did not amount to a clog or fetter on the equity of redemption and that both the mortgages must be redeemed at the same time (a)

In second appeal, the plaintiffs, mortgagors, were allowed to amend their plaint so as to include a prayer for redemption of both the mortgages. **Brij Lal Singh v Bhawani Singh**, 7 A L J 821=7 Ind Cas 115.

STANLEY, C.J and GRIFFIN J

References —(1906) A W N 278, D (1906) A W N 267 R

(13) *Redemption suit—Account—Claim for mesne profits between date fixed for redemption and actual date of delivery of property—Whether separate suit maintainable—Civil Procedure Code (Act XIV of 1888) Ss 13 43—Res judicata—Relinquishment of claim—Provincial Small Cause Courts Act (IX of 1887), Sch II, Art 31*

It is the duty of the mortgagor in a suit for redemption to include a claim, not merely for the recovery of possession, but also for an account of what was due upon the mortgage security.

Mortgage—(Continued).**—5.—Redemption—(Continued).**

But a distinction ought to be drawn between the claim for mesne profits between the date of tender or deposit and the date of the decree in the redemption suit, and the mesne profits from the latter date to the date of delivery of possession.

The claim for mesne profits between the date of tender or deposit and the date of the decree must be included in the suit for redemption; but the claim for mesne profits for the period, which intervened between the date fixed for redemption in the decree and the date of actual delivery of possession, may be enforced in a separate suit (a).

Such a suit does not fall within Art. 31 of Sch. II of the Provincial Small Cause Courts Act, and is maintainable in a Small Cause Court **Sakari Dutta v. Sheik Ainuddy**, 6 Ind. Cas. 36=14 C.W.N. 1001

MOOKERJEE and TRUNON JJ.

References —(a) 31 B 527, 34 C. 223 D.

(14) *Mortgage Construction—Satisfaction of the principal money out of surplus profits.*

The terms of a mortgage deed were that the mortgagee should realize the rents from the tenants of the land, should appropriate Rs 7 8 0 to himself, and pay the balance of the rent amounting to one rupee to the mortgagor every year, and, on payment of the entire mortgage-money, the mortgagor would be entitled to redeem. The mortgagee did not pay the balance of Re. 1 to the mortgagor. *Held* that, at the time of redemption the mortgagor was entitled to a deduction from the mortgage money of Re. 1 a year. **Sayid Amir Husain v. Musammat Imtiaz Fatima**, 6 Ind. Cas. 503.

KARAMAT HUSAIN, J.

Reference .—6 A. 303, F.

(15) *Mortgage—Covenant for mortgage money being paid up from the surplus profits—Mortgagor's right to redeem by making payment—Equity of redemption, clog on.*

A mortgage deed provided as follows—

When the entire mortgage money is paid up from the surplus profits, property can be redeemed in the month of Jeth. So long as the entire mortgage-money... is not paid up, the mortgaged property cannot be transferred to any one else, nor will the executant repay the mortgage money by borrowing elsewhere.

Mortgage—(Continued).**—5.—Redemption—(Continued).**

Held that this covenant did not debar the mortgagors from redeeming the mortgage by payment of any sum remaining due whenever convenient to them. *Held* further (per *Evans*, A.J.C.) that, even if the covenant did clog the equity of redemption so as to bar redemption by any payment in cash, such conditions being in restraint of the right of redemption should be disregarded by a Court of Equity. **Kandhai Singh v. Babuain Biranj Kunwar**, 13 O C. 128.

EVANS and PIGGOTT, JJ.

(16) *Transfer of Property Act (IV of 1882), S. 91—Redemption—Mortgage of fixed rate tenancy by tenant—Death of tenant heirless—Right of zamindar to redeem—Escheat to Crown—Agra Tenancy Act (II of 1901, Local), Ss 5, 15, 20, 57.*

A fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown. Such a tenancy is carved out of the landholder's interest in the land to which it relates, and a fixed rate tenant has no absolute interest in it. If the tenancy comes to an end it necessarily goes back to the estate, which it was carved out of, and lapses to the landholder. Where a fixed rate tenant, therefore, who had made a usufructuary mortgage of the tenancy, died without leaving heirs, and the zamindars offered to redeem the mortgage after his death, *held* that the plaintiffs were clearly entitled to redeem the mortgage made by the tenant. *Query*, if they were not entitled to possession of the holding without redemption. **Tulshi Ram v. Gurdial Singh**, 7 A L J. 1011 (F.B.) 7 Ind. Cas. 231.

STANLEY, C J., KNOX and BANERJI, JJ.

Reference :—(a) 30 All. 498, overruled.

(17) *Property undivided and subject to mortgage—Power of one sharer to redeem—Lien over other shares—Res judicata.*

If any property remains undivided, then that has to be divided between the co-sharers. When such property is mortgaged, any of the sharers might redeem the whole mortgage and recover possession of his share, retaining a lien over the other shares in the property. Such a claim is not *res judicata*. **Shamuga Pillayaram v. Soosai Udayan**, 8 M.L.T. 186.

BENSON and SANKARAN NAIR, JJ.

(18) *Anubhava Kanom—Document in discharge of—Creation of right to require*

Mortgage—(Continued).**—5.—Redemption—(Continued).**

renewal — Construction — Redemption — Right to resist claim for redemption until renewal.

Where a document, which was executed in discharge of an *anubhava kanom* held by a third party subsequently assigned by the defendants created a mere right to require a renewal.

Held that the defendants cannot resist the claim to redeem until such renewal is granted (a). **Pandarathile alias Yakkayal Raru Nair v. Nadurile Madathil Vishnu Bharathigal alias Pakarayar Swamier**, 8 M.L.T. 234 = 7 Ind. Cas. 698.

BENSON and KRISHNASAMI IYER, JJ.

References.—(a) 30 M. 900; 30 M. 61; 6 M.H.C.R. 258, *Ref. to.*

(19) *Valuation of subject-matter of suit—Jurisdiction—S. 5, Suits Valuation Act—S. 2, Lower Burma Courts Act.*

In a suit for redemption by a mortgagor in possession of the mortgaged property, the subject-matter of the suit, within the meaning of cl. (b) of S. 2 of the Lower Burma Courts Act, 1900, is the mortgage, and the amount of the principal money secured by the mortgage determines the jurisdiction of the Court competent to try the suit. **Kalee Kumar Nag v. M. Mayappa Chetty**, 5 L.B.R. 208 (F.B.).

FOX, C.J., HARTNOLL, ORMOND, TWO-MEY, ROBINSON and PARLETT, JJ.

References.—2 A. 698, 2 A. 778, 3 A. 822, 5 M. 284; 5 A. 332; 8 A. 488; 11 B. 591; 7 B. 448; 17 Eq. C. 545, 15 C. 104, 13 B. 489; 14 B. 19; 16 M. 326, *supra*, 1 L.B.R. 96, *D.*

(20) *Clog on equity of redemption—Mortgage for twenty years—Condition as to interest for the period to be paid in lump sum at the time of redemption.*

Held that the condition in the mortgage-deed for a term of twenty years, which required the mortgagor to pay the interest for the full term of the mortgage along with the principal at the time of redemption, and not as he pleased within the term, was a clog on the equity of redemption and should not be enforced. **Bhahen Singh v. Jaimal Singh**, 128 P.L.R. 1910.

SHAH DIN, J.

References.—131 P.R. 1894; 6 P.R. 1905; S.O. 19 P.L.R. 1905, R.

(20-a) *Redemption before expiration of fixed day for redemption, whether allowable—Transfer of Property Act (IV of 1882), S. 60.*

Mortgage—(Continued).**—5.—Redemption—(Continued).**

The right of redemption and the right of foreclosure are co-extensive in the absence of any stipulation, express or implied, to the contrary; and when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period named. **Ramtarak Roy v. Aushtosh Maitly**, 8 Ind. Cas. 707.

CASPERSZ, J.

References.—10 A. 602, *not F.*, 5 B. 22; 16 M. 486; 7 M.I.A. 323; 1 W.R. 37 (P.C.), *Rel. on*

(20-b) *Lease by usufructuary mortgage—Redemption—Right of mortgagee.*

In Upper Burma, a lease by a usufructuary mortgagee is determined by redemption. Apart from custom, the mortgagee or his tenant has no just ground of complaint. The contingency of redemption is one that he must reckon with and may provide against. The mortgagor is entitled to immediate possession and therefore to compensation in the event of obstruction. **Nga Nyan Gyi v. Nga Kyaw Nya**, U.B.R. (1910), 2nd Qr., 14.

SHAW, J.C.

References.—U.B.R. (1901—06) II, Civ. Pro 26, U.B.R. (1897—1901) II, 414, R.

(20-c) *Usufructuary mortgage—Redemption—Value of suit—Jurisdiction.*

In a suit for redemption of a usufructuary mortgage, the subject-matter of the suit is the property which the plaintiff seeks to recover, and the value of the suit for purposes of jurisdiction is the market value of the property at the time the suit is filed. **Nga Tun Baw, Nga Chein v. Mi Kye**, U.B.R. 2nd Qr., 10.

MCCOIL, J.C.

References.—1 L.B.R. 96, *F.*; 5 A. 332; 8 A. 438; 11 B. 591, 14 B. 19, 5 M. 284, *Cons.*

(21) *Redemption by one mortgagor—Nature of possession—Limitation against co-mortgagors.* See LIMITATION ACT (1908), No. 22, 7 A. L. J. 95.

(22) *Persons holding under invalid mortgage—Suit against them as trespassers—Suit treated as one for redemption.* See UNDUE INFLUENCE, No. 1, 123 P.W.R. 1909.

(23) *Second suit for redemption—Res judicata.* See CIV. PRO. CODE, 1882, No. 4, 7 A.L.J. 185.

Mortgage—(Continued).**—5.—Redemption—(Concluded).**

(24) Mortgagor holding property under a rent note—Decree for arrears of rent due—Subsequent suit by mortgagor to redeem—Mortgagee found to have overpaid himself—Right of mortgagor. See ACT XVII OF 1879 (DEKKHAN AGRI. RELIEF), No. 3, 12 Bom. L. R. 137.

(25) Suit by puisne mortgagee purchaser to redeem prior mortgagee purchaser—Limitation. See LIMITATION ACT, 1877, No. 84, 14 C.W.N. 439.

(26) Applicability of S. 244, C.P.C., 1882. See CIV. PRO. CODE, 1882, No. 95, 7 A.L.J. 264.

(27) Covenant that mortgagee will remain always in possession after redemption—Clog. See TRANSFER OF PROPERTY ACT, No. 40, 6 Ind. Cas. 707.

(28) Occupancy holding—Transfer before Agra Tenancy Act—Rights of mortgagee. See OCCUPANCY, No. 6, 7 A.L.J. 755.

(29) Meaning of "redeemed"—Suit for redemption of mortgage and profits valued at less than Rs. 1,000—Decree for over Rs. 1,000—Jurisdiction. See REGULATION XV OF 1793, No. 1, 7 A.L.J. 963.

(30) Right to redeem after expiration of time. See TRANSFER OF PROPERTY ACT, No. 61, 7 Ind. Cas. 50.

(31) Transfer by mortgagee to third person—Mortgagor and his descendant not taking steps protect their interest—Redemption—Limitation. See LIMITATION ACT, 1908, No. 23, 93 P.W.R. 1910.

(32) See PAUPER, No. 2, 7 A.L.J. 1191.

(33) Valuation of suit for redemption. See ACT VII OF 1887 (SUITS VALUATION), No. 6, 214 P.L.R. 1910

(34) Right of private purchaser to redeem his own share. See MORTGAGE (GENERAL), No. 56, 8 M.L.T. 409.

(35) Suit to redeem by alleged karnavan—Subsequent suit for redemption by junior members—*Res judicata*. See CIV. PRO. CODE, 1882, No. 14, 8 Ind. Cas. 129.

—6.—(Sub-mortgage).

(1) Sub-mortgage—Purchaser of mortgagee's interest at sale in execution of sub-mortgagee's decree—Mortgage by mortgagee, of properties after sub-mortgage—Foreclosure suit and decree against mortgagee alone treated as owner—Priorities.

Mortgage—(Continued).**—6.—Sub-mortgage—(Concluded).**

A R, claiming title as mortgagee under a mortgage-deed executed on 26th July 1890, deposited the title-deeds of the mortgaged property (being the mortgage-deed itself and a deed of assignment of the same) by way of equitable mortgage with the plaintiff in October 1895. In March 1895, A R purported to execute a mortgage as owner in fee of some of the properties in favour of A G who, in July 1902, brought a foreclosure suit which was decreed in the same month. The plaintiff was not made a party to this suit. A G's case that the mortgage of 26th July, 1890 was satisfied previous to the execution of the mortgage in his favour, by the mortgagors making over to A R all the mortgaged properties, was disbelieved. Meanwhile in 1901, plaintiff had sued on his mortgage and had, on 28th August, 1902, purchased the right, title and interest of his mortgagor A R in execution of the decree obtained by him. The plaintiff instituted the present suit to enforce the mortgage of 26th July, 1890 against the original mortgagors, as also A R and A G.

Held, that the plaintiff, not having been made a party to A G's suit, could not be barred or affected by the decree in that suit, and an enquiry as to the priority between the plaintiff and A R was necessary for the proper disposal of the case. *The Hnyn v. Maung Mya Su*, 14 C.W.N. 214 (P.C.) = 5 Ind. Cas. 151 = 11 C. L.J. 166 = 12 Bom. L. R. 234 = 20 M. L.J. 168 = 37 C. 239.

LORD MACNAGHTEN, LORD COLLINS,
LORD SHAW and SIR ARTHUR
WILSON.

(2) Power of sub-mortgagee to sue for sale of mortgagee rights of his mortgagor. See PLEADINGS, No. 6, 7 Ind. Cas. 166.

(3) Suit by sub-mortgagee—Parties. See MORTGAGE (GENERAL), No. 18, 5 Ind. Cas. 654

—7.—(Usufructuary).

(1) Evidence—Admissibility in—Registration Act (III of 1877), S. 17—Usufructuary mortgage below Rs. 100—Proof of debt—Decree for money.

I executed a usufructuary mortgage-deed in favour of B, the value of which was below Rs. 100. The deed was not registered. I did not put B, in possession. In a suit for possession, and in the alternative for recovery of

Mortgage—(Continued).

—7.—Usufructuary—(Continued).

money brought by B, held that the document could be taken in evidence, in order to show that money was borrowed, and that the Court could pass a simple money decree, although it could not pass a decree for possession. *Jaddu Chaudh v. Bhagwat Chaudh*, 7 A.L.J. 71=5 Ind. Cas. 519.

* STANLEY, C.J. and BANERJI, J.

(2) *Usufructuary mortgage—money, suit for—Usufructuary mortgages, dispossession—Partition—Estates Partition Act (V of 1907 B.C.), §. 99.*

A usufructuary mortgagee can bring a suit for mortgage-money on dispossession, from land given in lieu of interest, by a co-sharer of the mortgagor who obtained the same on partition, and is not precluded from so doing by S. 99 of the Estates Partition Act. *Talik Singh v. Jalal Singh*, 11 C.L.J. 186=5 Ind. Cas. 180

HARRINGTON and CHATTERJEE, JJ.

(3) *Mortgage usufructuary—Covenant to pay—Payment after a fixed period—Option to pay within time—Sale of the property by mortgages—Regulation V of 1827, S 15, cl. 3.*

A usufructuary mortgage, executed in 1869, provided as follows.—“The amount of Rs. 1,750, is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received.”

The mortgagee sued in 1906 for recovery of the mortgage-debt. The first Court allowed the claim. The lower appellate Court reversed this decree, holding that, where, in the case of a usufructuary mortgage, the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagor has no higher or better rights than he has under a simple usufructuary mortgage.

Held, that the suit would lie, inasmuch as the mortgage in question was governed by S. 15 (8) of Regulation V of 1827 and there was nothing in the terms of the mortgage-deed which, either expressly or by implication, indicated that the property should not, by

Mortgage—(Continued).

—7.—Usufructuary—(Continued).

means of a civil suit, be applied in liquidation of the debt. *Parasharam Vishnu Dabke v. Putlajirao Kalavarao Salvi*, 11 Bom. L. R. 1815=34 B. 128=4 Ind. Cas. 595.

SCOTT, C.J. and BATCHELOR, J.

References.—(1892) 17 Bom. 425; (1896) P.J. 43, P. (1891) 16 Bom. 803; (1895) 20 Bom. 796, (1908) 10 Bom. L.R. 615, *Expt.*

(4) *Mortgage—Stipulation to give mortgagee actual physical possession of plots mortgaged—Failure to get actual physical possession on account of mortgagor's fraud—Mortgagee entitled to simple money decree—Limitation Act, Sch. (i), Arts. 95, 97, 116 and 120.*

On 19th November, 1903, defendant-respondent executed a mortgage deed with possession for a certain specified plot of land in favour of the plaintiff-appellant. The contract was that the mortgagee should have actual physical possession and enjoy the entire gross rental in lieu of interest. The plot in question turned out to be the land of the defendant, and plaintiff obtained merely proprietary possession with the right to collect rent at a reduced rate from the mortgagors. It was found as a fact by the lower appellate Court that the contract was obtained from the plaintiff by defendant by means of a concealment of material facts amounting to fraud.

Held that, upon the finding of the lower appellate Court, the plaintiff would be entitled to a simple money decree for the sum advanced with such interest as the Court might find due.

Held further, that the claim must fall either under Art. 95 or 97 of the first schedule to the Limitation Act, Arts. 116 and 120 cannot apply to the case. *Udit Narain v. Sahib Ali and others*, 13 O C 148.

EVANS and PIGGOTT, JJ.

(5) *Mortgage—Property security for interest—Personal liability—Effect of.*

Where a usufructuary mortgage deed provided for payment of interest at twelve annas per cent. per mensem if the rents and profits were not sufficient to pay up the whole amount of interest, held that the mortgaged property was security not only for payment of the principal but also of interest. Held, further, that the mere fact that the mortgagor took a personal liability to pay up the interest did not relieve the mortgaged

Mortgage—(Continued).**—7.—Usufructuary—(Continued).**

property from liability to satisfy the deficiency.
Chintaman v. Dulari, 7 A.L.J. 1087.

STANLEY, C.J. and BANERJI, J.

- (6) *Mortgage-deed—Suit for possession—Nature of suit—Execution admitted—Consideration, want of—Proof—Onus on mortgagor—Delay in institution of suit—Presumption as to passing of consideration—Limitation Act (XV of 1877), Sch II, Arts 113, 135—Specific performance of contract*

A mortgage deed contained a recital that the mortgagor had received the mortgage money and put the mortgagee in possession of the property mortgaged. As a matter of fact the possession had not been given and the mortgagee sued for possession. *Held* that the suit was not a suit for specific performance of a contract of mortgage. It was a suit for possession and was governed by Art. 135 and not by Art. 113 of the Limitation Act 1877 (a)

In a suit for possession by the mortgagee, if the mortgagor admits the execution of the deed but denies the receipt of consideration the onus lies on him to prove that he had not received the consideration. Mere delay in the institution of the suit does not shift the burden on to the mortgagee to prove that the consideration had passed (b). **Thakur Ram Chand v Behari** 7 Ind Cas 646.

KARAMAT HUSAIN J

References—(a) A.W.N. (1884) 123, F. (b) 8 A. 641, D., A.W.N. (1904) 163, 1 A.L.J. 423, 27 A. 71, F.

- (7) *Redemption—Usufructuary—Right to redeem before satisfaction of debt by rents and profits—Assignment by mortgagee for lesser consideration—Right of assignee to recover entire amount due to his assignor—Interest, rate of Appropriation of rent first towards principal and then for interest—Liability of mortgagor to pay enhanced assessment—Transfer of Property Act, S 135.*

In the absence of an express recital to that effect, a mortgagor under an usufructuary deed of mortgage is not debarred of his right to redeem till the entire debt is satisfied by enjoyment by the mortgagee of the profits of the land.

Where the mortgagee assigns his interest for a lesser amount than that due to him,

Mortgage—(Continued).**—7.—Usufructuary—(Continued).**

without stating that the balance was conveyed as a gift, the assignee cannot recover from the mortgagor more than the consideration he paid for the assignment and reasonable interest thereon

Where, at the date of the assignment, a very small portion of the consideration was due for principal and the balance represented the interest, the assignee was held not entitled to the high rate of interest provided for in the original mortgage-deed, viz., 24 per cent per annum, but was awarded only 6 per cent. per annum.

The rents and profits have first to be applied towards principal and then towards interest

The mortgagor is liable for the enhanced assessment levied by Government after the date of the mortgage **Burle Jaganna v. Yelugula Latchanna** 8 M.L.T. 420=7 Ind. Cas 971

MILLER and KRISHNASWAMI IYER, JJ

- (8) *Usufructuary mortgage—Decree for sale barred—Mortgage obtaining possession after barring of decree—Whether mortgagee's right to possession put an end to before sale—Right of mortgagor to obtain possession*

A usufructuary mortgagee, who was out of possession at date of his suit, obtained a decree for sale which became barred. He subsequently got possession from the mortgagor. In an action by the mortgagor's representative for possession

Held, that the mortgage decree, which did not deal with the mortgagee's right to possession, did not put an end to his right until sale, and that the mortgagor, his representative or assignee could not oust him even though he had obtained possession after the date of his suit. **Kaveri Ammal v. Kali Ammal**, 8 M.L.T. 427=8 Ind. Cas. 180

MILLER and KRISHNASWAMI IYER, JJ.

References—34 C 150 (161) (P.C.), 4 A.L.J. 109, 11 C.W.N. 249, 5 C.L.J. 106; 17 M.L.J. 43, 9 Bom. L.R. 304, 2 M.L.T. 75, R. and *Expl*

(9) *Possession not given to mortgagee—Suit for possession compromised—Mortgagee taking simple money decree—Sale of mortgaged property.* See CIV. PROC. CODE, 1908, No. 140, 7 A.L.J. 821.

Mortgage—(Concluded).**—7.—Usufructuary—(Concluded).**

(10) Of *air* lands—Possession not delivered to mortgagee—Rights of mortgagee. See ACT II OF 1901 (AGRA TENANCY), No. 2, 7 A.L.J. 380.

(11) Proprietary rights, losing or parting with—Expropriatory tenant. See REG. II OF 1877 (AJMER), No. 1, 7 A.L.J. 370.

(12) Power to sell mortgaged property conferred by the deed—Right of mortgagee. See TRANSFER OF PROPERTY ACT, No. 39, 6 Ind. Cas. 795.

(13) Liability of usufructuary mortgagee to account. See TRANSFER OF PROPERTY ACT, No. 54, 7 A.L.J. 787

(14) Mortgage money repayable after a given number of years—Right to order for sale. See TRANSFER OF PROPERTY ACT, No. 44, 12 Bom. L.R. 491

(15) Possession under, nature of. See PARTITION, No. 7, 5 Ind. Cas. 664

(16) Vendor agreeing to pay back purchase money if there be any prior hypothecation or vendee be dispossessed—Effect of prior usufructuary mortgage. See VENDOR AND VENDOR, No. 3, 6 Ind. Cas. 114

Mosque.

(1) Lands granted for support of—Attachment and alienability. See INAM, No. 2, 7 M.L.T. 349

(2) Suit for removal of trustee of, and for injunction—Right to possession of lands attached to. See TRUST, No. 3 c, 8 Ind. Cas. 525

Moveable property.

Deposit of—Suit for recovery of the thing deposited—Limitation. See LIMITATION ACT, 1877, No. 49, 5 Ind. Cas. 1

Muktear.

(1)—convicted of offence implying defect of character—Jurisdiction of High Court and subordinate Court. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 3, 11 C.L.J. 164.

(2) Amendment of Muktearnama—Power to amend—Effect of amending. See AMENDMENT, No. 1, 11 C.L.J. 285

(3) Misconduct—Conviction—Removal—Restoration—Power of High Court. See PLEADER, No. 3-b, 12 C.L.J. 625.

Mulgeni lease.

(1) *Mulgeni lease*—Payment of rent in kind—Assessment payable by *Mulgar*—Increase in assessment—*Mulgar* liable to pay the increase—Interest over arrears of rent payable in kind—Interest Act (XXXII of 1839)—Contract Act (IX of 1872), S. 73—Unliquidated damages

Under the terms of a *Mulgeni* lease, executed on the 25th September, 1869, the *Mulgenidar* (tenant) agreed to pay the *Mulgar* (lessor) rent of five and a quarter khandies of rice every year, and the latter to pay the Government assessment of Rs. 6-14-6. It was also agreed that rent settled should not be reduced or enhanced. At the revised survey settlement the assessment was increased to Rs. 16-12-0. The *Mulgar* then having sued the tenant for the arrears of rent for six years preceding the suit, with interest, the tenant claimed refund of the increased assessment which he paid and for which the *Mulgar* was liable.

Held, (1) that the amount of assessment Rs. 6-14-6, mentioned in the lease as being payable by the *Mulgar*, must be deemed to refer to the assessment as it then existed, irrespective of the question of its reduction or enhancement thereafter that, therefore, the *Mulgar* remained liable to pay the enhanced assessment,

(2) that, as the rent was payable in kind, the arrears of rent were not such a debt as was contemplated by the Interest Act, 1839, which required that there must be a debt or sum certain at the time when the promise was made to bring it within the operation of the Act, and there was no debt certain at that time, because the market value of rice then need not have necessarily been the same as the market value at the time of the breach of the contract,

(3) that neither was interest recoverable under S. 73, Contract Act, 1872, as damages for breach of the contract to pay rent since a suit to recover the money value of the rent in kind was a suit to recover unliquidated damages which were measured by the market value of the goods deliverable under the contract on the day they ought to have been but were not delivered, and interest could not run upon unliquidated damages. *Narayan Ramachandra Bhatta v. Manager Nagappa*, 12 Bom. L.R. 831.

CHANDAVARKAR and HEATON, JJ.

(2) *Landlord and tenant*—*Mulgeni* tenure—Sudden enhancement of Government

Mulgeni lease—(Concluded).

assessment—Liability of tenant to contribute rateably to the increase—Madras Revenue Recovery Act (II of 1864).

Where Government assessment on land let under *mulgeni*-tenure is suddenly increased, the landlord alone should bear the whole increase under the provisions of the Madras Revenue Recovery Act, and the tenant cannot be called on to contribute rateably towards the increase. *Venkataramana Aithala v. Nagapaya*, 8 Ind. Cas. 428.

KRISHNASWAMI AIYAR, J.

References :—20 M.L.J. 640 (F.B.) ; 1 M.W. N. 399 ; 8 M.L.T. 173 ; 7 Ind. Cas. 321, F.

(3) *Mulgar—Mulgenidar—Liability to pay enhanced rent.* See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 3, 8 M.L.T. 173.

Municipal Act.

(1) See ACT III OF 1884 (BENGAL).

(2) See ACT XVI OF 1903 (C.P.).

(3) See ACT I OF 1900 (N.W.P.).

(4) See ACT XX OF 1891 (PUNJAB).

Municipalities.

(1) *Municipal Act, construction of—Statutory powers of—How to be exercised—Abuse of power—Effect—Central Provinces Municipal Act—Power of Committee, President or Vice-President—S. 66—Power to impose conditions on owners of lands to ensure safety—S. 67—'Projection lawfully in existence,' meaning of—Power to remove—Compensation—Notice under Ss. 66 (5) and 153 (3)—S. 88—Rebuilding a building, what is—Discretion exercised by Municipal Committee when can be interfered with by Civil Courts.*

A public body like a Municipal Committee invested with statutory powers must take care not to exceed or abuse their powers. They must rigidly keep within the limits of the authority committed to them. If they act beyond their powers, they have to make compensation to the person sustaining damage by reason of their unlawful proceedings (a).

An Act like a Municipal Act, which touches the private rights of individuals, must be most carefully construed "without unwarrantable severity on the one hand or unjustifiable lenity on the other" (b).

Any action to be taken or order to be passed or notice to be issued in the exercise of powers conferred by the Central Provinces Municipal

Municipalities—(Continued).

Act, 1908, must be taken, passed or issued respectively, by the Committee, by means of a resolution passed at a meeting convened and conducted under Ss. 15 to 19 inclusive. But, in cases of emergency, the President, or, in his absence or during the vacancy of his office, a Vice-President, may direct the execution of any work or the doing of any Act which the Committees are empowered to execute or do, and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public ; under S. 66, no power is given to a Committee absolutely to deprive owners of the legitimate use of their lands, but the Committee can only impose conditions to ensure the safety and sanitation of the building and suitability of its structural appearance relatively to neighbouring buildings, and also to conserve the health, safety or convenience of the public, or of persons dwelling in the vicinity. Under S. 67, a Committee cannot require any projection or structure over any public drain to be removed, if the projection or structure has been lawfully in existence at the date of the commencement of the Act, without making reasonable compensation for damage caused by such removal (c). But power of removal of projections without compensation is limited to cases of altogether new structures, and does not extend to structures taking exactly the place of pre-existing structures (d). Any projection, in the absence of any rule declaring it a public or common nuisance under the former Act, and in the absence of any action by way of civil proceedings for its removal by the Committee, must be held to be lawfully in existence. Before a Committee can acquire a power to pull down a building erected or re-erected in violation of the provisions of S. 66, it must give a notice to remove under sub-S. (5), and also a second notice under S. 153 (3) if the first notice is not complied with.

The exercise of its discretion by an authority like a Municipal body, in respect of a matter within its jurisdiction, when that discretion has been honestly and *bona fide* exercised, cannot be controlled by an action in Court (e). But if the discretion is capriciously or perversely exercised, and injury results to the plaintiff, he may then have a cause of action, and not till then (f). Where, a *chappri* was in existence for 20 years, and plaintiff took down the roof and the posts, and, after fixing new posts, put back the roof in its old place, held the renewal of the old posts, and then to put back

Municipalities—(Continued).

the soil in its old position can scarcely be called rebuilding a building (*g*). **Hamdularay v. Chittagore Municipality**, 6 N.L.R. 53.

Sri Bipin Krishna Bose, A.J.C.

References :—(a) (1905) L.J. Ch. 629. (b) 27 B. 221 (227), B. (c) 28 B. 248. (d) 25 C. 160 & 21 M. 4, R. (e) 66 L.J.Q.B. 427 (438, 484); (77) L.J.Q.B. 51. (f) 25 M. 118 (139); 26 C. 811 (815) and 22 B. 230 (238). (g) 28 A. 199 (201); 12 Q.B.D. 224 and 18 B. 547, R.

(2) Lands within a—Acquisition—Valuation. See **ACQUISITION OF LAND**, No. 1, 11 C.L.J. 408.

(3) Municipal elections—Jurisdiction of Chief Judge of Small Cause Court. See **ACT III OF 1888 (CITY OF BOMBAY MUNICIPAL)**, No. 1, 12 Bom. L. R. 737.

Murshidabad Act.

See **ACT XV OF 1891 (BENGAL)**.

Mutts.

Their origin—Head of—Position of—Trustee or life-tenant—Income, power to spend. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 7 M.L.T. 1 (F.B.).

Name.

(1) Use of another's name—Allegation of damages—Right of suit. See **REG. II OF 1897**, No. 1, 12 Bom. L.R. 358.

Native Christian.

(1) Joint tenancy—Gift by a, to three children—Nature of estate taken. See **GIFT**, No. 1, 7 M.L.T. 379.

Natural Rights.

(1) *Easements—Rain-water flowing in undefined water-course—Natural right of adjacent owner to obstruct—Damages—Water, right of.*

Where rain water falling on plaintiff's land flowed over land of the adjoining owner,

held that this was a natural right and the adjacent owner cannot claim damages for any inconvenience caused to him; but it is equally a natural right of the adjacent owner to build up to the edge of his land, so as to obstruct the flow of surface water from adjoining land, or he may erect a dam upon his own land which has the effect of obstructing the flow of the neighbour's surface drainage water over his land. **Sangana Reddiar v. Perumal Reddiar**, 7 M.L.T. 164 = 5 Ind. Cas. 921.

Benson and Krishnaswami Iyer, JJ.

Reference :—29 M. 539, F.

Natural Rights—(Continued).

(2) *Injunction—Right to let the water run off from land on a higher level into that on a lower level.*

The owner of higher land is entitled to let the water run off into the lower land by whatever means nature intended that it should, and his right is infringed by any means which prevent the water so doing, whether it be the damming of stream or the holding up of the promiscuous spill (*a*). **Mahomed Hossain v. Mansooklal**, 8 Ind. Cas. 456.

PARLETT, J.

References :—(a) 1 M. 385, F.; 2 C.L.R. 141; 12 C. 323; 11 M. 16, R.

Necessity.

—is a question of fact—Interference in revision. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 12, 67 P.W.R. 1910.

Negligence.

(1) Rule of speed limit in navigable channels—Contributory—Bad light. See **TORT**, No. 3, 8 Ind. Cas. 611.

Negotiable Instruments.

(1) *Hundi—Consideration—Burden of proof—Revision under S. 70 (a) of Act XVIII of 1884.*

Held, that, where a man executes a Hundi, he must pay the money or must prove that no consideration passed. This law may at times secure decrees for money to plaintiffs who never paid the *quid pro quo*, but this is immaterial. The Legislature, in the interest of the business community generally, has adopted a policy, and, in pursuance of that policy, the onus in such cases is laid upon the person who promises to pay upon a negotiable instrument.

A person is not bound to keep careful proof of matter which the law says he need not prove.

Held, also, that a finding of fact by wrongly throwing burden of proof on a party can be questioned in revision under S. 70 (a) of Act XVIII of 1884. **Kishen Chand v. Jamna Das**, 25 P.W.R. 1910 = 24 P.L.R. 1910; 5 Ind. Cas. 391.

JOHNSTONE, J.

(2) *Hundi endorsed for collection—Whether endorser entitled to sue upon it without a re-endorsement to him.*

Where a Hundi is endorsed over to an Agent for collection who has no property in the same, the endorser is entitled to sue upon it, without

Negotiable Instruments—(Concluded).

any re-endorsement back to him. **Ponnayya v Palaniappa Chetty and others**, 7 M L T. 271=5 Ind Cas 485.

SANKARAN NAIK and ABDUR RAHIM, JJ.

Reference —80 M. 441, F.

- (3) *Money lent, suit for—acceptance of hundi for the loan—Hundi dishonoured and unpaid—Suit on the original loan—Maintain ability*

A sued B for the recovery of a sum of money lent and repayable on a certain date B also gave a *hundi* for the sum A brought a suit on the *hundi*, which failed by reason of defect in the stamp. A brought the present suit on the original loan for recovery of the sum lent, costs, etc

Held that the plaintiff's claim to recover his loan is not barred by his acceptance of a *hundi*, payment of which was refused (a) **Gokuldas v. Parmanand**, 6 N L R 125

STANYON, A J C.

References —(a) 23 C. 851, 28 A. 298, 24 B 360, F. 7 C 256 *considered*, 8 C 721, 26 A 178, Diss., 29 M 111, R

- (4) *Promissory note—Transfer of ownership—Want of endorsement—Purchaser in Court auction—Right of purchaser to sue—Vesting order—C P C (Act of 1908), O. XXI, ss 50 and 51*

In order to effect a transfer of ownership of a negotiable instrument, an endorsement is not in general required by law

A purchaser of a promissory note in Court auction, who was obtained a vesting order before date of his decree, is entitled to a decree in suit on the promissory note even though there was no endorsement on it **Kuthala-lingam Pillay v Packiyam Fernandez**, 8 Ind Cas 17

MILLER, J

Reference —6 B 139, R

(5) *Bill of Lading—Endorsement in blank—Effect.* See **BILL OF LADING**, No 1, 3 S L R. 203

(6) *Instrument negotiable by custom—Effect of partition list—Absence of assignment in writing.* See **PROMISSORY NOTE**, No 8, 8 Ind. Cas. 33.

Negotiable Instruments Act.

See **ACT XXVI OF 1881.**

Next friend.

Making default—Effect upon minor. See **CIV. PRO CODE**, 1882, No. 198, 99 P.L.R. 1910.

Non-joinder.

(1) *Plea of, taken in appeal—Proper course.* See **INAM**, No. 2, 7 M L T. 349.

(2) —of parties—Objection not taken at the earliest opportunity—Waiver. See **CIV. PRO. CODE**, 1908, No 101, 7 Ind. Cas. 102.

Notice.

(1) *Plea of want or insufficiency of notice, when may be taken* See **ACT III OF 1884 (BENGAL MUNICIPAL)**, No 5, 8 Ind Cas 81.

(2) *Objection as to want of, when may be taken* See **LEASE**, No 8, 5 Ind Cas 386.

(3)—to *am mukhtar* when he is husband of principal—Effect See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 50, 5 Ind Cas. 652.

Nunc Pro Tunc

Award made after death of one of the parties—Doctrine of whether applicable. See **ARBITRATION**, No 2, 14 C W N 759

Oath

- (1) *Oath in a particular form—Vakil offering to be bound by though not specially empowered—Effect of*

A vakil, unless specially empowered, cannot bring a suit to a close, by offering to be bound by the oath of the opposite party in a particular form **Ramasami Odayan v P. M. Ramasami Odayan**, 7 M.L.T. 43=5 Ind Cas. 514—20 M L J 396.

MUNRO and ABDUR RAHIM, JJ.

Reference —14 B 455, F

- (2) *Proposal by plaintiff to take oath in one form—Plaintiff subsequently insisting upon another form—Defendant's duty*

Where the defendant was willing to take the oath in the form proposed by the plaintiff, but the plaintiff insisted on taking the oath in another form,

held that the defendant was not bound to take the oath in the form which the plaintiff insisted upon **Ramalingam Chetti v. Yeerayya Chetti**, 7 M L.T. 197

SIR ARNOLD WHITE, C.J.

References —(a) 17 M.L.J. 99, D., 17 M.L.J. 546, R.

Oaths Act.

See **ACT X OF 1873.**

Occupancy.

(1) *Absolute—Occupancy holding—Belonging to a minor—Surrender of, by a guardian when binding on minor—Absolute occupancy tenant right when might be lost—Absolute occupancy tenant and ordinary tenant—Difference between the rights—Applicability of Tenancy Act to absolute occupancy tenants.*

The validity of a surrender, by the guardian of an absolute occupancy holding belonging to a minor, as operating to put an end to the rights of the minor thereto, must be judged by the same considerations as apply to the acts of guardian with respect to ordinary property as laid down in *Hanooman Persaud's case* (a). So if the surrender is not a prudent act, and is in excess of the guardian's qualified powers, it cannot so operate as to destroy the absolute occupancy tenant-right.

An absolute occupancy tenant-right will not be lost, by reason of the tenant's connection with his land ceasing to exist by means of a transaction not binding on him, unless such severance of the tenant's connection amounts to a dispossession extending over the full statutory period of limitation for suits for land.

Although the Tenancy Act incorporates an absolute-occupancy tenant within its sphere of operation and classes him as a tenant along with tenants properly so called, yet in its essence his right to something quite apart from the rights of tenants proper. More inclusion in the Act does not subject him to the disabilities of tenants, apart from what the Act specially provides for. *Racho v. Sadoo*, 6 N.L.R. G.

KRISHNA BÖSE, J.C.

Reference :—(a) 6 M.L.A. 393.

(1-a) *Uniform rent for half a century—Tenants contributing for the reclamation of the lands.*

Suit in ejectment. The suit lands originally formed part of a zemindary, and were forest lands. They were reclaimed, the defendants contributing the bulk of the expenditure. The lands were held by the defendants and their ancestors for about half a century at a uniform rent.

Held, that the Judge, who found that the defendants, had acquired occupancy rights, cannot be said to be legally wrong in coming to that conclusion, in view of the fact that the tenants would have probably had notions about tenure similar to those of the (occupancy) tenants in the surrounding zemindaries.

Occupancy—(Continued).

The Baptist Missionary Society of India v. Horiah Behara, 7 M.L.T. 201=5 Ind. Cas. 972.

BENSON and KRISHNASWAMY IYER, JJ.

Reference :—28 M. 318, R.

(2) *Occupancy holding—Recorded tenant, whether represents holding—Question of fact—Decree for rent against recorded tenant—Sale—Interest of unrecorded tenant now affected.*

The decision in 9 C.W.N. 848 lays down no more than this, that a landlord is not justified in treating the registered tenant, of raiyati holding as the sole tenant, merely because his co-sharers in the holding are not registered. There is nothing in that case to prevent the whole body of tenants of a raiyati holding electing to treat one of their number as their representative in their dealings with the landlord. The fact that only one tenant is registered is merely an item in the evidence, on the question whether he is or is not the representative tenant *qua* the landlord (n).

The question whether the recorded tenant represents the holding or not is, under the present law, always a question of fact. *Jagat Tara Dassya v. Daulati Bewa*, 13 C.W.N. 1110=2 Ind. Cas. 695=37 C. 75.

RICHARDSON and CHATTERJEE, JJ.

References :—(a) 26 C. 677; 2 C.W.N. 172; 27 C. 546; 6 C.W.N. 302; 7 C.W.N. 170; 10 C.W.N. 176; 24 C. 612; 3 C.W.N. 19, R., 9 C.W.N. 843, R.

(2-a) *Occupancy right, a personal right—Transferability—Sust by transferee of a share for joint possession with co-sharers, if maintainable—Estoppel.*

The right of occupancy is a right personal to the particular raiyat and cannot be transferred (n).

The transferee of the share to one of several persons jointly owning an occupancy holding cannot claim joint possession of the holding as against his transferor's co-sharers, there being no room in such a case for the application of the doctrine of estoppel (b). *Sreemati Agarjan Bibi v. Panaula*, 14 C.W.N. 779=6 Ind. Cas. 452=37 C. 687.

JENKINS, C.J., and DOSS, J.

References :—(a) 7 W.R. 28 (1867); 22 W. R. 22 (1874); 18 C. 353 (1891); 24 C. 355; S.C. 1 C.W.N. 396 (1897); 26 C. 727 (1899); 26 C. 937, (1899), *relied on*; 15 W.R. 152 (1871); 17 W.R. 179 (1872), R. (b) 2 C.W.N. cclxix (1898); 13 C.W.N. 630 (1909), *Expl.*; 4 C.W.N. 679 (1900); 11 C.W.N. 76 (1906); 14 C.W.N. 71 (1909), D.

Occupancy—(Continued).

(3) *Transfer of non-transferable occupancy holding—Sale by purchaser to under-tenant, effect of—Bengal Tenancy Act (VIII of 1885), Ss. 22, 49—‘Otherwise,’ meaning of, in S. 22*

A non-transferable occupancy holding under the plaintiff belonged to B, who sublet a portion of the same to defendants Nos. 1 and 2 and then sold the holding to a third party who again sold the same to defendant No. 1. The plaintiff sued for recovery of possession, and it was contended in defence that the effect of the transfer of the holding is that of abandonment which should be considered to be a transfer in favour of the landlord who is bound to sue for evicting the defendants as the original tenant would have been bound to do, that is after notice under S. 49 of the Bengal Tenancy Act.

Held, that what had taken place in the present case was not tantamount to a sale by the tenant in favour of the landlord, and was not to be clothed with the same legal effect.

Where the plaintiff is not the immediate landlord of the under-tenant, S. 49 Bengal Tenancy Act, has no application.

S. 22 of the Act applies only to occupancy holdings which are transferable (a).

The word “otherwise” in that section is used in respect of the transaction, which is *ejusdem generis* with the co-ordinate words used in the section, by transfer or succession, and cannot be held to apply to the present case. *Radha Nath v. Aditya Prosad Dass*, 5 Ind. Cas. 264.

CHATTERJEE, J.

References—(a) 27 C. 473, 4 C.W.N. 569, F.

(3 a) *Landlord and tenant—Occupancy right—Successor to an occupancy tenant—Presumption of occupancy*

Where a Zamindar granted a *Rajabligam* right to one B and, at the time of the grant a tenant cultivated the land under occupancy rights.

Held, that the successor of the occupancy tenant should be deemed to be a tenant with occupancy rights. *Sappa Krishna Patrudu v. Theili Mukunda Sahu*, 6 Ind. Cas. 586 = 8 M.L.T. 96.

WHITE, C.J. and MUNRO, J.

References—30 M. 502, 2 M.L.T. 470, S.A. No. 1021 of 1905, S.A. No. 1737 of 1908, D.

Occupancy—(Continued).

(4) *Landlord and tenant—Sale of occupancy holding in execution of money-decree—Question of transferability of holding, who can raise—Do-sharer of raiyat whether competent to take the plea.*

The raiyat, whose occupancy holding has then sold in execution of a money-decree, can raise the question of transferability, as soon as he comes to know of the execution-proceedings taken against his holding (a).

But a third party cannot raise the plea, against a person who had purchased the holding in execution of a decree against the raiyat (b).

Therefore, the question cannot be raised by a co-sharer of the tenant, when the latter himself is silent, and the landlord is not a party to the suit. *Ambika Charan Mondal v. Ram Charan Pramanik*, 5 Ind. Cas. 885.

CHATTERJEE, J.

References—(a) 24 C. 355; 1 C.W.N. 396; 26 C. 727, 3 C.W.N. 588, R. (b) 2 C.W.N. cclxxix, 6 C.W.N. 624, F.

(5) *Mortgage—Occupancy-holding—Relinquishment of holding by mortgagor in favour of Zamindar—Mortgage not affected.*

A mortgagor of an occupancy-holding is not competent to relinquish the holding, so as to impair the security given by him to the mortgagee and in fact to destroy it. *Jaijopal Singh v. Ram Tahal*, 6 Ind. Cas. 705.

BANERJEE, J.

References—24 A. 538, A.W.N. (1902), 161; 18 A. 354, referred to.

(6) *Redemption—Sub-mortgage by a mortgagee—Occupancy holding—Transfer before the 1911 Tenancy Act came into force—Right of mortgagee to redeem—General Clauses Act (1 of 1904, local), S. 6.*

Rights which accrued before the *Agra Tenancy Act* came into force are not prejudiced by that enactment.

A mortgage of an occupancy tenancy, executed prior to the coming into operation of the *Agra Tenancy Act*, is valid. Such a mortgagee has all the rights of a mortgagee, including a right to transfer his mortgage and also a right to sub-mortgage.

A mortgagee of an occupancy holding and a transferee from him have a power to redeem the mortgage. *Ram Pargas Upadhyay v. Sooba Upadhyay*, 7 A.L.J. 755 = 6 Ind. Cas. 837.

STANLEY, C.J., and GRIFFIN, J.

Reference—(1906) 26 A.W.N. 802, D.

Occupancy—(Continued).

(8-a) *Landlord and tenant—Occupancy holding—Pacca mosque built on the holding—Act inconsistent with the purpose of letting—Ejection.*

At one of the corners of an occupancy holding, there stood some huts which the defendant used for his living and for his cattle and *kohlu*. In one of these huts, the Mussulmans used to meet for prayers. Subsequently the defendant began to build a *pacca* mosque on the site of the house in which they used to pray.

Held, that the building of *pacca* mosque was an act inconsistent with the purpose for which the holding had been let, and the defendant was liable to be ejected for so doing.

Held, further, that the defendant was liable to be ejected from the entire holding, and not only from the part on which the mosque was built. *Allah Dia v. Sada Nand*, 8 Ind. Cas. 732.

KARMAAT HUSSAIN, J.

(7) Right of succession to—Poor and rich daughters—Preference. See ACT II OF 1901 (AGRA TENANCY), No. 5, 7 A.L.J. 293.

(8) Mortgage of—Relinquishment by mortgagor's representative—Right of mortgagee—Declaratory suit. See MORTGAGE (GENERAL), No. 18, 7 A.L.J. 291.

(9) Occupancy tenant—Lease for a term or in perpetuity—Muggeri lessee—Relative positions of. See LANDLORD AND TENANT, No. 14, 7 M.L.T. 231.

(10) Presumption of fixity of rent—When arises. See ACT VIII OF 1885 (BENGAL TENANCY), No. 26, 6 Ind. Cas. 217.

(11) Succession to—*Onus*. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 12, 60 P.W.R. 1910.

(12) Sale of—Possession of tenant of portion of holding—Rent decree against purchaser—Sale of holding—Right of old tenant to save by deposit of decretal amount. See CIV. PRO. CODE, 1882, No. 150, 5 Ind. Cas. 561.

(13) Mortgage of—Void mortgage—Rights of mortgagor and mortgagee. See MORTGAGE (GENERAL), No. 44, 7 Ind. Cas. 738.

(14) Registered occupant of holding in Berar—Relinquishment of holding—Surrender—Co-sharer's right of pre-emption—Failure to exercise the right, effect of. See PRE-EMPTION, No. 27, 6 N.L.R. 78.

Occupancy—(Concluded).

(15) Lease—Presumption of right of—Meaning of 'Kudimiras.' See LANDLORD AND TENANT, No. 42, 8 M.L.T. 430.

(16) —whether extinguished by non-cultivation by a minor tenant. See XVI OF 1887 (PUNJAB TENANCY), No. 2, 3 P.R. 1910.

(17) Temple lands—Use of terms such as "permanent," "you and your heirs" in documents—Effect. See RELIGIOUS ENDOWMENTS, No. 3, 7 M.L.T. 386.

(18)—not found—Presumption. See LANDLORD AND TENANT, No. 17, 7 M.L.T. 350.

(19) Succession—Survivorship—Recognition by landlord of right as heir of deceased tenant—Effect. See LANDLORD AND TENANT, No. 18, 23 P.L.R. 1910.

(20) Custom as to existence of—Nature and proof of usage. See CUSTOM (GENERAL), No. 1, 6 Ind. Cas. 291.

(21) Stipulation by tenant not to enter land without fresh cowls—Effect on. See LANDLORD AND TENANT, No. 27, 20 M.L.J. 526.

Offer.

(1) What amounts to an. See CONTRACT, No. 10-a, 8 Ind. Cas. 601.

Official Assignee.

Official Assignee's commission—Right to draw without order of Court. See INSOLVENCY ACT, 1848, No. 6, 7 M.L.T. 290.

Official Receiver.

Position of—Assignment by—Suit by assignee—Validity—S. 503, C.P.C. 1882.

The status of a Receiver is merely that of an officer of the Court. He is sometimes referred to as the "hand of the Court." He acquires no proprietary rights or interest in the property of which he is appointed Receiver. Having no title to the property, he cannot convey or assign any title to it to any other person. The Court may direct him to sell property, but, in such a case, he merely carries out the Court's order. His assignee cannot maintain a suit in respect of the property assigned. *Po Shan v. Maung Gyi*, 5 L.B.R. 213 (F.B.).

FOX, C.J., HARTNOLL and PARLETT, JJ.

Official Trustee.

Official Trustee whether can be made executor—Private testator—Official Trustees Act (XVII of 1864), Ss. 810, 32.

It is not open to a testator to appoint the Official Trustee as constituted by Act XVII of 1864 as executor of his will; and if he be so appointed, he will not be entitled, by virtue of

Official Trustee—(Concluded).

his office and in his character as Official Trustee, and in the name of the Official Trustee, to have a grant of probate. *C. E. Grey v. Charuella Dasi*, 7 Ind. Cas. 247.

JENKINS, C.J., and WOODROFFE, J.

Oral agreement.

—to be inferred from conduct. See EVIDENCE ACT, No. 18, 6 Ind. Cas. 577.

Oudh Talukdar.

- (1) *Oudh Talukdar and his relatives—Superior proprietor—Sub-proprietor—Provision for maintenance—Rule of the British Indian Association of Oudh—Construction—Suit in a Rent Court—Jurisdiction—Maintenance, payments on account of.*

Where in Oudh, sub-proprietary rights in a village were held by the relatives of a Talukdar, who held superior proprietary rights in it, under the provision for maintenance in accordance with one of the rules of practice, framed by the British Indian Association, with regard to suits instituted and decrees passed therein, dated the 25th September, 1867, *viz.*, "This class will remain in possession of what they actually had at annexation rent free during their lifetime, but subject to payment in the second generation of 25 per cent. to the Talukdar, and in the third 50 per cent., and will not have transferable rights. If such persons pay the Government revenue, *plus* 10 per cent. to the Talukdar, they will have heritable rights in addition."

Held, that the bulk sum out of which the percentages were to be struck was the assumed rental, of which 50 per cent. was the Government revenue.

Held, also, that it was not within the province of a Rent Court to determine whether maintenance was or was not payable, and consequently, that certain payments made, on account of maintenance to the respondent by the Court of Wards, which represented the appellant during his minority, could not be opened up by the appellant in a suit brought in a Rent Court by him after he attained his majority. *Nawab Ali Khan v. Wahid Ali*, 7 A.L.J. 41 (P.C.)=14 C.W.N. 297=11 C.L.J. 116=5 Ind. Cas. 156=12 Bom. L.R. 161=32 A. 92=20 M.L.J. 195=18 O. C. 74.

LORD MACNAGHTEN, LORD ATKINSON,
LORD COLLINS, LORD SHAW and SIR
ARTHUR WILSON.

Ouster.

—what constitutes. See CO-SHABERS, No. 4, 11 C.L.J. 189.

Overruling.

—of old and unchallenged decisions—Duty of Court. See DECISIONS, No. 1, 11 C.L.J. 106.

Ownership.

- (1) *Recital as to—Recital in document relating not to suit land but to neighbouring land—Effect.* See EVIDENCE ACT, No. 4, 8 Ind. Cas. 268.

Pardanashin lady.

- (1) *Document executed by—Not binding on—Unless understood and explained.*

In order to charge a pardanashin lady upon an instrument purporting to have been executed by her, it is requisite to give satisfactory evidence that the document was explained to and understood by her. Where a pardanashin lady fell in love with an adventurer and left her husband, and, at a time when no one but the adventurer had access to her, executed a power of attorney, in his favour, and he, on the authority of the power of attorney mortgaged the property to the plaintiffs, *held*, that there was nothing to show that the instrument was explained to and understood by her, and that the mortgage was not binding. *Kubra v. Ajedhia Pershad*, 7 A.L.J. 445=6 Ind. Cas. 689.

STANLEY, C.J., and BANERJI, J.

- (2) *Pardanashin lady—Execution of document—Inconsistent plea—Explaining document to her—Onus of proof—Independent advice—Lack of business habits literate and of intellectual capacity—Power-of-attorney given to husband—Estoppel.*

It is not open to a pardanashin lady to plead that she never executed a certain document, and, in the alternative, that, if she executed it, she did so under circumstances which did not make it binding upon her as a *pardanashin lady* (a).

But where, in the first written statement filed by the lady, there was no suggestion that the document had not been executed by her, and at a later stage she endeavoured to file a new written statement which, if admitted, would have made her case contradictory to her previous allegations, but the attempt failed:

Held, that the case of the lady as it stands in its original form is self-consistent and is not open to objection on the ground of inconsistency

Pardanashin lady—(Continued).

The Court, when dealing with a deed alleged to have been executed by a *pardanashin* lady, must, before it gives effect to it, satisfy itself, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction; and thirdly, that she had independent and disinterested advice in the matter (b).

It is requisite that those, who rely upon documents executed by *pardanashin* ladies, should satisfy the Court that they had been explained to and understood by those who executed them (c).

Where it is proved that the lady was of business habits, was literate and of considerable intellectual capacity, the Court will be less inclined to interfere with the deeds, which have been *prima facie* properly executed, or to interfere with transactions to which her consent had been deliberately given.

Where the deed was of the simplest character, and the lady was herself able to read and write, and there is no foundation for any possible pretence that the deed was read out in such a way as not to convey its true meaning to the executant: *Held*, that the deed was intelligently executed and that the lady fully understood the nature and effect of the transaction (d).

Where a *pardanashin* lady and her husband executed a deed, and, although the interest of the husband at the time was in conflict with that of the lady yet, she had opportunities for independent advice, as her sons were grown up and were about her at the time and they attested the document: *Held*, that the deed was valid.

A general power-of-attorney does not necessarily imply an unlimited authority to borrow, and the general words in a power-of-attorney confer upon the agent only such general powers as are necessary to carry out the special powers (e).

If a *pardanashin* lady deliberately makes herself jointly and severally liable for a debt incurred by her husband on the strength of a power-of-attorney alleged to be given to him by her, she cannot subsequently be permitted to turn round and question his authority to pledge her credit. *Bindubashini Dasi v. Giridhari, Lal Roy*, 3 Ind. Cas. 880 = 12 C.L.J. 115.

MOOKERJEE and VINCENT, JJ.

References:—(a) 15 I.A. 81 = 15 C 684, F. (b) 8 A. 267; (1887) A.W.N. 84; 14 A. 8, R. (c) 29

Pardanashin lady—(Concluded).

I.A. 127 = 29 C. 749; 8 I.A. 39 = 7 C. 245, R. (d) 28 I.A. 71; 28 C. 546, D. (e) (1898) C.A. 170; 6 C.L.J. 639, R.

(3) Execution behind *parda*—How to be attested—Document to be explained to and understood by. See ATTESTATION, No. 1, 55 Ind. Cas. 589.

(4) Document by—Duty of Court—Rule as to not applicable to literate lady of considerable intellectual capacity. See PLEADINGS, No. 6, 7 Ind. Cas. 166.

Paper Currency Act.

See ACT III OF 1905.

Parliament.

(1) Statements made in—Privilege—Relevance. See LIBEL, No. 1, 14 C.W.N. 718.

Parties.

(1) Revision of an order refusing to add parties—Failure to exercise jurisdiction—'Case,' meaning of—Civ. Pro. Code (Act V of 1908). O. I, R. 10, Civ. Pro. Code (Act V of 1908), S. 115.

Where the lower Court rejected the applicants' application to be made a party in the case on the ground that plaintiff was not willing to implead them as defendants, *held* that the Court failed to exercise the jurisdiction vested in it under O. I, R. 10 of Act V of 1908, inasmuch as it failed altogether to consider whether it was necessary, for the effectual and complete adjudication of all the questions involved in the suit, to join them as parties to the suit.

Held further, that the petition of the applicants, the proceedings held thereon and the order of the Court rejecting the petition, amounted to a "case" within the meaning of S. 115 of Act V of 1908. *Raisat Ali (Chaudri) and others. v. Rae Rajeshwar Ball*, 13 O.C. 109.

CHAMBER and EVANS, JJ.

References:—Select Case No. 302; 5 O.C. 91; 10 O.C. 8; 12 O.C. 105, R.

(2) Parties to suit—Failure to examine themselves as witnesses—Presumption.

Presumptions are necessarily made against parties, if, when facts are in dispute, the knowledge of which must rest with them, they will not present themselves to the Court to state their own evidence and the knowledge of facts (a). *Ramanna v. Naganna*, 15 M.C.C.R. 126.

STANLEY ISMAY, C.J. and KRISHNA RAO, J.

References:—(a) (1873) 19 W.R. 140; (1901) 26 B. 392, F.

Parties—(Continued).

- (9) *Party—Suit for account by partner against representatives of deceased partner—Receiver of deceased partner's estate, whether necessary party—Civil Procedure Code (Act of 1908), S. 151, O. XXI, R. 23—Remand by appellate Court when suit not disposed on preliminary point—Inherent power of Court.*

In a suit to wind up a partnership business brought by one partner against the representatives of a deceased partner it is necessary to join as party defendant the receiver appointed by competent Court to take charge of the estate of the deceased (a).

When a decree has been made by an original Court in a suit improperly framed by reason of the failure of the plaintiff to join a necessary party as a defendant, it is competent to the Court of appeal, under S. 151 of the Civil Procedure Code, to set aside that decision and to remand the case for re-trial with directions to add all necessary parties (b). **Tohra Bibi v. Zbaeda Khatoon**, 7 Ind. Cas. 75.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 6 Ind. Cas. 214; 14 C.W.N. 653; 6 Ind. Cas. 63; 11 C.L.J. 958, R. (b) 18 A. 131; 18 A. 396; 23 A. 167; 25 A. 194, R.

- (4) *Objection as to defect of—Failure of plaintiff's attempt to defeat objection—Prayer in second appeal to join party, not to be allowed. See LANDLORD AND TENANT, No. 1, 5 Ind. Cas. 105.*

(5) *Trade debt—Bond in favour of one co-parcener—Suit by obligee—Non joinder of other co-parceners. See HINDU LAW (JOINT FAMILY), No. 1, 7 A.L.J. 161.*

- (6) *Result of non-examination of—English and Indian practice. See ADOPTION, No. 1, 7 M.L.T. 57 (P.G.).*

(7) *Right of party subsequently added to raise plea of limitation. See CIV. PRO. CODE (1892), No. 1 70, 7 M.L.T. 306.*

(8) *Person only indirectly interested—Whether necessary party—Power of Court. See CIV. PRO. CODE (1908), No. 96, 6 Ind. Cas. 36.*

(9) *Claim of private right by plaintiff over land—Claim of public right by defendants—Who are necessary parties. See SPECIFIC RELIEF ACT, No. 20, 6 Ind. Cas. 46.*

(10) *Appellate Court's power to add. See PROBATE, No. 3, 12 C.L.J. 91.*

Parties—(Concluded).

- (11) *Land in possession of village community—Delivery to defendant by Government—Suit for possession—Secretary of State whether a necessary party. See POSSESSION, No. 3, 6 Ind. Cas. 419.*

(12)—in rent suits. See RENT, No. 1. 6 Ind. Cas. 570.

(13) *Suit by manager on contract—Rules for joinder of. See HINDU LAW (JOINT FAMILY), No. 11, 4 S.L.R. 2.*

(14) *Addition and substitution of—Suit for accounts—Mistake of fact or law. See CIV. PRO. CODE (1908), No. 99, 12 C.L.J. 537.*

(15) *Absence of parties and pleaders—Hearing of suit after settlement of issues—Procedure. See CIV. PRO. CODE (1892), No. 58-a, 8 Ind. Cas. 156.*

Partition.

- (1) *Partition—Joint estate—Subordinate tenure under one co-sharer—Effect of partition.*

An estate was held in three equal shares. Plaintiff obtained settlements, from all the co-owners, of one of the shares, and then granted leases to the defendant. The parent estate was subsequently partitioned under Act V of 1897 (B.C.), but the co-sharers, to whom the lands in suit were allotted, took no steps against the plaintiff or the defendant, nor, did they disturb the defendant's possession nor dispute the plaintiff's title.

Held, the defendant was in no way entitled to withhold payment of rent to the plaintiff. **Almanaddi Patturi v. Nabin Chandra Gope**, 11 C.L.J. 95 = 5 Ind. Cas. 307.

CHITTY and RICHARDSON, JJ.

- (2) *Appeal—Partition—Preliminary decree—Final decree—Appeal against preliminary decree after final decree—Not maintainable.*

Where, in a suit for partition, a final decree has been made, and the preliminary decree only is appealed against, *held* that the correctness of the decree cannot be challenged without an appeal against the final decree also. **Kuriya Mal v. Bishambhar Das**, 7 A.L.J. 210 = 5 Ind. Cas. 276 = 32 A. 225.

STANLEY, C.J. and PIGGOTT, J.

*References:—*36 C. 762, P.; 33 A. 479, D.

(3) *Partition suit—Civil Procedure Code Act (XIV of 1882), Ss. 13, 371, 544—Res judicata—"Heard and finally decided"—*

Partition—(Continued).

Representatives of one of the respondents not brought on record—Abatement of appeal—“Cause of action,” meaning of—Limitation—Idea of adverse possession—Defendant not himself in possession—Jurisdiction.

A brought a suit for partition against F and others. The Court of first instance decreed the suit. Two separate appeals were preferred against the decree to the District Judge. Both these appeals were dismissed on practically the same ground. One of the defendants, who was an appellant in one of the two appeals but was no party to the other, preferred a second appeal to the High Court. No second appeal was filed from the decree in the other appeal; *Held*, that, there being no claim for partition among the defendants *inter se*, the Court had no jurisdiction to divide off their shares (a).

The appellant's appeal to the High Court was not barred by *res judicata*, by reason of his not having appealed against the decree in the other appeal to which he was no party (b).

If, during the pendency of an appeal, one of the respondents dies and his representatives are not brought on the record, the whole appeal does not abate for that reason (c).

A brought a suit against Z and Y for joint possession. The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge. During the pendency of the appeal, Y died and his representatives were not brought on the record. The District Judge decreed the appeal as against Z, and held it to have abated as against the representatives of Y. Subsequently, the heirs of A brought a suit for partition against the heirs of Y and others: *Held*, that the subsequent suit was not barred by *res judicata*, either under S. 13 or S. 371 of the Code of 1882. The appeal in the former suit having abated, it could not be said to have been heard and finally decided (d).

“Cause of action,” in S. 371 of Act XIV of 1882, should be taken to mean the facts constituting the infringement of right, and not those constituting the right itself (c).

In a suit for partition, the defendant, who himself is not in actual possession of the property, cannot say that the suit is barred by limitation. **Syed Farhatt Husain v. Mahomed Ibrahim Ali**, 5 Ind. Cas. 325.

KARAMAT HUSAIN, J.

References:—(a) 12 A. 506, R. (b) 11 B. 596, D.; 20 A. 81, R. (c) 23 A. 22, F.; 25 A. 27; 27

Partition—(Continued).

B. 284; 30 M. 470, R. (d) 13 A. 53, 62; 17 I.A. 150; 19 A. 277; 24 I.A. 10; 1 C.W.N. 265, R. (e) 16 A. 165; 22 C. 833, R.

(4) *Res judicata—Partition suit—Parties in subsequent suit arrayed on same side in previous litigation—Effect of.*

A suit for partition was brought by R against the plaintiffs and M, the husband of the defendant. The Court of first instance passed a decree and defined the rights of the defendants in the suit. M died during the pendency of the suit. The plaintiffs brought this suit for declaration of their right to the property of M. *Held* that, having regard to the decision in the suit of R against the plaintiffs, it was no longer open to the plaintiff to bring the present suit, inasmuch as in the previous suit a decree ascertaining and declaring the rights of the parties was passed.

The nature of partition suits discussed. **Pursotam Rao Tantia v. Radha Bai**, 7 A.L.J. 451 - 6 Ind. Cas. 692.

RICHARDS and TUDBALL, JJ.

(5) *Partition suit, scope of—Partition—Portion of joint estate, suit for—When maintainable.*

A suit for partition, properly framed, does not include within its scope a property, in which some only of the parties are interested as owners.

Therefore, a suit for partition of a portion of a joint estate is maintainable, when such portion is the only property held jointly by the plaintiffs and defendants, although the defendants may be jointly interested with persons other than the plaintiffs in the remaining portions of the estate. **Kailash Chandra Das v. Nityananda Das**, 3 Ind. Cas. 21 = 11 C.L.J. 381.

MOOKERJEE and VINCENT, JJ.

References:—1 C.L.J. 40 and S.A. No. 1788 of 1907, F.

(6) *Declaratory decree—Suit for partition—Prayer that previous solenamah and decree may be declared invalid—Consequential relief—Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii) and cl. (vi), S. 7, cl. (iv) (c).*

Where a plaint prayed to have an arrangement, carried out under the terms of a previous decree, reversed, and to bring into hotchpot, for the purpose of making a partition, the properties which, since that arrangement, had been

Partition—(Continued).

in the exclusive possession of one or other of the defendants, and also to have certain additional properties brought into partition :

Held, that the plaintiff asked that the decree might be declared invalid and that, as a consequence of that declaration, the properties might be restored to their original state as joint property and then brought under partition ; that the suit, therefore, was for a declaratory decree and for consequential relief ; and that an *ad valorem* Court-fee was payable on the plaint under S. 7, clause iv (c). **Haro Gowri Saha v. Dukhi Saha**, 5 Ind. Cas. 582.

BRETT and SHARFUDDIN, JJ.

- (7) *U.P. Land Revenue Act (III of 1908), S. 118—Partition—Site of a building of one co-sharer allotted to another—Owner of the building failing to express his intention to retain the building by application to the Collector on payment of a ground rent—Right to keep the house after partition—Adverse possession—Usufructuary mortgage, possession of.*

At the partition of a village, the site of a building occupied by one of the co-sharers was allotted to another co-sharer. No application was made on behalf of the occupant of the house to the Collector expressing his intention to retain the building on payment of a ground rent: *Held*, after the partition he was not entitled to remain in possession of the building.

When a partition has been effected by the Revenue Court, the parties are bound by the provisions contained in the order of partition, and they cannot, in a subsequent civil suit, go behind the partition.

The possession under a usufructuary mortgage is referable to the contract of the parties and cannot be regarded as adverse. **Subu-Nandan Pat Tewari v. Radha Keshun Kalwar**, 5 Ind. Cas. 664.

STANLEY, C.J. and BANERJI, J.

- (8) *Partition suit—Parties, necessary—Hindu wife, if unnecessary party—Unknown person and his heirs to be made parties—Service of summons—Civil Procedure Code (Act XIV of 1882), S. 82—Court's power to regulate procedure—Appeal, valid, requisites of—Indian Evidence Act (I of 1872), S. 107—Presumption.*

Ordinarily only such persons should be added as defendants in a partition suit as are owners

Partition—(Continued).

of the interest to be partitioned. But if it cannot be ascertained with precision whether some of the owners are alive, then both the unascertained owners and their legal representatives should be added as defendants, and service of notice effected on the unascertained owners in the manner prescribed by S. 82 of the Code of Civil Procedure (1882).

The only presumption enacted by S. 107 of the Indian Evidence Act is, that the party is dead at the time of suit, but there is no presumption as to the precise time of his death (a).

The Court has inherent power to regulate its procedure in such manner as may shorten litigation and result in substantial justice to the litigant parties.

The requisites of a valid appeal are, *first*, that no one can appeal from a judgment or decree unless he was a party to the action or was treated as such or is the legal representative of a party, or has privity of estate, title or interest, apparent on the face of the record: *secondly*, that the appellant has an interest in the subject-matter of the suit, and *thirdly*, that the appellant is prejudicially affected by the decree complained of.

A Hindu wife's right to maintenance is attributed to a kind of identity with her husband in proprietary right though her right may be of a quite subordinate character (b).

When a partition takes place, the share of the husband may be made to his wife, to be held by her on his behalf during his absence. **Srinath Das v. Probodh Chunder Das**, 11 C. L.J. 580 6 Ind. Cas. 244.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 8 A. 614; 23 Bom. 296; 5 C.L.J. 649; 35 C. 25; L.R. 5 Ch. App. 189, R. (b) 8 M.I.A. 66, 2 A. 315, R.

- (9) *Partition suit for—Ministerial Act—Measurement of plots—Delegation of power—Whether entire proceedings void—Costs—Principle of assessment.*

When a joint judicial act is to be done, it ought to be done, by the parties jointly ; but this principle has no application when the act is of a ministerial character (a).

Therefore, the proceedings before Commissioners, appointed in a partition suit, are not vitiated in their entirety, by reason of the failure of one of the Commissioners to be present when measurements were taken in respect of some of the plots.

Partition—(Continued).

In a suit for partition, in so far as the costs up to the stage of the preliminary decree are concerned, the parties must pay their own costs. In so far as the costs subsequent to the preliminary decree and up to the stage of the final decree are concerned, the costs must be borne by the parties in proportion to their respective shares (b). **Moti Lal Ghoshi v. Girish Chandra Ghosh**, 6 Ind. Cas. 109.

MOOKERJEE and TEUNON, JJ.

References:—(a) 13 M. and W. 466; 2 D. and L. 428; 14 L.J. Ex. 81; 9 Jur. 285, F. (b) 5 C.L.J. 642; 34 C. 878, F.

(10) *Deed effecting or declaring partition—Registration Act (III of 1877, Ss. 17, cl. (b), 49—Evidence Act (I of 1872). S. 91—Part performance, doctrine of—specific performance—Improvements by co-owner upon common property, effect of, at partition—Question whether property is joint to be decided by Court.*

A deed, by which a partition of immoveable property is effected, or which declares such a partition previously effected by the parties, is compulsorily registrable under cl. (b) of S. 17 of the Registration Act (a).

The essence of the matter is, whether the deed is a part of the partition transaction, or contains merely an incidental recital of a previously completed transaction (b).

Where the intention of the parties was that the document should be the only repository and the appropriate evidence of the partition, the deed, if not registered, is not admissible in evidence, under S. 49 of the Registration Act, to establish the fact that the property was so partitioned, with the result that S. 91 of the Evidence Act excludes other evidence also in support of the transaction, because the written instrument is not collateral, but is of the very essence of the transaction (c).

But, if there is part performance of verbal agreement, by the party seeking relief, and to the knowledge of the other party, proof will be admitted of the verbal contract in cases when an action for specific performance would lie. In other words, an act done by a party in pursuance of the parol agreement, in order to be a part performance of it, must not only be one which could not be done with any other view than to perform it, but must also be such as could not be undone without causing the party unliquidated damage.

Partition—(Continued).

Hence, if it is possible to restore the parties to precisely the same position as they occupied before they entered into the parol agreement, the doctrine of part performance will not ordinarily be allowed to be invoked.

If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take this fact into consideration upon a partition, and, in some way, will make an allowance to him, therefore, in addition to his rateable share of the property. And it is in recognition of such equitable right that to the co-owner, who has made the improvements, is assigned that portion of the property on which the improvements have been made, the division being made on the basis of the unimproved value.

In a partition suit, the question whether a particular property, alleged to be joint, really possesses that character, must be determined before the preliminary decree is made; all questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court. **Upendra Nath Banerjee v. Umesh Chandra Banerjee**, 6 Ind. Cas. 346=12 C.L.J. 25.

MOOKERJEE and CARNDUFF, JJ.

References.—(a) 13 M. 281; 2 Bom. L.R. 800, F. (b) 2 B. 635, R. (c) 3 Barn. and Ald. 588; 28 R.R. 493, R.

(11) *Partition—If mokuridar of share may sue proprietors of remaining share—Forfeiture, liability to, if affects right to partition.*

The right of partition exist when two parties are in joint possession of land under permanent titles, although those titles may not be identical.

A mokuridar of a share, whose interest is liable to forfeiture in events which have not occurred, is entitled to sue the proprietors of the remaining share for partition.

Whether the right exists in any other case, their Lordships expressly refrained from indicating. **Lala Bhagwat Sahai v. Bepin Behari Mitter**, 14 C.W.N. 962 (F.C.)=12 C.L.J. 240=8 M.L.T. 228=7 Ind. Cas. 549.

LORD MACNAGHTEN, LORD COLLINS
SIR ARTHUR WILSON and MR. AMBER ALI.

(12) *Partition—Mortgage of undivided share—Suit for partition by mortgagor's co-sharer—of mortgagee necessary party—Security*

Partition—(Continued).

transferred to separate share allotted to mortgagor—Fraud, allegation of, in plaint—Negligence, case of, not to be allowed to be raised in appeal—Pleadings.

A partition can be effected, without making the mortgagee of a share a party, when the suit is brought by the mortgagor's co-sharer, so that the mere fact that the mortgagee was not a party to the partition suit in no way invalidates the proceedings.

A mortgagee of an undivided share, when there is a subsequent partition, ordinarily has, as his security after the partition, the separate share allotted to his mortgagor in place of the undivided share (a).

Where the mortgagee in his plaint alleged that the partition was effected fraudulently, but in appeal tried to make out a case of negligence on the part of his mortgagor in the conduct of the partition suit, the High Courts did not allow such a case to be raised as it was not made in the pleadings, nor raised by the issues. **Narendra Chandra Lahiri v. Saroda Kanto Moitra**, 6 Ind. Cas. 829.

JENKINS, C. J. and DOSS, J.

References:—(a) 1 L.A. 106; 21 W.R. 233, F.

(13) *Partition suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Decree validated from date of decree—Civil Procedure Code (Act V of 1908), S. 15b—Stamp Act (11 of 1899), S. 52, Sch. I, Art. 45—Refund of value of Court-fee stamp.*

In a partition suit, the first Court directed the plaintiff to file a non-judicial stamp of Rs. 100 for the decree to be drawn up thereon in accordance with Art. 45 of Sch. I of the Stamp Act. By mistake the plaintiff filed a Court-fee stamp of that value and by mistake the Court engrossed the decree on the same. The defendant appealed and the appellate Court could not detect the mistake. Then the plaintiff applied for execution of the decree in the first Court, where the defendant took the objection that the decree could not be executed, not being drawn up upon a non-judicial stamp paper. The objection was allowed and the plaintiff moved the High Court.

Held, that this is a fit case for the exercise of the inherent powers of the Court which have been saved by S. 151 of the Civil Procedure Code, that the plaintiff should be allowed

Partition—(Continued).

to put in a non-judicial stamp of Rs. 100 which would be defaced and attached to the decree already drawn up, and that this would be sufficient to validate the decree with retrospective effect from the date when it was drawn up, and the result would be to validate the appeal as well (a).

S. 52 of the Stamp Act does not cover a case in which a Court-fee stamp has been erroneously used where a non-judicial stamp ought to have been used under the provisions of the Stamp Act (b).

But the Revenue Officers, as a matter of indulgence, though not as a matter of right, may grant relief to the person who has made the error. **Rafi-ud-din v. Latif Ahmed**, 7 Ind. Cas. 94.

MOOKERJEE and CARNIFF, JJ.

References:—(a) 5 Ind. Cas. 532; 37 C. 399; 11 C.L.J. 285, F. (b) 23 A. 213; A.W.N. (1901) 1, F.

(14) *Party—Partition suit—Tenant under owner of half share of proprietary title suing for partition—Owner of other half share alone made defendant—Whether plaintiff's land-lord ought to be made party.*

The plaintiffs sued for the partition of certain *jamias*, to a half share of which they are entitled as tenants under M, the owner of a half share of the proprietary title. The title to possession of the remaining half share of the *jamias* was in S, the owner of the remaining half share of the proprietary title. The proprietors as between themselves were undivided in respect of the *jamias*. The suit had been brought against Salono. The first Court decreed the suit, but the lower appellate Court set aside the decree and remanded the suit for the purpose of giving the plaintiffs an opportunity to bring M on the record:

Held that M was, if not a necessary party, at least a proper party to the suit, as his presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in it, and that the order of the lower appellate Court was right (a). **Indu Bhushan Acharya v. Sallaja Sundari Barmanya**, 7 Ind. Cas. 382.

RICHARDSON and VINCENT, JJ.

References:—(a) 28 B. 209; 5 Bom. L.R. 937, R.

(14-a) *Partition—Property not conveniently divisible—Sale among co-sharers to highest bidder—Partition Act (IV of 1893), S. 4.*

Partition—(Continued).

Where the nature of the property to be divided in a partition suit is such that a division thereof amongst all the share-holders cannot reasonably or conveniently be made, the proper course to follow is to direct a sale of the property among the co-sharers: and it should be given to that share-holder who offers to pay the highest price above the valuation made by the Court. The defendant cannot be compelled to transfer his share at a valuation to the plaintiff, merely because the latter happened to have possession of the property at the time when he commenced the action. **Debendra Nath Bhattacharjee v. Hari Das Bhattacharjee**, 7 Ind. Cas. 844.

MOOKERJEE and SHARFUDDIN, JJ.

References:—L.R. 10 Ch. App. 204; 44 L.J. Ch. 245; 32 L.T. 411; 23 W.R. 779; 5 App. Cas. 651; 49 L.J. Ch. 795; 43 L.T. 385; 29 W.R. 33, *Hel.*; 6 C.L.J. 8 (note), *D.*

(14-b) *Partition by arbitration—Award not binding on the heirs who were not parties to the agreement—Minor.*

It is a fundamental principle that no one is bound by any contract or by a decision in any proceeding to which he, or some one through whom he claims, was not a party.

A partition by arbitration may be binding on a minor, but only when he is not injuriously affected thereby, when it is fair and when he has been duly represented. **Ma Gyi v. Maung Po Hmyin**, 8 Ind. Cas. 439.

FOX, KT., C.J. and LEWIS, J.

(15) Suit for—Preliminary decree in plaintiff's favour—Resistance to Commissioners—Refusal of plaintiff's application for re-issue of commission—Court's power. See CIV. PRO. CODE (1882), No. 185, 7 A.L.J. 196.

(16) Suit for—When relief will be given. See CIV. PRO. CODE (1908), No. 152, 7 M.L.T. 174.

(17) Suit for partial partition, when maintainable. See LIMITATION ACT (1877), No. 98, 7 M.L.T. 155.

(18) Decree in partition suit—Subsequent decree for debt due by the parties to partition suit—Payment of decretal amount by one party—Right to contribution from the others. See CONTRIBUTION, No. 3, 4 Ind. Cas. 872.

(19) Construction of deed—Indefiniteness of description of property—Charge—Validity. See CHARGE, No. 1, 7 M.L.T. 158.

Partition—(Concluded).

(20) Declaratory Suit—No consequential relief—Maintainability. See DECLARATORY SUIT, No. 3, 7 M.L.T. 161.

(21)—of revenue paying land—Duty of Court. See ACT III OF 1901 (U. P. LAND REVENUE), No. 6, 7 A.L.J. 553.

(22) Mortgage during partition suit—Right of mortgagee. See CIV. PRO. CODE (1882), No. 17, 16 Ind. Cas. 196.

(23) Principles to be used as guides to Civil Court in making a. See ACT V OF 1897 (ESTATES PARTITION), No. 3, 6 Ind. Cas. 450.

(24) Suit for—Prayer in the nature of an easement made in second appeal—Whether can be granted. See APPEAL (SECOND APPEAL), No. 3, 6 Ind. Cas. 423.

(25) Agreement to Registration. See REGISTRATION ACT (1877), No. 16, 6 Ind. Cas. 361.

(26) Suit by Mahomedan for, of immovables—Limitation. See LIMITATION ACT (1877), No. 78, 6 Ind. Cas. 579.

(27) Security, substitution of,—Joint property mortgaged—Other property falling to the mortgagor's share at partition. See MORTGAGE (GENERAL), No. 29, 20 M.L.J. 393.

(28) Right to claim—Limitation. See LIMITATION ACT (1877), No. 71, 98 P.W.R. 1910.

(29)—among joint tenants—Legality and effect—Right, of landlord. See RES JUDICATA, No. 11, 7 A.L.J. 918.

(30) Suit for, how long to be deemed to be pending. See CIV. PRO. CODE (1882), No. 186, 8 M.L.T. 295.

(31) What is an instrument of—Release. See STAMP ACT, No. 1, 12 Bom. L.R. 936.

(32) Effect of perfect partition on custom of pre-emption. See PRE-EMPTION, No. 43, 7 Ind. Cas. 572.

(33) Suit for, by a co-parcener in joint possession—Court-fee. See COURT FEES ACT, No. 3-a, 8 Ind. Cas. 512.

Partition Act

See ACT IV OF 1893.

Partner.

(1) Application to set aside *ex parte* decree—Applicant sued as partner but not served personally. See *EX PARTE-DECREE*, No. 2-a, 8 Ind. Cas. 448.

Partnership

- (1) *Dissolution—Accounts—Loan—Limitation—Acknowledgment by managing partner—Limitation Act (XV of 1877), S 19—Receiver.*

Where the manager of a firm has full power to borrow and repay money, it follows of necessity that he has power to acknowledge the debt, by either immediately giving a promissory note, or subsequently, upon an adjustment of accounts or in any other way in the course of business, making *bona fide* admissions in writing. To require express authority from each one of the partners to acknowledge the debt would be placing a very narrow construction on S 19, Limitation Act 1877, and would open the door to very serious fraud.

It is a part of the duty of the Court in the course of a suit for dissolution of partnership, in which a receiver has been appointed to discharge the debts and liabilities of the firm, and the mere fact that the Court does not adjudicate on the claim of the creditor, until after the expiration of more than three years, does not render the claim a bad claim against the assets of a firm which is being administered by the Court. **Lalta Parashad v Babu Parshad**, 6 A L J 953 32 A 51=1 Ind Cis 708

RICHARDS and FUDBALL, JJ

- (2) *Partnership Accounts—Dissolution of firm—Deceased partner—Right of representatives to have an account—Dissolution does not affect liability of firm for subsisting contracts—Duty of surviving partners to take steps for completion of unperformed engagements—One member not competent to refer to arbitration unless authorized by the other members—Production of account books—Presumption if books not produced.*

The right to call for an account upon the dissolution of a firm is mutual and each partner is entitled to an account from his co-partners of their partnership dealings and transactions, unless he has legally waived or parted with such right.

The personal representatives of a deceased partner are entitled to an account from the surviving partners (a)

As the surviving partner is bound to account to the representatives of the deceased partners, they are bound to account when the deceased partner had the management or control of the assets of the firm. Before the accounts are taken, therefore, it is necessary to determine

Partnership—(Continued).

the precise extent to which each partner took part in the management of the firm.

The dissolution of a partnership does not affect the liability of the firm for subsisting contracts, and it is, therefore, the duty of the surviving partners to take all steps necessary for the completion of their unperformed engagements (b)

It is incompetent to one of the members of a partnership to bind the firm by a submission to arbitration, unless there be some special delegation of authority to that effect, either formal or informal (c)

It is the duty of the surviving partners of a firm to produce the account books, so that the accounts may be properly adjusted, and if the accounting party does not produce them, or destroys them before the matters have been finally adjusted, the Court will presume every thing, most unfavourable to him, consistent with established facts. **Hazi Mohammad Akbar v. Rai Dwarka Nath Sarkar Bahadur**, 6 Ind Cis 63 11 C L J 659—14 C W N 1106

MOOKIETEE and TEUNON, JJ

References —(a) 1 H and Tw 390, 1 Mac and G. 294, 47 E R 1463, 41 E R 1278, 19 L J Ch 40 13 Jur 993 28 L T N S 189, F (b) 17 Ves 298 (308), 11 R R. 73, 6 Bing N. S. 296, 9 T J C P 194, 4 Jur 165, Coe 80, 35 L R 424, 34 E R 515, F (c) 3 Bing 101, 28 R R 602, 10 Moore 389, 3 N L J (O.S.) C P 175 28 R R 602, 1 C M and R. 611, 40 R R 670, 5 Tyt 425, 1 Gale 48, 5 L J Lx 69, 15 East 209, F

- (3) *Practice—Parties—Suits by a partnership—Non joinder of some partners—Effect.*

A suit by one partner alone on behalf of a firm is bad for non joinder of the other partners. **Subraya. Kini v. A Ramachandra Pai**, 7 M L T 432—6 Ind. Cis 438

MILLER, J

Reference —18 M 33, F.

- (4) *Practice—Pleading—Partnership—Suit by partners on a joint claim—Counter-claim against individual partners, whether could be set up—Court's discretion to refuse—Test—Madras High Court rules (Original side) 1902, S 47*

When two or more plaintiffs sue for a joint claim, the defendant may set up, as against each individual plaintiff, separate counter-claims (a)

Partnership—(Continued).

In order to avoid multiplicity of suits, questions of this character should be disposed of in one action, unless any inconvenience would arise by their being so disposed of. If any inconvenience would arise, the Court has a discretion, under R. 47, Madras High Court Rules, 1902, to decline to allow the counter-claims to be set up. **R. M. M. Ramanadan Chetty & Co. v. K. M. Abdul Karim Sahib**, 8 M.L.T. 73=7 Ind. Cas. 267.

WHITE, C.J. and SANKARAN NAIR, J.

Reference:—(a) 2 E.D. 243, 1'.

- (5) *Parties—Partnership firm—Debt due to—Representatives of a deceased partner—Not necessary parties—Contract Act. S. 45—Application of.*

Money was advanced to the defendant by a partnership firm consisting of B and H. The only surviving member of the partnership at the date of suit was one M. He, together with the representatives of B, brought this suit for recovery of the money. Held that the representatives of a deceased partner were not necessary parties to a suit for recovery of a debt, which accrued due during the lifetime of the deceased partner. Held further that S. 45, Contract Act, does not apply to a suit for recovery of a debt due to a partnership firm. **Ugar Sen v. Lakshmi Chand**, 7 A.L.J. 759=6 Ind. Cas. 840.

STANLEY, C.J. and BANERJI, J.

- (6) *Dissolution—Partner's remedy for general account against co-partner barred—Co-partner recovering a particular item of partnership assets—Right to recover share therein—Maintainability of suit.*

A partner, whose remedy against his co-partner for a general account is barred,* can recover by suit his share of a particular item of partnership assets which the co-partner received after dissolution of the partnership (a). **Tiruvengada Mudaliar v. S. Sadasiva Mudaliar**, 8 M.L.T. 231.

SIR ARNOLD WHITE, C.J. and ABDUR RAHIM, J.

References:—(a) 28 M. 344; 6 B. 628; 12 B.H.C.R. 97; and L.R. 5 H.L. 656, *Ref. to.*

- (7) *Solicitor's lien—Costs—Partnership suit—Assets of partnership in the hands of Receiver—Solicitors' costs entitled to preference over creditor's claim—Creditor should not issue execution against assets, but to ask for charging order—Practice and procedure.*

Partnership—(Continued).

Where there are assets of a partnership in the hands of a Receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership (a).

A creditor of a partnership, the assets of which are in the hands of a Receiver appointed by the Court, should not issue execution against the assets; but he should ask the Court for a charging order in his favour (b). **A. Haji Ismail & Co. v. Raniabai**, 11 Bom. L. R. 1062=34 B. 484=4 Ind. Cas. 135.

MACLEOD, J.

References:—(a) 2 Ch. 344, F. (b) 2 Ch. 344, F.

- (8) *Inheritance—Hindu Law—Widow's right to inherit her husband's joint property—Hindu khatri residing in towns—Hindu family—A brother making other brothers partners in his business—Nature of partnership—Death of one partner dissolves the partnership—Suit by widow for an account of partnership property—Invalidation of such suit—Res judicata—Previous suit for partnership debt—Widow as co-plaintiff—Presumption of union—Separation—Re-union—Power of a Hindu over self-acquired property—Share of profits in agricultural land—Jurisdiction of Civil or Revenue Courts—Application of old or new Civ. Pro. Code on the question of Res judicata—Contract Act, S. 238 and 253 (10)—Indian Limitation Act, XV of 1877, S. 5 and Art. 106—Punjab Tenancy Act, XVI of 1887, S. 77 (3) (h)—General Clauses Act, X of 1897, S. 6—C.P.C. (Old) Act XIV of 1852, Ss. 13 and 32 and of new C. P. C. (Act V of 1906), S. 11.*

Held that:

- 1 Where a Hindu governed by Mitakshara Law is the sole proprietor of a business and makes his brothers or nephews his partners, and by way of gift assigns to each a certain share in that business and they are allowed to have such shares in that business ever since and to take its profits to the extent of their respective shares, the relationship thus created is that of partners of an ordinary partnership as defined by S. 238 of Act IX of 1872, but not of a hereditary trading partnership contemplated by Hindu law, and it dissolves under S. 253 (10) on the death of the donor or any of the other partners.
2. (A) A suit brought by the representative of one of the partners on his death praying the

Partnership—(Continued).

following reliefs is practically a suit for an account of a dissolved partnership and is governed by the three years limitation prescribed by Art. 106, Limitation Act (XV of 1877).

(a) It may be declared that the plaintiff is representative and heir of Lala Nathu Mal, her husband, and as such is entitled to the entire property left by her husband and also to two-thirds of the entire property acquired with the joint capital of the shop after the death of the plaintiff's husband, no matter in whose name it is acquired. Defendants Nos. 1 and 2 may be ordered to render account of the entire property and the business of the shop mentioned in paras 7 and 8 of the petition of the plaintiff from the date of the starting of the said firm up to 23rd April 1900, and the subsequent period up to the institution of the suit and (the plaintiff) may be awarded two-thirds share of the entire property, viz., cash, valuable securities of every description, shares in firms and companies, decrees passed by Courts and all other moveable and immovable property of every kind acquired with the capital of the said firm or belonging to it, together with interest up to the date of realization; the *bahis* and all other documents are in possession of defendants Nos. 1 and 2 and the plaintiff cannot, therefore, give detail of such property. According to S. 7, cl. IV of the Court Fees Act, she has fixed the value of this relief at Rs. 15,00,000.

(b) The defendant may be ordered to file in Court the *bahis*, account registers relating to the account of property in dispute belonging to the said firm and shown in the list marked (E), she (the plaintiff) may be awarded two-thirds of them, she may be ordered to obtain copies of the rest; the defendant may be ordered to file in Court other papers and documents of every kind relating to the property in dispute, a clue to which may be found from the registers and *bahis* shown in list marked (E) or which are proved in some other way to be in possession of the defendants, and she (the plaintiff) may be awarded documents and certificates relating to the property which is awarded to her by the Court, or some other order which the Court deems proper for protection of her (plaintiff's) rights and to do justice may be passed; according to S. 7, cl. IV, the value of this relief is fixed at Rs. 1,00,000.

(c) She may be awarded possession of the houses shown in list marked (A) and valued at

Partnership—(Continued).

about Rs. 30,000. (The buildings mentioned at No. 8 of the list are in possession of defendants Nos. 3 to 5, as stated in para. 14, consequently they have been made defendants).

(d) She may be awarded possession as manager of the property entered in list marked (C) valued at Rs. 10,200-10-0; an account of the income thereof may be prepared and the amount realized by defendants Nos. 1 and 2 may be awarded.

(e) Any other orders that may be necessary for grant of the above relief may be passed or any other relief to which the plaintiff may be found entitled under the circumstances of the case and according to law and justice may be granted and the defendants may be ordered to pay the costs of this case.

(B) Every suit involving a claim to account of the general partnership property and its share in the same and its profits is governed by the said Art. 106.

(C) Where a suit relating to the general account of a partnership business is barred by this article, it is equally barred in respect of the assets of the business, acquired within three years of institution (a).

3. Even in the absence of plea of limitation by defendant, both the first and the appellate Courts are bound to see *suo moto* whether the claim, as laid down in the plaint, is barred by limitation in whole or in part.

4. Where, in a previous suit brought by a widow's husband's brothers for recovery of joint debt, the widow was impleaded under S. 32 of the C.P.C. as co-plaintiff and, on an issue specially raised, it has been finally decided that she is entitled to the share to which her husband would have got, if alive, the widow is also entitled to get share in the rest of the property, and the question of widow's right therein becomes *res judicata* in a subsequent suit between the widow and her husband's brothers as regards that property, provided that all the other ingredients of the rule of *res judicata* are not wanting.

5. As the question of *res judicata* involves a substantive and real right within the meaning of S. 6 of Act X of 1897, its decision is to be governed by the provisions of the Civ. Pro. Code in force at the time of instituting the suit, although it has been repealed by another Civ. Pro. Code, before the appeal is decided. But the principle as to the

Partnership—(Continued).

competency of the appellate Court is confined to the ordinary Courts established in this Province and does not apply where, having regard to the value of the two suits, one of them is appealable to their Lordships of the Privy Council and the other is not (b).

6. The Civil Courts is not debarred under S. 77 (3) (k) of the Punjab Tenancy Act (XVII of 1877), from taking cognizance of that portion of the claim which relates to the share in profits of agricultural land entered in the books as part and parcel of the partnership property.

7. Among non-agricultural *khatris* residing in towns, brothers are presumed to be members of a joint family. But where one of them becomes separate and upon such separation shares of others are fixed, there is virtually a separation of all, and without proving that rest of the members agreed to remain united there is no presumption of re-union (c).

8. According to the text of Vrihaspati (Mitakshara Ch. 11. S. 9) a re-union in estate, properly so-called, can only take place between persons who were parties to the original partition.

9. A Hindu has full power to dispose of, as he likes, the acquired property (d). **Mussammatt Nehal Devi v. Kishore Chand**, 142 P.W.R. 1910.

RATTIGAN and WILLIAMS, JJ.

References:—20 Bom. 15, *P.*; 6 Bom. 628 (635); 28 M. 344, *Diss.* (b) 20 P.R. 1891 (F.B.); *D.* (c) 30 C. 725 (P.C.) *P.*; 31 A. 412 (P.C.), *Expl.* (d) 20 A. 267 (P.C.), *F.*

(9) *Suit between partners—Decree in favour of one partner against a debtor of the firm—Debtor not party to suit—Right of debtor to show that the sum is not due.*

In a suit among partners, a decree was passed in favour of one of them for a certain amount as being due from a person who is not a partner. This latter person was not given an opportunity to show that such an amount was not due by him. *Held* that he had the right of showing that the sum was not so due. **Sheik Miran Saib v. The Commercial Bank of India, Ltd.**, 8 M.L.T. 344.

BENSON, O.C.J. and SANKARAN NAIR, J.

(10) *Suit for dissolution and winding up of—Parties.* See HINDU LAW (JOINT FAMILY), No. 6, 7 M.L.T. 211.

(11) *Suit for dissolution of—Appeal—Court-fee.* See COURT FEES ACT, No. 2, 7 A.L.J. 546.

Partnership—(Concluded).

(12) —between toddy vendor and arrack vendor—Public policy. See EXCISE ACT (MYSORE), No. 1, 15 M.C.C.R. 23.

(13) *Suit for accounts by partner against representative of deceased partner—Receiver of deceased partner's estate, whether necessary party.* See PARTIES, No. 3, 7 Ind. Cas. 75.

(14) *Dealings by some members of a Mahomedan family—Liability of other members—Joint family—Partnership among heirs.* See MAHOMEDAN LAW (GENERAL), No. 2, 7 Ind. Cas. 103.

(15) *Difference between co-parcenary and—Suit on contract by partners—Rules for joinder of parties.* See HINDU LAW (JOINT FAMILY), No. 11, 1 S.L.R. 2.

(16) *Suit for winding up of—Order for taking accounts—High Court's order on remand for fresh taking of accounts—Effect.* See CIV. PRO. CODE (1908), No. 56, 7 Ind. Cas. 622.

(17) *No evidence as to terms of—Rights and liabilities of partners.* See MAHOMEDAN LAW (WILL), No. 2, 8 Ind. Cas. 431.

Part performance.

(1) *Lease—Doctrine of.* See TRANSFER OF PROPERTY ACT, No. 3, 5 Ind. Cas. 562.

(2) *Doctrine of.* See PARTITION, No. 10, 6 Ind. Cas. 346.

Pasture lands.

See CHARURAMNA HOLDINGS, No. 1, 14 C.W.N. 372.

(2) *Pasture, right of—Over waste land—Prescriptive right.* See WASTE LAND, No. 1, 7 M.L.T. 380.

Pauper.

(1) *Pauper appeal—Application for leave to appeal as a pauper, matters to be considered in determination of—O.P.C., O. 41, R. 1.*

Held that, under O. 41, R. 1, C.P.C., all that the Judge is bound to consider is what is contained in the application, copy of the judgment and the copy of the decree. He is not at liberty to refer to any other matter in determining whether the application for leave to appeal as a pauper may or may not be granted. **Shah Inayat-ul-Rahman v. Aziz-ul-Rahman**, 13 O.C. 302.

LINDSAY, J.C.

Reference:—I.L.R. 28 Bom. 451, R.

(2) *O.P.C. (Act V of 1908), O. 33, r. 1—Inquiry into pauperism—Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption.*

Pauper—(Concluded).

The applicant who wished to institute a suit for redemption applied to be declared a pauper. The Court below holding that he was possessed of the equity of redemption of the property in dispute and was therefore not a pauper, dismissed the application. *Held* that the plaintiff could have raised money on the equity of redemption, and that, in trying to raise money on the equity of redemption, he would not in effect be mortgaging his claim. **Kapil Deo Singh v. Ram Rekha Singh**, 7 A.L.J. 1191.

KNOX and KARAMAT HUSSAIN, JJ.

Reference :—3 M. 249, D.

(3) Suit as, when may be instituted. See CIV. PRO. CODE, 1908, No. 135, 12 Bom. L.R. 102.

(4) Application by next friend of minor for leave to appeal as pauper made after time—Payment of Court-fee—Sufficient Cause. See LIMITATION ACT, 1877, No. 5, 144 P.W.R. 1909.

(5) Application to sue in *forma pauperis*—Rejection on ground that litigation would end in failure. See CIV. PRO. CODE (1908), No. 136, 6 Ind. Cas. 703.

(6) Order granting application to sue in—Revision. See CIV. PRO. CODE (1908), No. 61, 7 A.L.J. 741.

(7) Application for leave to appeal in—Delay—Excuse of delay—Minor applicant. See LIMITATION ACT (1877), No. 4, 12 Bom. L.R. 694.

(8) Cross objections in. See MAINTENANCE, No. 7, 7 Ind. Cas. 118.

(9) *Bona fide* claim—Abuse of process of Court. See CIV. PRO. CODE (1908), No. 137, U.B.R. (1910), 2nd Qr., 26.

(10) Order rejecting application for permission to sue as—Appeal. See CIV. PRO. CODE (1908), No. 138, U.B.R. (1910), 2nd Qr., 28.

Pawnor and Pawnee.

(1) *Contract Act*, S. 176—*Pawnee's rights*.

Where a pawnor makes default in payment of the debt, it is open to the pawnee to bring a suit upon the debt or promise: he is not bound to sue for a sale of the property held by him in pawn. **N. Ramachandrabadhani v. Naganna**, 15 M.C.O.R. 297.

STANLEY ISMAI, C.J.

Payment.

(1) —of money for defendant's use—Cause of action—Right to recover—Limitation. See LIMITATION ACT (1877), No. 50, 7 A.L.J. 585.

(2) Money paid by defendant not liable to pay into Court and realised by decree-holder—Suit to recover—Limitation. See LIMITATION ACT (1877), No. 44, 6 Ind. Cas. 654.

Pedigree.

(1) Evidentiary value of. See EVIDENCE ACT, No. 2, 8 Ind. Cas. 728.

Penalty.

(1) When provision for higher rate of interest becomes a—. See CONTRACT ACT, No. 49, 7 C.L.J. 394.

(2) Decree contain in penal clauses—Relief against penalty in execution. See CIV. PRO. CODE (1908), No. 27, 4 S.L.R. 1.

(3) Stipulation for compound interest in default, not a—. See MORTGAGE (GENERAL), No. 51, 8 M.L.T. 387.

(4) Stipulation for interest when not a—. See CONTRACT ACT, No. 51, 8 Ind. Cas. 301.

Pensions Act.

See ACT XXIII OF 1871.

Perishable articles.

(1) Sale of—Claim to—Right of successful claimant. See CLAIM, No. 1, 8 Ind. Cas. 77.

Permanent tenure.

(1) *Amaram tenure*—*Resumability*—*Circumstances telling against the right of permanent occupancy*.

Lands held on "amaram" tenure are resumable (a).

Where the original owners of the land raised the "jodi" or rent from time to time and also resumed the lands on two occasions for a long period, these circumstances tell against the right of permanent occupancy. **Raja of Venkatagiri v. Mukku Narasayya**, 8 M.L.T. 258.

References :—(a) 7 M.I.A. 128 (135); 8 M. 367; M. 268; 11 M. 365; 22 C. 938, R. (b) 7 M.I.A. 128; 13 M.I.A. 438, R.

WHITE, C.J. and ABDUR RAHIM, J.

(2) Mirasi, or permanent tenure—*Circumstances necessary to infer the existence of*. See ACT VIII OF 1876 (BENGAL ESTATES PARTITION), No. 1, 37 C. 662.

(3) Evidence of. See ACT VIII OF 1885 (BENGAL TENANCY), No. 8, 7 Ind. Cas. 785.

Perpetuities.

Covenant in contravention of rule against—**Effect.** See PATNI, No. 1, 14 C.W.N. 601.

Personal action.

Suit for, dismissed—Defendants' death pending appeal—Abatement—Representative's right to costs. See CIV. PRO. CODE (1882), No. 178, 7 M.L.T. 195.

Personal liability.

(1)—may be excluded by contract. See CONSIDERATION, No. 2, 8 Ind. Cas. 302.

Plaint.

(1) *Relinquishment of portion of claim—Effect.*

The statement in the plaint was "I claim Rs. 1,191 as due to me, but I shall be satisfied with a decree for Rs. 700." *Held* that, though his relinquishment of Rs. 491 was based on the supposition that Rs. 1,191 was due to him, he ought not to be tied down to such relinquishment, when, as a matter of fact, what is found due to him is less than Rs. 1,191, provided he does not get more than Rs. 700 for which he asked for a decree. **Sinnathambi Rowther v. S. M., Sellam Chetti**, 8 M.L.T. 436.

ABDUR RAHIM and AYLING, JJ.

(1-a) *Plaint ordered to be registered after limitation—Effect—Plaint presented to suits clerk after Judge and munsarim left Court—Effect.* See CIV. PRO. CODE (1882), No. 35, 5 Ind. Cas. 330.

(2) *Amendment of.* See EASEMENT, No. 2, 7 M.L.T. 222.

(3) *Suit in ejectment—Notice to quit—Whether plaint itself can be accepted as notice—Rights of a party to suit, how ascertained.* See BERAR LAND REVENUE CODE, No. 1, 6 N.L.R. 17.

(4) *Insufficient stamp on—Power to extend time ex post facto.* See COURT FEES ACT, No. 17, 6 Ind. Cas. 424.

(5) *Return of, to be filed in proper Court—Saving of limitation.* See CIV. PRO. CODE (1882), No. 56, 6 Ind. Cas. 637.

(6) *Defective—Procedure—Amendment of.* See CIV. PRO. CODE (MYSORE), No. 4, 15 M.C.C.R. 112.

(7) *Plaint clumsily drawn—Reading issue to ascertain the case—Difficulty arising from confusion in the plaint—Liability of appellant to pay costs—Appeal.* See PLEADINGS, No. 5, 8 M.L.T. 202.

(8) *Declaratory suit—Rejection of.* See DECLARATORY SUIT, No. 7, 129 P.L.R. 1910.

(9) See AMENDMENT.

Pleader.

(1) *Pleader—Misconduct—Cheating client out of the subject matter of suit—Penalty—Removal from practice—Suspension.*

Where it was found by the Chief Court, before whom the appellant practised as a pleader, that he had taken advantage of his position of trust, in order to cheat his client out of the subject-matter of the suit and obtain it for himself, and on the appellant's application for a review of the finding, he instead of pressing it, deliberately admitted the charges made against him in the sense in which those charges were understood by the Judges :

Held—That the Chief Court was amply justified in passing orders removing the appellant permanently from the list of pleaders on the ground of misconduct, and the subsequent order of the Court upon the application for review, reducing the penalty to suspension from practice for three years, went as far in the direction of mercy as it properly could go. *In the matter of Chanda Singh*, 14 C.W.N. 521 (P.C.)—11 C.L.J. 438 7 M.L.T. 412=6 Ind. Cas. 269—12 Bom. L. R. 425—11 Cr. L. J. 303.

LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

(1-a) *Plaintiff putting low value to avoid higher Court-fees—effect of on—Pleader's fees.*

In this case it was *held*, that, though the prescribed fee Rs. 30 was inadequate having regard to the intricacies of the case and the number of hearings, the plaintiff could not be allowed special fees as between pleader and client, as he himself had apparently preferred a low valuation in order to avoid payment of higher Court-fees. **Goverdhandas v. Naraindas**, 4 S.L.R. 37 (F.B.)=7 Ind. Cas. 601.

HAYWARD, CROUCH and LEGGATT, J.
• CS.

(2) *Letters Patent (Madras), Cl. 10—Vakil acting as agent to receive purchase money—Using the money for his own purposes—Unprofessional conduct.*

A Vakil had authority, from the defendants in a suit, to receive the purchase money of their house on their behalf. Under the authority, he received the money, and without the consent of the defendants, appropriated the sum for his own use. It was found that the Vakil had no intention to act dishonestly. *Held* that the Vakil abused his position as an agent

Pleader—(Continued).

though, in so doing, it did not appear that he acted in his capacity as Vakil, and that his act amounted to unprofessional conduct. *In the matter of a High Court Vakil*, 7 M.L.T. 427 (F.B.) = 6 Ind. Cas. 310 - 11 Cr. L. J. 307 = 20 M.L.J. 494.

WHITE C.J., MILLER and KRISHNASAMI AIYAR, JJ.

(3) *Pleader—Setting up a false plea of alibi—Professional misconduct.*

In a case where a pleader was alleged to be guilty of professional misconduct in setting up a false plea of *alibi* in a case of defamation brought against him, their Lordships were of opinion that they were not called upon to make any order under the Legal Practitioners Act. *In re a Second Grade Pleader*, 20 M.L.J. 498 = 7 Ind. Cas. 356 = 11 Cr. L.J. 452.

SIR ARNOLD WHITE, C.J., MILLER and KRISHNASWAMI AIYAR, JJ.

(3-a) *Professional misconduct, what amounts to—Reflections upon conduct of Judge.*

In this case a Vakil of the High Court presented a petition to the Sessions Judge (Tanjore), a day after the summing up of the case to the assessors and before judgment was delivered, in which he alleged that the Judge, before the arguments in the case were over, came to the Court with a draft judgment, and added not only that but that the draft judgment was the judgment for conviction.

These allegations were found to be quite unfounded. *Held* that the vakil was guilty of professional misconduct, for which he must be reprimanded and made to pay the costs of the proceedings against him. *In the matter of a High Court Vakil*, 8 M.L.T. 375 (F.B.).

WALLIS, KRISHNASWAMI IYER and AYLING, JJ.

(3-b) *Legal Practitioner—Muketar—Criminal conviction—Misconduct—Removal—Restoration—High Court, power of.*

It is open to a Court, when a legal practitioner has been dismissed for criminal conviction or misconduct of any description in the widest sense of the term, to re-admit him after the lapse of time, if he satisfies the Court that he has in the interval conducted himself honourably and that no objection remains as to his character or capacity.

The authorities on the subject reviewed.

Where a *Muketar*, who was dismissed upon conviction for a criminal offence of a grave

Pleader—(Concluded).

character implying moral turpitude and was also directed to be prosecuted for perjury, applied after the lapse of seven years to be re-instated, and it was found on enquiry that he had not made a full disclosure of his previous history, the High Court refused to make the order for re-admission. *In re Abiruddin*, 12 C.L.J. 625.

MOOKERJEE and SHARFUDDIN, JJ.

(4) *Suit withdrawn—Pleader's fee.* See COSTS, No. 1, 5 Ind. Cas. 121.

(5) *Appeal called on for hearing—Duty of.* See CIV. PRO. CODE (1908), No. 151, 5 Ind. Cas. 120.

(6) *Vakil not specially empowered,* offering to be bound by the oath of the opposite party in a particular form—Effect of.* See OATH, No. 1, 7 M. L. T. 43.

(7) *Plaintiff and plaintiff's vakil absent—Plaintiff's absence satisfactorily explained—Restoration.* See CIV. PRO. CODE (1882), No. 71, 7 M.L.T. 308.

(8) *Authority to represent client how arises and terminates—"Appearance" by pleader, what is.* See CIV. PRO. CODE (1882), No. 61, 3 Sind L.R. 208.

(9) *Unprofessional conduct—What amounts to.* See ACT XVIII of 1879 (LEGAL PRACTITIONERS), No. 2, 6 Ind. Cas. 313.

(10) *Absence of parties and pleaders—Hearing of suit after settlement of issues—Procedure.* See CIV. PRO. CODE (1882), No. 58-a, 8 Ind. Cas. 156.

Pleader and client.

(1) *Pleader's acts—Scope of authority—Party's power to repudiate.*

A party is not entitled to repudiate the act of his pleader done within the scope of the authority delegated to him (a). *Somayya v. A. Govindachariu*, 15 M.C.C.R. 521.

STANLEY ISMAY, C.J. and CHANDRA-SEKARA IYER, OFFG. J.

Reference :—(a) (1899) 22 Mad. 538, F.

(2) *Compromise signed by pleader without authority from client—Decree ultra vires—Power of Court.* See COMPROMISE, No. 2, 12 Bom. L.R. 223.

(3) *Compromise by pleader without client's authority—Right of party to apply to Court.* See ACT XVII of 1879 (DEKKHAN AGRICULTURAL RELIEF), No. 4, 12 Bom. L. R. 378.

Pleader and client—(Concluded).

(4) Statement as to relevant facts made by pleader—Effect upon client. See **GUARDIAN AND MINOR**, No. 7, 86 P.W.R. 1910.

(5) Unconscionable bargain—Misconduct of pleader. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 23, 109 P.W.R. 1910.

(6) Party not to suffer on account of absence of pleader. See **CIV. PRO. CODE (1908)**, No. 150, 34 P.L.R. 1910.

Pleadings.

(1) Defendant, stranger to transactions upon which pleas founded—Whether it is open to him to raise distinct, separate, inconsistent pleas—Principle applicable to plaintiffs—**S. 7, Negotiable Instruments Act—Provisions of the Act, how far applicable—Hundies in oriental language—S. 74—Presentment of hundies for payment within reasonable time—Effect of failure—Discharge—“Reasonable time” what is.**

It is open to a defendant, who is a stranger to the transactions in respect of which he makes allegations upon which his defence is founded, to raise and set up as many distinct and separate defences as he might think proper, even though they are obviously inconsistent. This principle which has been applied to the case of a plaintiff is applicable to a defendant also (a).

What S. 1 of the Negotiable Instruments Act does is, to save the operation of any local usage relating to instruments written in an oriental language. So in the absence of any allegation or proof as, to the existence of any such usages, the provisions of the Act are applicable to hundies written in an oriental language (b).

Under S. 74, the holder of a hundi is bound to present it for a payment within a reasonable time, and if it is not so done, and the drawer and the previous indorsers are prejudiced by the delay in presentment, they would be discharged and be absolved from their liability to the party guilty of such delay. In determining what is a reasonable time for presentation, the nature of the bill, the usage of trade with respect to similar bills and the facts of the particular case are to be taken into consideration (c). **Joharmal v. Nainsukh**, 6 N.L.R. 33 = 5 Ind. Cas. 745.

BIPIN KRISHNA BOSE, A.J.C.

References :—(a) 14 M. 172 (174) and 16 M. 121, *Appl.*; 18 A. 125; 34 C. 51; 31 M. 252 and

Pleadings—(Continued).

29 M. 50, R.; (1878) 47 L.J.Q.B. 62; 56 L.J. Ch. 603; 49 L.J.Q.B. 333, R.; *Odger's Principles of Pleading*, 6th Edn., p. 208, R. (b) 26 M. 526 (531), F. (c) 2 Lord Halsbury's Law of England, p. 528, 14 E.R. 215; 18 R.R. 512; 33 R.R. 650; 35 R.R. 579 and 51 R.R. 789, R.

(2) Pleading—Point pleaded in plaint and denied in the written statement—No issue taken—No objection taken in the grounds of appeal to the lower appellate Court—Abandonment.

Case where a lease was held not to be one in perpetuity, but one for a specific period.

Where notice was pleaded in the plaint and the sufficiency of notice was denied in the written statement, but no issue was raised and no question as to sufficiency of notice was raised in the lower appellate Court.

Held, that the contention as to sufficiency of notice must be taken as abandoned. **Ponnu-sami Pillai v. Pasupathi Mudaliar**, 7 M.L.T. 106 = 5 Ind. Cas. 813.

WALLIS and SANKARAN NAIR, JJ.

(3) Fraud—Pleadings—Plaintiff's case resting solely on fraud—Fraud negatived—Case on mistake, whether allowable—Alternative claim.

Where the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out, from the allegations of the plaint, facts which might, if not put forward as proofs of fraud, have warranted the plaintiff in asking for relief.

If relief is asked alternatively, either on the ground of fraud, or failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. **Rajendra Kumar Bose v. Gangaram Koyal**, 6 Ind. Cas. 472 = 12 C.L.J. 70.

JENKINS, C.J. and DOSS, J.

(4) Practice—Pleadings—Parties to be kept to their pleadings—Court making a new case for a party—Oppressive or unconscionable bargains—Court's duty to investigate—Second appeal—High Court—Specific ground on which appeal is fought in lower Court—Waiver by the parties of the other grounds—Presumption.

As a general rule, parties ought to be kept to their pleadings, and the Court should not raise

Pleadings—(Continued).

a new point for them in appeal. There are exceptions to this rule. One of them relates to agreements entered into between persons who stand to each other in the relation of mortgagor and mortgagee, or trustee and *cestui que trust*. A Court, as a Court of Equity, is bound to examine into the nature of such agreements, where, on the face of them, or having regard to the surrounding circumstances, the Court finds *prima facie* grounds to suspect that the transaction is oppressive or unconscionable.

When a question is fairly raised either at the original trial or in appeal, and it is met thereby one of the parties on a specific ground, though other grounds were open, and the specific ground fails, that party should not be allowed, as a general rule, to rely upon any of the other grounds in second appeal, if the allowing of that ground necessitates a remand for the taking of fresh evidence and thereby prolongs the litigation. In such a case the Court will presume, in the absence of clear indications from the record to the contrary, that the other grounds were waived by the party. **Jagannath Rango Dandekar v. Bhaskar v. Gopal Bhat**, 12 Bom. L.R. 795.

CHANDAVARKAR and HEATON, JJ.

- (5) *Plaint clumsily drawn—Reading issues to ascertain the case—Difficulty arising from confusion in the plaint—Liability of appellant to pay costs—Appeal—Practice.*

Where the plaint was clumsily drawn, it was held in second appeal that the plaint ought to be read with the issues framed in the case to ascertain the plaintiff's case.

As much of the difficulty in the appeal arose from the confusion in the plaint, the appellant, the plaintiff in the lower Court, was directed to pay the costs of the respondent in the appeal, though the High Court reversed the decree of the lower appellate Court and remanded the case for disposal according to law. **Gadidass Suryanarayana Row v. Gadidass Rajya Lakshamma alias Rajyam**, 8 M.L.T. 202 = 7 Ind. Cas. 800.

BENSON and KRISHNASWAMI IYER, JJ.

- (6) *Pleadings—Inconsistent defences—When may be pleaded—Bond not executed—Bond executed under—Circumstances so as not to bind executant—Sub-mortgagee—Whether competent to sue for sale of mortgagee rights of his mortgagor—Benamidar—Right of suit—Benamidar mortgagee—Pardanashin lady—Document executed by such lady—*

Pleadings—(Continued).

Court to be satisfied on what points—Rule not applicable to literate lady of considerable intellectual capacity—Execution sale—Purchase by stranger—Subsequent modification of decree—Whether sale affected or not.

It is open to a defendant to raise by his written statements as many distinct and separate, and, therefore, inconsistent defences as he may think proper, subject only to the qualification that, if the defence is embarrassing, the Court may, under O. 6, r. 16, direct one of two inconsistent defences to be struck out and the pleading amended (a).

The defendant pleaded that the bond in suit was a forgery and never executed by her, and, in the alternative that, if it was executed, it was done under circumstances which did not make it binding upon her. When the evidence came to be adduced, the defendant was allowed to go into both these matters;

Held, that it was too late for the plaintiff in appeal to raise any objection on the ground that the defences put forward were inconsistent.

A sub-mortgage is competent to maintain a suit for sale of the mortgagee right of his mortgagor (b).

Whatever divergence of judicial opinion there may be upon the question of the right of a benamidar to maintain an action in ejectment, there is none as to his right to maintain a suit to enforce a mortgage security which stands in his name, or has been assigned in his favour (c).

The Court, when called upon to deal with a deed alleged to have been executed by a *pardanashin* lady, must, before it gives effect to it, satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter (d).

But this doctrine applies to the case of execution of a document by a *pardanashin* lady properly so called. If a lady is not *pardanashin*, or, though *pardanashin*, is literate and of considerable intellectual capacity, the Court will not be inclined to interfere with a deed which

Pleadings—(Continued).

has been *prima facie* properly executed by her, or to interfere with transactions to which her consent has been deliberately given (e).

When a property passes into the hands of a stranger by a sale in execution of a decree, then, even if the decree be modified, the sale will not be affected (f). **Alkjan Bibi v. Rambaran Shah**, 7 Ind. Cas. 167.

MOOKERJEE and CARNDUEF, JJ.

References:—(a) 4 C.L.J. 437; 34 C. 51; 11 C.W.N. 20 (F.B.); 1 M.L.T. 364, *relied upon*. (b) 20 M. 35; 4 Ind. Cas. 433; 10 C.L.J. 470, *F.* (c) 17 W.R. 192; 24 C. 644; 21 A. 380, *F.* (d) 3 Ind. Cas. 330, *relied upon*. (e) 18 M. 257 at p. 262; 12 M. 380 at p. 384; 15 C. 684; 15 I.A. 81; 33 I. A. 86; 3 C.L.J. 484; 33 C. 773; 10 C.W.N. 570; 3 A.L.J. 353; 8 Bom. L. R. 379; 16 M.L.J. 166; 1 M.L.T. 137, *Ref. to*. (f) 26 C. 734; 29 B. 435; 7 Bom. L. R. 535 (F.B.); 1 Ind. Cas. 871; 37 C. 107; 11 C.L.J. 254; 13 C.W.N. 710, *relied upon*.

(7) **Pleadings—Burden of proof—Plaintiff must succeed or fail on his own allegations.**

The plaintiff, vendor, sued for a part of the consideration of the sale, alleging that the defendant had orally agreed to pay the amount in cash and it was fictitiously entered in the sale-deed as due to certain creditors of his to be paid by the vendee to prove "necessity." In his oral statement, the plaintiff said that the amount was entered fictitiously to defeat pre-emptors. The claim was allowed by the original Court, but was rejected on appeal. *Held*, that the claim was rightly rejected, for the plaintiff must succeed or fail on his own allegations. **Pala v. Beant Singh**, 40 P.L.R. 1910.

JOHNSTONE, J.

(8) **Plea raised for the first time in appellate Court.**

A plea raised for the first time in the appellate Court cannot be considered by it. **Rayar, Sivarama Krishniah v. Sankaralinga Kone**, 8 M.L.T. 247.

WALLIS and KRISHNASWAMI AIYAR, JJ.

(9) **Incompetency of defendant to make a new case in appeal.** See **WILL**, No. 3, 100 P.W.R. 1909.

(10) **Suit on allegation of exclusive title barred—No relief can be given on basis of tenancy-in-common.** See **HINDU LAW (PARTITION)**, No. 3, 7 M.L.T. 95.

(11) **Resumption and transfer by Government of Chowkidari Chakran lands to the Zemindar,**

Pleadings—(Concluded).

subsequent to patni and darpadni leases—Rights of Patnidars and Darpatnidars—Suit for possession and execution of deed of transfer against the Zemindar—Whether badly framed. See **CHOWKIDARI CHAKRAN LANDS**, No. 1, 37 C. 57.

(12) **Denial by tenant of his landlord's title in the—Whether gives a cause of action for ejectment.** See **EJECTMENT**, No. 3, 6 N.L. R. 83.

(13) **Findings sufficient—Remission of issues unnecessary.** See **ACT II OF 1901 (AGRA TENANCY)**, No. 6, 6 Ind. Cas. 499.

(14) **Allegation of fraud in plaint—Case of negligence not to be raised in second appeal.** See **PARTITION**, No. 12, 6 Ind. Cas. 829.

(15) **Whether plea of title by adverse possession should be allowed though not raised in plaint—Test.** See **ACT X OF 1865 (SUCCESSION)**, No. 1, 12 C.L.J. 459.

Police Act.

See **ACT V OF 1861**.

Poramboke.

Entry as—Effect. See **ADVERSE POSSESSION**, No. 2, 5 Ind. Cas. 118.

Possession.

(1)—*actual or constructive—When time runs—Joint holding—Absence of one co-sharer—Long silence and inaction—Abandonment—Adverse possession—Arts. 142, 144, Limitation Act (1877).*

(a) **Possession may be either actual or constructive.**

(b) **While either kind of possession exists in the proprietor, time does not begin to run against him.**

(c) **Where one co-sharer holds the share of another co-sharer, who had simply ceased to hold actual possession, the holder's possession implies constructive possession by the proprietor.**

(d) **Where the absentee has "abandoned" possession, the co-sharer's possession of the renouncing person's share will not be possession on behalf of the latter. Long silence and inaction may be evidence of abandonment.**

Where A sued to recover certain shares in a joint holding from B, who was absent and whose ancestors also had been absent from the village for a very long period, and it was alleged that B returned to the village lately and took

Possession—(Continued).

possession of the shares, the right to which had become extinct and lapsed in favour of A through long dispossession, *held*, the long silence and inaction of B and his ancestors, may be evidence of abandonment, and the possession of B and his ancestors ceased when they left the village and ceased to take share of the profits, and that, the rights of B having become extinct at the end of the twelve years, A had a right to sue for possession. **Shahzada Suraya Jah v. Azim**, 29 P.R. 1910 = 17 P.W.R. 1910 = 5 Ind. Cas. 888.

JOHNSTONE, J.

References :—85 P.R. 1892 (F.B.) F.; 23 P.R. 1890 (P.C.); 30 P.R. 1901; 85 P.R. 1909 and 6 C. 34, R.

- (2) *Suit for possession under a sale-deed—Sale declared invalid—Prayer for possession as mortgagee—Inconsistent reliefs—Pleading—Practice.*

Plaintiff sued for possession on the strength of a sale from first defendant's son. The land sued for was already mortgaged to plaintiff by first defendant. The Court found that plaintiff's vendor had no title to convey the land to plaintiff. Plaintiff urged in second appeal that he may be allowed to remain in possession as mortgagee from first defendant :

Held, that, as such a claim was inconsistent with the absolute right claimed in the plaint, plaintiff was not entitled to possession as mortgagee. **Kumarasami Chetty v. Poosari Sakka Naick**, 4 Ind. Cas. 37 = 20 M.L.J. 141.

BENSON, O.C.J. and SANKARAN NAIR, J.

- (3) *Possession, suit for—Land in possession of village community—Delivery to defendant by Government and assignment as cultivable natham—Right of the village community—Secretary of State, whether a necessary party.*

The land in suit was found to have been enjoyed by the village community till 1903. In 1903 the Revenue Officials gave possession to defendants, and entered it in the Register kept for *natham* lands for cultivation :

Held, that the action of Government in assessing the land as *natham* and giving it to defendants did not deprive the plaintiffs (members of the village community) of their rights to the land. **Reverend P.G. Simon v. Thuralmuthua Kadamban**, 6 Ind. Cas. 419 = 8 M.L.T. 248.

SANKARAN NAIR and KRISHNASWAMY AIYAR, JJ.

Possession—(Continued).

- (4) *Suit for exclusive possession—Decree for joint possession—Practice.*

Where plaintiff sued for exclusive possession of certain lands, and it was found that the lands belonged to him jointly with the defendant.

Held, that the plaintiff could be given a decree for joint possession along with the defendant, to the extent of his interest. **Pichinathoo v. Ramasamy Naick**, 6 Ind. Cas. 502 = 8 M.L.T. 57.

MUNRO and SANKARAN NAIR, JJ.

Reference :—26 B. 141, F.

- (5) *Possession, suit for—Previous possession for eleven years—Jalkar—Attachment by Criminal Court under S. 146, Crim. Pro. Code (Act V of 1898).*

(a) A jalkar was attached by the Criminal Court under section 146, Crim. Pro. Code. The plaintiff brought this suit for recovery of possession and proved undisturbed and peaceable possession for eleven years before the attachment, and the defendant was proved not to have been in possession before the Magistrate's order :

Held, that the plaintiff was entitled to maintain the possession which he had against all but the true owner ; the defendant had not shown himself to be the true owner, and therefore, the plaintiff was entitled to a decree. **Shama Charan Roy v. Surja Kanta Acharya Bahadur**, 6 Ind. Cas. 806.

JENKINS, C.J. and DOSS, J.

- (6) *Purchase of house with one's own funds—Right to recover possession—Benami.*

The purchaser, with his own funds, of a house, is entitled to recover possession of the same (a). **Chinna Pakkiri Nagaswaragaran v. Govindar vami Pillai**, 8 M.L.T. 283.

MUNRO and ABDUR RAHIM, JJ.

Reference :—(a) 29 M. 336, F.

- (6-a) *Limitation—Adverse possession—Necessity for finding whether defendant's possession was adverse or derivative—Failure to account for origin of possession—Legal presumption—Derivative possession.*

In a suit for possession of property, where defendant sets up the plea of adverse possession, it is not enough for the Court simply to find against defendant and for plaintiff. The Court should find how long the defendant was in possession, and, if for over the statutory period,

Possession—(Continued).

whether the possession was only derivative. Without a definite conclusion on these points, no finding should be recorded on the question of limitation in plaintiff's favour.

The mere failure of the defendant to prove the origin of his possession does not give rise to a legal presumption that his possession was only derivative. It is a question in each case on the facts, whether, having failed to prove the origin of his possession, the defendant may be deemed to have come into possession under the plaintiff or under persons who got into possession from the plaintiff. **Erannikkal Kunhimmacha v. Thoppil Pudia Yittel**, 8 Ind. Cas. 506.

BENSON and KRISHNASWAMY AIYAR, JJ.

(7) Suit for—Accretion. See **REG. XI OF 1825**, No. 1, 11 C.L.J. 148.

(8) Suit for, of land, proof of, for twenty years by claimant—Onus on the Crown to prove subsisting title—Adverse—Proof of, if necessary. See **CROWN**, No. 1, 7 M.L.T. 128.

(9) Plaintiff dispossessed without his consent otherwise than in due course of law—Suit for. See **SPECIFIC RELIEF ACT**, No. 4, 5 Ind. Cas. 482.

(10)—when may be conversion. See **CONVERSION**, No. 1, 12 Bom. L.R. 316.

(11) Possession, suit for—Facts to be proved—Onus. See **LIMITATION ACT**, 1877, No. 94, 7 M.L.T. 310.

(12) Person out of—Right to ask merely for injunction. See **DECLARATORY SUIT**, No. 4, 7 M.L.T. 311.

(13) Water course—Right to protect possession against trespasser. See **INCORPOREAL RIGHTS**, No. 1, 7 M.L.T. 352.

(14) Resistance by outsider to delivery of, to decree-holder—Order for delivery of, to decree-holder—Inherent power of Court. See **CIV. PRO. CODE (1908)**, No. 87, 6 Ind. Cas. 120.

(15) Character of adverse possession—Doctrine of constructive possession—Evidence of—Presumption that possession goes with title. See **ACT XV of 1891 (MURSHIDABAD)**, No. 1, 6 Ind. Cas. 392.

(16) Suit for declaration does not bar suit for See **CIV. PRO. CODE (1882)**, No. 12, 6 Ind. Cas. 696.

(17) Suit for dispossession, whether different from suit for—Applicability of Art. 144, Limitation Act, to suit for dispossession. See **ACT XVI of 1897 (PUNJAB TENANCY)**, No. 5, 3 P. R. 1910 (Rev.).

Possession—(Concluded).

(18) Suit for—Limitation. See **LIMITATION ACT (1908)**, No. 8, 13 O.C. 179.

(19) Suit by vendee or auction purchaser for—Limitation. See **LIMITATION ACT (1877)**, No. 38, 70 P.L.R. 1910.

(20) Possessory suit—Admissibility of evidence of title. See **SPECIFIC RELIEF ACT**, No. 5, 4 S.L.R. 80.

(21) Suit for, based on title—Title not proved—No decree for, can be given—Plaintiff in continuous peaceful possession—Effect. See **SPECIFIC RELIEF ACT**, No. 2, 7 Ind. Cas. 495.

(22) Nature of—in possessory suits. See **SPECIFIC RELIEF ACT**, No. 6, 7 Ind. Cas. 700.

(23) Nature of, sufficient to support gift—Presumption of, in favour of title when arises. See **MAHOMEDAN LAW (GIFT)**, No. 3, 13 O. C. 317.

(24) Meaning of “physical possession.” See **LIMITATION ACT (1877)**, No. 40, 8 Ind. Cas. 608.

(25) Suit for permanent injunction—Second suit for possession barred. See **CIV. PRO. CODE (1892)**, No. 14, 8 Ind. Cas. 9.

(26) Suit for, against certified purchaser—Maintainability. See **CIV. PRO. CODE (1892)**, No. 161-a-i, 8 Ind. Cas. 258.

Poundage fee.

—to be taken as costs of the execution. See **EXECUTION OF DECREE**, No. 3, 5 Ind. Cas. 139.

Power of attorney.

—not executed before Sub-Registrar—Authentication—Validity of presentation of document by the attorney. See **REGISTRATION ACT**, 1877, No. 23, 7 A.L.J. 157.

Practice.

(1) *Practice* Suit brought on one ground cannot be decreed against the defendant on another—Amendment of plaint—No amendment allowed after hearing arguments in appeal.

A suit brought against the defendant on one ground, which fails, should not be decreed against him on another ground which he had no opportunity of meeting.

After arguments in an appeal have been heard, the Court will not allow amendment of the plaint, so as to convert a suit of one character into a suit of a substantially different character. **Dayabai v. Haji Noor Mahomed**, 11 Bom. L.R. 237 = 34 B. 244.

BATCHELOR and CHAUBAL, JJ.

(2) *Practice*—Amendment of order—Inherent power of Courts in India—**152, C.P.C.**

Practice—(Continued).

(1908)—*Attachment—Wrongful seizure—Withdrawal by direction of law—Sheriff's right to poundage.*

The Courts in India have the same inherent power, as the Courts in England, to amend or vary a perfected order, when they find that the judgment as drawn up does not correctly state, what the Court actually decided and intended, even if the matter does not fall within S. 152, C.P.C. (1908) (corresponding to O. XXVIII, R. II, English Supreme Court Rules) (a).

Where there was no levy but only a seizure, and where the seizure was wrongful and withdrawn by direction of law, the sheriff receives no poundage (b). **Brijaratan v. Jayanarain**, 37 C. 649.

CHITTY, J.

References:—(a) (1880) 30 Ch. D. 239, R.; (1896) 1 Ch. 673, D. (b) (1878) 3 C.P.D. 216; (1884) 13 Q.B.D. 415 and (1899) 1 Q.B. 460, F.

(3) *Practice—Vakil—Right to appear before the High Court on its original side—Application to remove case to itself from mofussil Court—Vakil not entitled to file warrant of attorney—C.P.C., 1908, not affecting rules in force before 1909.*

A vakil of the High Court has no right to file a warrant of attorney before a Judge sitting on the original side of the High Court at Fort William, in respect of an application praying for the removal of a suit pending before a mofussil Court to itself in its extraordinary original civil jurisdiction.

The Civil Procedure Code, 1908, has nothing to do with a matter governed by old rules in force before 1909. *In re a Vakil's application*, 37 C. 853.

FLETCHER, J.

(4) *Non-examination of parties in a suit, result of—English and Indian—Account books, non-production of. See ADOPTION, No. 1, 7 M.L.T. 57 (P.C.).*

(5) *Point raised one of novelty—Fresh suit likely to be time barred—Plaintiff allowed to continue original suit. See RECEIVER, No. 4, 14 C.W.N. 658.*

(6) *Legal effect of a transaction ignored by the parties and the Judges in lower Courts—Right of appellant to press the view in second appeal. See PRE-EMPTION, No. 27, 6 N.L.R. 78.*

(7) *Suit by partners—Counter-claim against each partner—Whether allowed to be set up. See PARTNERSHIP, No. 4, 8 M.L.T. 78.*

Practice—(Concluded).

(8) *Case must be decided according to allegation and proof. See HINDU LAW (ADOPTION), No. 8-a, 8 Ind. Cas. 713.*

(9) *Incorporation of sections of Transfer of Property Act as O. 34 of the C.P.C. of 1908—Effect on practice of High Court. See MORTGAGE (GENERAL), Nos. 57 and 58, 37 C. 907.*

(10) *Civil Rules of Practice, r. 152—Holding execution sale for more than seven days—Legality. See CIV. PRO. CODE (1908), No. 118-b, 8 Ind. Cas. 564.*

Pre-emption.

(1) *Res judicata—Estoppel—Admission of, and decree against father binding on son, Pre-emption—Mortgage—Sale—Pre-emptor competent to prove a mortgage is a sale—S. 11 of Civ. Pro. Code, V of 1908—Indian Evidence Act, I of 1872, S. 99 (1).*

Held, that, where a pre-emption suit has been decreed on the ground that an ostensible mortgage is in reality a sale, the decision is *res judicata* in a subsequent suit brought by the vendor's sons and nephews against the vendee or impugn the alienation, and that they are also estopped from urging against their father's own admission therein; and that they are not entitled to get the sale set aside, if nearly whole of the consideration is for necessity.

Held, also, that, under S. 92 of Act I of 1872 read with its proviso (i), it is open to a pre-emptor to show that a transaction is really one of sale and is fraudulently made to appear as one of mortgage.

Held, that the terms of mortgage-deed in this case clearly indicate that a sale was intended from the very first by the parties thereto. **Atra v. Basant Singh**, 157 P.W.R. 1909.

JOHNSTONE and SCOTT-SMITH, JJ.

(2) *Pre-emption—Wajib-ul-arz giving preference ver strangers—Acquisition by a stranger of a share other than one sought to be pre-empted—Effect of.*

The *wajib-ul-arz* of a village gave a right of pre-emption to certain co-sharers in succession over strangers. A share was transferred to a stranger who subsequently acquired another share at an auction. In a suit for pre-emption brought to pre-empt the former sale, *held* that the plaintiff was entitled to pre-empt, inasmuch as the defendant's rights were still inferior to his rights. **Pargan Singh v. Ajkumar Singh**, 7 A.L.J. 77 = 5 Ind. Cas. 267.

RICHARDS and TUDBALL, JJ.

*References:—*25 All. 421; 20 All. 100, R.

Pre-emption—(Continued).

(8) *Covenant in deed of partition—Proper sale price, meaning of.*

A right of pre-emption reserved in a partition deed is valid as between the co-owners themselves.

The *ekrarnamah* contained the following clause:—Any one of the parties desirous of selling.....shall sell the same to the other party willing to buy the same at the proper sale price.

Held, that the proper sale price would be the market value. **Kallmuddin Bhuyan v. Reazuddin Ahmed**, 14 C.W.N. 295 = 10 C.L.J. 626.

CIMTTY and RICHARDSON, JJ.

(4) *Civil Procedure Code (Act XIV of 1882), Ss. 44, 45—Mis-joinder—Joining of vendor and vendee in a pre-emption suit—Several sales—Same vendee—Joining all causes of action in one suit—Effect of.*

The vendors are not necessary parties to a suit for pre-emption. Claims for pre-emption in respect of more sales than one, by different vendors, can be joined together against the same vendee. Where, therefore, several vendors executed several sale-deeds in favour of the same vendee, and the pre-emptor brought one suit for pre-emption of all the sales, joining the vendors as defendants, *held*, that the suit was not bad for misjoinder of parties and causes of actions, the joining of the vendors being superfluous. **Harbans Tewari v. Tota Sahu**, 6 A. L.J. 926 = 32 A. 14 = 3 Ind. Cas. 735 = 6 M.L. T. 300.

BANERJI and ALSTON, JJ.

Reference:—4 A. 163, not followed.

(5) *Pre-emption, right of—Right of substitution—Vendee's rights to mortgage for sale consideration—Enforcement of mortgage—Pre-emptor's right to take property as it stood at the date of sale.*

A purchased certain property and mortgaged a portion of it to the vendor. K instituted a suit for pre-emption making vendor and vendee parties, and paid the whole of the pre-emption money which was taken away by the vendee. In a suit for sale upon the mortgage, *held*, that the mortgage could not be enforced, as the mortgagor's right to the property was subject to the pre-emptor's right of pre-emption.

Held, further, that the right of pre-emption is not a right of re-purchase, but a right to be substituted for the vendee as he stood at the

Pre-emption—(Continued).

date of sale. *Held*, also that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption, and that the vendee cannot defeat the pre-emptive right, by subsequently mortgaging the property, so as to force him to take the property subject to the mortgage. **Kamta Prasad v. Mohan Bhagat**, 5 A.L.J. 966 = 32 A. 45 = 3 Ind. Cas. 782.

KNOX, A.C.J. and TUDBALL, J.

References:—20 All. 100; 23 All. 247 and 8 All. 502, D.; 7 A. 775, R.

(6) *Pre-emption—Wajib-ul-arz—Interpretation—Perfect partition—No new wajib-ul-arz framed—Malikan deh.*

The determination of an alleged right to pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right.

A village was divided by perfect partition into several *mahals*, but no new *wajib-ul-arz* was prepared. The *wajib-ul-arz* framed before partition was headed "rights of co-sharers *inter se*" and gave the right of pre-emption (1) to co-sharers in the *khata* (2) to the proprietors of the *patti* and (3) to the proprietors of the village (*malikan deh*). Plaintiff was a co-sharer in a different *mahal* to that in which the vendor was a co-sharer. *Held*, that the heading of the *wajib-ul-arz* limited the meaning of the expression *malikan deh* to co-sharers who had a common bond with the vendor, and as the plaintiff was not a co-sharer in the same *mahal* with the vendor, she had no right of pre-emption (a). **Sahib Ali v. Fatima Bibi**, 6 A.L.J. 958 = 32 A. 63 = 4 Ind. Cas. 138.

STANLEY, C.J. and BANERJI, J.

References:—(a) 28 A. 286; 28 A. 614; 29 A. 295, D.; 22 A. 1, F

(7) *Pre-emption, suit for—Suit instituted after decrees in favour of other pre-emptors—Plaintiff no party to former suits—Suit maintainable—Nature of right of.*

Where a suit for pre-emption based upon the plaintiff's superior right of pre-emption is brought within limitation, after decrees have been made in favour of other pre-emptors, the plaintiff not being a party to those former suits, *held* that the suit is maintainable.

The right of pre-emption is not a right of re-purchase, but a right of substitution for the original vendee. **Raj Narain Rai v. Duniya Pande**, 7 A.L.J. 259 = 5 Ind. Cas. 527.

KNOX and PIGGOTT, JJ.

Pre-emption—(Continued).

- (8) *Pre-emption—Punjab Laws Act (IV of 1872)—Punjab Pre-emption Act (II of 1905)—Party not having right at the date of sale cannot subsequently maintain suit—Agricultural tribe—Lis Pendens.*

K D sold his land to M B K B, and A B brought suits for pre-emption. Pending these suits, M K filed another suit for pre-emption and afterwards took a sale-deed of the property from M B.

Held that, inasmuch as K B, being a *Kureshi* was not a member of a notified agricultural tribe under Act XIII of 1901, at the date of suit, cannot sue for pre-emption of agricultural land at all (a).

Held also that the exclusion of persons, who are not members of agricultural tribes, from suing for pre-emption, is an absolute exclusion not depending on the pleadings of the defendants. (See S. 20, Act II of 1905, Punjab).

Held further that as A B, was a landlord in the village, as also M K, both had equal rights, and were entitled each to half (b).

The fact that M K, was also a collateral of K D, will not help him, in the absence of a special custom, as pre-emption is a village custom, not a triable one, and the existence of a special custom of pre-emption in one village of Gujars is not even *prima facie* proof of its existence in another Gujar village. **Muhammad Khan v. Sardar and others**, 7 P.R. 1910=14 P.W.R. 1910=5 Ind. Cas. 249.

JOHNSTONE, J.

References:—(a) 15 P.R. 1905, *Appl.* (b) 23 A. 347, *D.*

- (9) *Pre-emption—Vendee acquiring equal status subsequent to the institution of the suit by the pre-emptor, but prior to the pre-emption decree, ineffectual.*

Held, by the Full Bench (*Rattigan, J., dissenting*):—In a suit for pre-emption, based on the ground that at the date of sale, the plaintiff pre-emptor was a proprietor in the village in which the property is situate, and the vendee was not, the vendee cannot, by becoming a proprietor in that village whether by gift or otherwise, after the date of the institution of the suit, but before the passing of the pre-emption decree, defeat the plaintiff's claim (a).

Per Rattigan, J.—It is essential for a claimant for pre-emption to show that he possesses the right, to which he lays claim, up to the date of the decree (b).

Pre-emption—(Continued).

The following propositions are well established:

(1) That the right of pre-emption is a right of a most exceptional and burdensome nature, and that, as it infringes upon the owner's ordinary rights of dealing with his property, it should not be decreed unless and until the claimant has conclusively established his right thereto;

(2) That this so-called right is not a right in property (*Jus in re aliena*) but merely a right to acquire property in certain defined circumstances (*jus ad rem acquirendam*) (c);

(3) That the claimant for pre-emption has no right, title or interest in the property sought to be pre-empted, until he pays the amount which the Court decrees to be payable by him for its purchase;

(4) That, at any time prior to decree, the claimant for pre-emption may lose his so-called right of pre-emption, either because he has himself parted with the property by reason of the possession of which he claimed that right, or because the original vendee has transferred the property claimed to a person, who has rights of pre-emption in respect thereof either equal to or superior to those of the claimant (d);

(5) That the right of pre-emption is in reality a right which the claimant has to substitute himself for the original vendee, and

(6) That the right of pre-emption is a right to acquire property in preference to another person. (S. 4, Punjab Pre-emption Act, 1905). **Dhanna Singh v. Gurbaksh Singh**, 91 P.R. 1909 (F.B.).^e

CLARK, C.J., REID, ROBERTSON, KENSINGTON, RATTIGAN and SHAH DIN, JJ.

References:—(a) 90 P.R. 1909 (F.B.), *F.*; 124 P.R. 1907, *Diss.* (b) 25 A. 121; 26 A. 389; 124 P.R. 1907, *F.* (c) 196 P.R. 1894; 95 P.R. 1901; 94 P.R. 1902. (d) 49 P.R. 1901; 95 P.R. 1901; 32 P.R. 1902; 26 P.R. 1908, *R.*

(10) *Pre-emption, suit for—Custom or contract—Partition of village—Separate wajib-ul-arz—Change in the language.*

In the beginning there was one village, which was subsequently formed into three mahals with a separate *wajibul-arz* for each, the pre-emptive clause in which conferred the right on (1) *ek jaddi* co-sharers, (2) other co-sharers,

Pre-emption—(Continued).

(3) co-sharer of the mahal, (4) strangers. Subsequently one of the three mahals was sub-divided and a separate *wajib-ul-arz* was framed for each mahal, of which the pre-emptive clause gave the right to (1) near relatives, co-sharers, of the *zemindari*, (2) owners of the mahal, (3) owners of other mahals, (4) strangers. Prior to the suit, another of the three original mahals was again sub-divided, but no *wajib-ul-arz* was prepared :

Held that there was no custom of pre-emption but that the right was the creature of a contract which had expired with the settlement. **Paran Sukh v. Salig Ram**, 7 A.L.J. 314 5 Ind. Cas. 267.

STANLEY, C.J. and PIGGOTT, J.

(11) *Pre-emption, suit for—Sale to stranger who before suit becomes co-sharer.*

The defendants, vendees, in a suit for pre-emption, purchased certain shares in eight villages on June 11, 1907. They were then admittedly strangers. A suit to pre-empt that sale was instituted on October 5, 1907. Before this suit was instituted, namely, on August 21, 1907, the vendees purchased shares in five out of the eight villages. A suit to pre-empt this sale was brought and decreed. The pre-emptors however, failed to deposit the price within time and their suit stood dismissed. The defendants thus became, by virtue of their purchase, indefeasible owners and co-sharers. *Held* that they could not be ousted from the five villages purchased by them. **Mathura Prasad v. Usuf Husain**, 7 A.L.J. 344=6 Ind. Cas. 566.

STANLEY, C.J. and BANERJEE, J.

(12) *Pre-emption—Wajib-ul-arz—Interpretation of—Sharek—Perfect partition.*

The provision as to the custom of pre-emption in a village contained in the *wajib-ul-arz* ran thus: "When a *hissidar* sells his share, he shall sell first to a *sharek*, who is a near relative (*aziz karib*), and afterwards to a *sharek* who is *aziz baid* or distant relative, and then to "*hissadaran deh*." The village was then divided by a perfect partition, and the property sold was situated in mahal No. 1, in which the plaintiff was not a sharer. The defendant was a co-sharer in mahal No. 1. The plaintiff was, however, a sharer in mahal No. III. *Held* that by reason of the perfect partition of the village, the plaintiff had ceased to be a partner with the vendor, and therefore he had no right of pre-emption against a co-sharer in the same mahal.

Pre-emption—(Continued).

Sharek means a partner or co-sharer with the vendor. **Mahesh Dat Pande v. Gokul Nalk**, 7 A.L.J. 415=6 Ind. Cas. 151.

STANLEY, C.J. and GRIFFIN, J.

(13) *Sale of land for purpose of constructing a Church—No stipulation for avoidance of sale on default—Pre-emptor, whether bound to carry out purpose.*

Where there has been a sale of a plot of land by S to N, and the sale-deed states that it is purchased by the latter for the purpose of erecting a Church or School, but there is no stipulation for avoidance of sale if no such building should be erected, *held*, the pre-emptor has a right to pre-empt without agreeing to erect a Church or School, but ignoring the expression in the deed of sale of intention to build a Church or School. **Hazara Singh v. Ganda**, 33 P.R. 1910=52 P.W.R. 1910=6 Ind. Cas. 658.

ROBERTSON and WILLIAMS, JJ.

Reference:—24 P.R. 1901, D.

(14) *Pre-emption—Wajib-ul-arz—Effect of preamble—Variation in terms—Custom or contract.*

The preamble of the *Wajib-ul-arz* of a mahal for 1860 opened with the words:—"We willingly and with full understanding subscribe to what follows." The *Wajib-ul-arz* then recorded: "This is our ancestral *zemindari* and its settlement has been made with us. Hence willingly and having understood, we write down the following clauses and shall act according to them." The right of pre-emption was thereafter given to certain co-sharers. *Held* that the record was a record of custom and not of contract, inasmuch as the rules prevailing at the time directed the Settlement Officer to record a custom which he found existing in the village (a).

The *Wajib-ul-arz* of 1833 provided as follows:—"Whoever from among us wishes to transfer either the whole or part of his share by means of sale or mortgage, it is proper that he should give information to the shareholders of the village—the sale or mortgage to be at the price appointed. In the event of a proper price not being taken or given, it is in his power to transfer to whom he likes."

The terms contained in the *Wajib-ul-arz* of 1860 ran as follows:—"Every shareholder is empowered to transfer his share, and at the time of transfer it will be proper that first he should give information to his ~~near~~ shareholders, and, in the event of their refusing, to other

Pre-emption—(Continued).

shareholders of the village and sell or mortgage at the proper price." Held that there was no real or substantial difference between the terms of the two *Wajib-ul-arzes*. The record of 1833 recorded the custom in brief and general terms, the record of 1860 set out the custom in greater detail. **Hub Lal Tewari v. Ganga Sahu**, 7 A.L.J. 519, 6 Ind. Cas. 151.

KNOX and KARAMAT HUSAIN, JJ.

References :—(a) A.W.N. 1897, p. 3; 25 A. 90; 3 A.L.J.R. 450, P.

(15) *Pre-emption—Wajib-ul-arz -- Construction—Right given inter se - Word 'stranger' used for regulating price.*

In the *Wajib-ul-arz* of a village, the right to pre-emption was recorded as follows: In case of sale or mortgage, the transferor was bound to transfer first to a co-sharer in the *patti*, then to *pattidars* of the *mahal*, then to the owners of the other *mehals*, and, in case of refusal, to an outsider, "at the same price as a stranger would be willing to give." Held that the right of pre-emption existed *inter se* between the persons mentioned in the *Wajib-ul-arz*, and that the "words at the price as a stranger would be willing to give" were introduced for the purpose of regulating the price only. **Gurdial v. Mathura Singh**, 7 A.L.J. 610, 6 Ind. Cas. 920.

RICHARDS and TUDBALL, JJ.

References :—27 A. 457; 5 A.L.J.R. 655, D.; 4 A.L.J. R. 352, R.

(16) *Pre-emption—Wajib-ul-arz -- Construction "Rishtadaran karibi," meaning of—Wife's half-sister, whether rishtadar karibi—Hissadaran shikmi—Co-sharer in the other half of khewat.*

The expression "*rishtadaran karibi*" means near relations by blood or by marriage (a).

Where a husband has inherited the property from his wife, his wife's half-sister comes within the meaning of "*a rishtadaran karibi*" (b).

Where a vendee as a co-sharer in one-half, and the vendor in another half of a *khewat*, the vendee is not a *shikmi hissadar* of the vendor. A co-sharer in the same half of the *khewat* is a *shikmi hissadar* (c). **Radhay Pershad v. Musammatt Nannu**, 5 Ind. Cas. 669.

KARAMAT HUSAIN, J.

References :—(a) A.W.N. (1882) 167; A.W.N. (1887) 216; 5 A.L.J. 52; A.W.N. (1908) 16; 30 A. 77, D. (b) 11 A. 41, R. (c) 23 A. 260, R.

(17) *Limitation Act (XV of 1877), Sch. II, Art. 10—Pre-emption—Vendee in possession of a*

Pre-emption—(Continued).

part of the property as usufructuary mortgage—Capable of physical possession—Time to run from registration of sale-deed—Practice—Validity of an order of remand—When to be impeached after the passing of final decree—Civil Procedure Code (Act XIV of 1882), S. 591—Wajib-ul-arz, construction of—Custom or contract.

Where a part of the property sold is already mortgaged with possession to the vendee, the whole of the property is not capable of physical possession at the time of the sale, and consequently the period of limitation for a suit for pre-emption must be reckoned from the date of the registration of the sale deed (a).

In second appeal against a decree passed after a remand under S. 562 of the Code of 1882, the appellant cannot be permitted to contest the validity of the order of remand, unless he also challenges the validity of the final decree on grounds independent of those upon which the order of remand was based (b).

Where the incidents of the right of pre-emption, as recorded in two successive *wajib-ul-arzes*, are uniform, and the documents as they stand contain no words or expressions which definitely stamp them as records of contract, it should be presumed that the *wajib-ul-arzes* record an established custom and not a contract (c). **Ramjas Ahir v. Babu Aman Sahai**, 5 Ind. Cas. 667.

PICOTT, J.

References :—(a) A.W.N. (1892) 77, F. (b) 18 A. 19, R. (c) A.W.N. (1899) 136, R.

(18) *Pre-emption—Wajib-ul-arz—Construction—Shurkai patti—Owner isolated plot assessed with Government Revenue.*

The *wajib-ul-arz* provided for a right of pre-emption, first, to *Shurkai ekjaddi*, and second to *Shurkai patti*. The pre-emptor was a co-sharer in the same *patti*. The vendee had also previously to the sale become owner of an isolated plot of land in the same *patti* by way of exchange. The isolated plot was liable for the Government Revenue: Held, that both the pre-emptor and the vendees were *Shurkai patti*, and, therefore, the plaintiff had no preferential right to pre-empt. **Masihullah v. Dakhil Din**, 6 Ind. Cas. 169.

GRIFFIN, J.

References :—A.W.N. (1886) 144; A.W.N. (1905) 264; 2 A.L.J. 788; A.W.N. (1907) 239; 4 A.L.J. 541; A.W.N. (1904) 118; 16 A. 412; 12 A. 426, noticed.

Pre-emption—(Continued).

- (19) *Muassafi land—Custom of pre-emption prevailing among owners of khalsa land—Owner of khalsa land cannot pre-empt Muassafi land.* • • •

A custom of pre-emption, which appertains to the *khalsa* land, does not give a co-sharer in the *khalsa* land, any right of pre-emption over a *muaafi* land in which he has no interest. **Sant Bakas Singh v. Mussammat Dhanesh Kore**, 6 Ind. Cas. 167.

STANLEY, C.J., and BANERJI, J.

References:—20 A. 419; A.W.N. (1902) 68, F.

- (20) *Pre-emption—Wajib-ul-arz—Construction—Variation—Custom or contract—‘Rewaj hug shufa,’ meaning of.*

Where there is variation in the terms of the pre-emptive clause in two successive *wajib-ul-arzes*, the clause records a contract and not a custom (a).

‘*Rewaj hug shufa*’ means a currency of the practice of pre-emption (b). **Ajudhia Prashad v. Jodha Singh**, 5 Ind. Cas. 659.

KARAMAT HUSAIN, J.

References:—(a) 29 A. 295; 4 A.L.J. 137; A.W.N. (1907), 39, F.; A.W.N. (1905), 266, D. (b) 7 A.L.J. 213; 5 Ind. Cas. 212; A.W.N. (1908), 121; 5 A.L.J. 470, R.

- (21) *Pre-emption—Price—Principle of settlement—Custom recorded—Reasonable or otherwise.*

A *wajib-ul-arz* recorded that, in case there was a dispute between the vendor and the pre-emptor regarding the price, it will be settled on the basis of Rs. 200 a *biswa*. Held that the custom was not reasonable and could not be enforced. Held also that, there being no dispute as to the price between the vendor and the pre-emptor, the provisions of the *wajib-ul-arz* did not apply. **Mahtab Ram v. Bhawani Singh**, 7 A.L.J. 504 = 6 Ind. Cas. 118.

STANLEY, C.J., and BANERJI, J.

- (22) *Pre-emption—Mahomedan Law—Right of vicinage—One plot intervening—Right to pre-empt—Principle of pre-emption.*

Plots 833, 834 and 836, which belonged to defendant No. 2, were sold to defendant No. 1. The plaintiff was the owner of plot No. 837 which adjoined a portion of No. 836. Held that the subject-matter of sale was a compact parcel of land adjoining the land of the plaintiff.

Pre-emption—(Continued).

Held further that, the subject-matter of sale being the entire parcel of land made up of three plots and this parcel adjoining the plaintiff's land, the plaintiff was entitled to pre-empt, by right of vicinage, the entire-subject matter, and not only a part. **Abdul Shakur v. Abdul Ghafur**, 7 A.L.J. 641 = 6 Ind. Cas. 858.

STANLEY, C.J., and BANERJI, J.

- (23) *Pre-emption—Wajib-ul-arz—Construction—Right inter se.*

The terms of a *wajib-ul-arz* of a village gave a right of a first purchase to *sab se karibi rish-tedar* who was a co-sharer and then to other co sharers. Held that the nearer relative had a preferential right to remoter relatives. **Jagan-nath v. Gola**, 7 A.L.J. 653 = 7 Ind. Cas. 261.

BANERJI, J.

- (24) *Pre-emption—Wajib-ul-arz, suit on—Parties found to have equal rights—Mahomedan Law—Importing incidents of.*

Where pre-emption is claimed on the basis of a *wajib-ul-arz*, whether the *wajib-ul-arz* records a custom or a contract, no incidents not mentioned in the record ought to be imported into it, unless the manifest intention of the parties is that they should be so imported (a).

Plaintiffs sued on the basis of a *wajib-ul-arz*. It was found that both parties had equal rights of purchase. The plaintiffs argued that, the parties being Mahomedans and both parties being equally entitled to purchase, they were entitled to get a decree for half the property. Held that, the case being a case on the basis of a *wajib-ul-arz*, no incidents of Mahomedan Law, not mentioned in it, could be taken into consideration. **Muhammad Salim v. Sardar-ud-din Beg**, 7 A.L.J. 660 = 7 Ind. Cas. 263.

STANLEY, C.J., and GRIFFIN, J.

References:—(a) S.D.A. (1860), 362; N.W.P. (F.B.) (1866), 96; A.W.N. (1894), 183, R. and F.

- (25) *Pre-emption—Wajib-ul-arz—“Hissadar karibi” means nearness in space.*

Where a *wajib-ul-arz* gave to a *Hissadar karibi* a superior right of pre-emption to any other *Hissadar* in the village: Held that the word ‘*Hissadar karibi*’ meant nearness in space. **Mussammat Maharaji v. Dwarka**, 6 Ind. Cas. 702.

BANERJI, J.

- (26) *Pre-emptor not entitled to mesne profits in execution of decree—Appal—Decree—Civ. Pro. Code (Act V of 1908), Ss. 2, 47.*

Pre-emption—(Continued).

An order, declaring that a decree-holder is entitled to get mesne profits from the judgment-debtor, is a decree within the meaning of S. 2 of Act V of 1908, and as such is appealable even before the exact sum to be paid to the former by the latter is ascertained.

The question, whether mesne profits should be allowed to a plaintiff in a pre-emption case for the period between the institution of his suit and the final obtaining of his decree on appeal is not included in the words "relating to the execution, discharge or satisfaction of the decree," and can be disposed of only by a separate suit. **Hoa Ram v. Rana Paleya**, 6 Ind. Cas. 648.

JOHNSTONE, J.

(27) *Registered occupant of holding in Berar -- Relinquishment of holding, a surrender—Co-sharer's rights of pre-emption—Failure to exercise the right, effect of—Practice—Legal effect of a transaction ignored by the parties and the judges in lower Courts—Right of appellant to press the view in second appeal.*

Held (1) The right of a registered occupant of a holding in Berar is a tenant-right, and not a proprietary one.

(2) A relinquishment by the registered occupant amounts to a surrender and terminates the tenancy (a).

(3) If a particular holding is relinquished by the registered occupant in favour of a specified person for valuable consideration, then the co-sharers will have their right of pre-emption, but if they fail to assert their right and to challenge the surrender, they cannot afterwards ignore the surrenders and treat as trespassers persons, who have come into possession in a manner expressly authorized by the law.

(4) Where the legal effect of a transaction is a question of law, the fact that neither the appellants, their advisers in the lower Courts, nor the Courts themselves, took the right view of their effect, does not prevent that view being taken in second appeal. **Baliram v. Maroti**, 6 N.L.R. 78 = 6 Ind. Cas. 824.

SKINNER, A.J.C.

References:—9 C.P.L.R. 122; 14 C.P.L.R. 29 and 5 N.L.R. 97.

(28) *Co-occupant of land in Berar—Mortgagee acquiring full ownership of a share in land by foreclosure of his mortgage, position of—When a co-sharer loses his right of pre-emption.*

Pre-emption—(Continued).

A man, once a "co-occupant," remains such, until he is shown to have lost his right by the effect of limitation or otherwise (a). A mortgagee, who acquires full ownership of a share in a village by foreclosure of his mortgage, becomes a "co-sharer" with the persons holding the remaining share or shares (b).

A co-occupant of a holding in Berar is, so long as his right to claim possession of his share of the land subsists, entitled to claim also the right of pre-emption under S. 205 of the Berar Land Revenue Code, though he may not be actually in possession of any part of the land and though the vendor and vendee may deny his title to a share in the land (c). **Tapaji v. Sayaji**, 6 N.L.R. 86 = 6 Ind. Cas. 930.

SKINNER, A.J.C.

References:—(a) 16 A. 412, R. (b) 20 A. 19, R. (c) 21 C. 496, R.

(29) *Pre-emption—Wajib-ul-arz—Construction—Contract or custom—Absence of proof that the record is one of contract—Pre-emption.*

The preamble of the *wajib-ul-arz* of a village in the district of Shabjahanpur contained the words '*dar bab haq shafa*.' It recited that, when a co-sharer has to sell and mortgage his *hageat*, then at the time of transfer it will be incumbent that he should after giving information sell and mortgage for a proper price, etc., etc. *Held* that, unless it could be shown that the pre-emption clause was the embodiment of a contract, it was to be presumed to be a record of a custom (a). *Held* further that the words relating to 'pre-emption in the *wajib-ul-arz* in question recorded a custom and not a contract.

Per Stanley, C.J.—The words "relating to a right of pre-emption" (*dar bab haq shafa*) applied equally well to a pre-emption existing by custom as to a right of pre-emption arising out of a contract. **Bhim Sen v. Moti Ram**, 7 A.L.J. 902 (F.B.) = 7 Ind. Cas. 181.

STANLEY, C.J., BANERJI and CHAMIER, J.

Reference:—(a) (1897) A.W.N. 3, F.

(30) *Pre-emption—Wajib-ul-arz—Intiqal, transfer—Perpetual lease—Whether a transfer.*

The *wajib-ul-arz* of a village provided that, in case of transfer (*intiqal*), a nearer co-sharer will have a right of pre-emption, and failing him other co-sharers will have, etc. The defendant, No. 2, executed a perpetual lease in

Pre-emption—(Continued).

favour of defendant No. 1, reserving a nominal yearly rent. *Held* that the lease was in the nature of a transfer, and the plaintiff had a right of pre-emption.

Where a lease purports to create a perpetual interest in the land reserving merely a nominal rent and is granted in consideration of a premium, *held* that the transaction is in reality a sale. **Lalji Misir v. Jaggu Tiwari**, 7 A.L.J. 1022.

STANLEY, C.J., and BANERJI, J.

(31) *Pre-emption—Custom or contract—Interpretation of document—Wajib-ul-arz—Variation of language—Regulation VII of 1822.*

In a suit for pre-emption, *wajib-ul-arzes* of 1833 and 1869 were produced; the preamble to the former was worded thus:—"Having well understood the following matters we willingly accept them"; it then dealt with the right of pre-emption in the following terms, "mode of sale or transfer of whole or part of share," giving the right of pre-emption to co-sharers as against strangers, and concluded with the words: "therefore we write this *ikrar-nama* so that it may be of use in future." The *wajib-ul-arz* of 1869 provided that "near co-sharers and other pattidars would have the right of pre-emption. Preference amongst them would be according to degrees of nearness":—

Held (Stanley, C.J. dissenting), the *wajib-ul-arzes* contained the record of custom and not of contract.

Per Stanley, C.J.:—A custom to be binding must be unaltered, uniform, constant and definite. If the settlement of 1833 recorded a custom, then the co-sharers in the village at the time of the later settlement of 1869 must be deemed to have abrogated it and to have adopted by agreement the right of pre-emption which is recorded in the later *wajib-ul-arz* as more suitable to the then existing conditions. The variance in the rights as defined in the two *wajib-ul-arzes* leads to the conclusion that the right recorded in 1869 cannot be treated as a right existing by custom.

Per Knox and Chamier, JJ.:—The word *iqrar* does not necessarily mean a contract. It means ratification or assent.

Per Chamier, J.:—In construing a *wajib-ul-arz*, one must have regard to the document as a whole and bear in mind the law and instructions, if any, under which, and the circumstances in which, the document was prepared.

Pre-emption—(Continued).

The history of the preparation of these *wajib-ul-arzes* shows that there is a strong presumption that what is entered in them regarding pre-emption is the record of a custom. There is not necessarily any contradiction between the two *wajib-ul-arzes*. The earlier gives the right of pre-emption to co-sharers, so also does the later. It is incontestable that, if the earlier *wajib-ul-arz* were the only record of the custom, oral evidence might be given to supplement it; and the later *wajib-ul-arz* being presumably more correct may be relied upon to supplement the earlier. The provisions of Regulation VII of 1822, discussed by Knox, J. **Returaji Dubain v. Pahalwan Bhagat**, 7 A.L.J. 1040 (F.B.).

STANLEY, C.J., KNOX and CHAMIER, JJ.

(32) *Grove-holder whether as such a member of the village-community—Oudh Laws Act, S. 9—Pre-emption.*

Held, that a grove-holder, i.e., a person owning trees, but having no interest in the land in which they are planted, is not, as such, a member of the village-community, within the meaning of S. 9 of the Oudh Laws Act, and cannot upon this basis claim a right of pre-emption in respect of the sale of a portion of the proprietary right (a). **Gangole v. Syed Kamar Ali Khan**, 13 O.C. 202.

LINDSAY and PIGGOTT, JJ.

References:—(a) 1 O.C. 231; 5 O.C. 266; 12 O.C. 1; 7 O.C. 275; and S.C. No. 122, R.

(33) *Wajib-ul-arz—Variation—Custom—Right of pre-emption inter se.*

The custom of pre-emption, as recorded in the *wajib-ul-arz* of 1833, gave no right of pre-emption *inter se*, whereas, the *wajib-ul-arz* of 1869 recorded such right. There was no instance of transfer between 1833, and 1862. The plaintiff has a preferential right under the document of 1862, but had no such right under that of 1833.

Held, that no new custom under the circumstances could have sprung up between 1833 and 1862, that the custom of 1833 still subsisted, and that the plaintiff had no right to pre-empt (a). **Tapaisha Dichhit v. Gokul Dichhit**, 6 Ind. Cas. 839.

TUDBALL and CHAMIER, JJ.

References:—(a) A.W.N. (1905), 266; 2 A.L.J. 790, R.; 6 Ind. Cas. 151; 7 A.L.J. 519, distinguished.

(34) *Pre-emption—Purchase in execution by plaintiff—Suit in respect of sale of another*

Pre-emption—(Continued).

share before confirmation of plaintiff's purchase—Hissedar—Civ. Pro. Code (Act XIV of 1882), S. 316—Act V of 1908, S. 65—Alteration in law.

Plaintiff purchased a share in a village in execution of a decree on 20th June. The sale was confirmed on 24th July. On 23rd July, defendant purchased another share in the same village. On a suit for pre-emption being brought by the plaintiff to pre-empt the latter share, *held* that the plaintiff did not become a *hissedar* of the mahal until the date when the sale became absolute, and his right to pre-empt could not arise until the sale had been confirmed in his favour.

A Court acting under S. 316 does not guarantee title. All that it does is to convey the right, title and interest in the property of the parties to the suit before it. So far as the parties are concerned, it guarantees that the judgment-debtor shall not recover back the property sold, and that from the date entered in the certificate the purchaser becomes entitled to whatever interest the judgment-debtor was possessed of on the date of sale.

S. 65 of Act V of 1908 has altered the law. **Hassan Ali v. Mian Jan Khan**, 7 A.L.J. 893=7 Ind. Cas. 409.

STANLEY, C.J., and KNOX, J.

(35) *Right of pre-emption, meaning of—Right of pre-emption, condition essential for enforcement of—Oudh Laws Act, S. 10, notice issued under—Tender made subsequent to notice, refusal of—Conditional agreement for sale, whether it gives right to sue for pre-emption—Oudh Laws Act, Ss. 6, 9, 11 12, and 13.*

A right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title.

The right of pre-emption is not an absolute right to acquire immoveable property, but only a relative right to acquire it in preference to all other persons, and in this respect it differs essentially from the right which has its origin in proposal and acceptance.

In all cases a violation of the right is an essential condition to the bringing of a suit for enforcement of the right of pre-emption.

Pre-emption—(Continued).

Held, therefore, that a person being entitled to a right of pre-emption is not entitled to claim a decree merely on the ground that the owner of the property has issued a notice under S. 10, Oudh Laws Act, and that a tender made subsequent to the receipt of notice has been refused.

Where a conditional agreement for sale had been entered into, but had subsequently been superseded by agreement of the parties, *held* that it could not give the plaintiff a right to sue for pre-emption; for it could not be said that the agreement was evidence of a complete contract to sell (a). **Jagan Nath v. Sheo Ratan Singh**, 13 O.C. 219.

PIGGOTT and LINDSAY, J.J.

References:—(a) 2 O.C. 7, D.; 9 O.C. 169, R.

(36) *Pre-emption—Wajib-ul-arz—“Stranger,” meaning of.*

A person, who is not a member of the proprietary body amongst whom a custom of pre-emption exists, and who has no common rights and liabilities with the members of the proprietary body, is, for the purpose of pre-emption, a stranger.

A person who is entitled only to a *Malikana* allowance is a stranger to the co-parcenary body; and a sale made to him is subject to pre-emption. **Dirgbijai Singh v. Ram Adhin**, 7 Ind. Cas. 70.

GRIFFIN, J.

(37) *Pre-emption—Non-existence of the custom in the new abadi of Garhi Awan, a suburb of Hafizabad in Gujranwala District.*

Held, that, a totally new abadi added to a town should be regarded as its distinct subdivision for the purposes of pre-emption, even if no one has yet christened it as a mohallah and no subdivisions have been hitherto recognised in such a town; and that custom of pre-emption cannot be presumed to exist in the new abadi, simply because it prevails in the town itself. The case is different where the limits of a town have been gradually extended by erecting house after house on its edge to meet the press of population.

Found, on the above principle, that abadi jadid of the old village of Garhi Awan, now a suburb of Hafizabad, is a distinct sub-division and that no custom of pre-emption on the ground of vicinage obtains therein. **Allah Ditta v. Muhammad Nazir**, 102 P.W.R. 1910=84 P.R. 1910=7 Ind. Cas. 716.

CHEVIS, J.

Pre-emption—(Continued).

- (39) *Pre-emption—Wajib-ul-arz—Sharik-hakkiat deh—Meaning of perfect partition—Plaintiff sharer in different mahal.*

The word *sharik* means a partner, and the fact of its being used in a record of the custom of pre-emption in a *wajib-ul-arz* shows that what is intended is that the person entitled to the right of pre-emption must be a *sharik* or partner of the vendor in a *hakkiat* of the village. Where therefore a *wajib-ul-arz* gave a right of pre-emption to *sharik hakkiat deh* and the village was afterwards divided into mahals by perfect partition, and the plaintiff pre-emptor was not a sharer in the mahal sold, but in another mahal, held that he was not a *sharik* of the vendor.

The fact of a new *wajib-ul-arz* having been prepared after partition, by which the co-sharers agreed to abide by the terms of the old *wajib-ul-arz*, does not make any difference as regards the plaintiff's right. **Batali Lal v. Arjun Singh**, 7 A.L.J. 1066.

STANLEY, C.J., and BANERJI, J.

- (39) *Pre-emption—Purchase money—Interest on money prepaid by vendee to vendor—Registration Act (III of 1877), S. 17, cl. (c)—Receipt for money paid prior to sale.*

All that a pre-emptor has to pay to the vendee is the sum actually representing the purchase money; interest chargeable on amounts prepaid by the vendee to the vendor before the date of sale cannot be levied from him. The mere fact that the pre-emptor is not legally bound to pay the interest, which is shown as part of the consideration for the sale, does not mean that the parties to the sale did not fix the price in good faith within the meaning of S. 22 of the Punjab Pre-emption Act.

A receipt for money paid previous to a sale by the vendees to the vendor is not compulsorily registrable under cl. (c) of S. 17 of the Registration Act, if the sale was not completed when the money was paid (a). **Sayad Rukh Abdulla Shah v. Dayala Mal**, 51 P.L.R. 1910.

REID, C.J., and RATTIGAN, J.

Reference:—(a) 184 P.R. 1889 (F B.) at p. 658, F.

- (40) *C.P.C. (Act V of 1908), S. 105 (2), O. 43, r. 1 (u)—Appeal—Remand—Power of Chief Court on appeal against order of remand—Waiver of right—Pre-emptor taking active part in negotiations for sale in favour of vendee.*

Pre-emption—(Continued).

The Chief Court is competent, on an appeal against an order of remand, to go into questions of fact decided by the lower appellate Court.

When it was found that the pre-emptor had taken active part in the negotiations for sale, that he brought his suit for pre-emption only about a week before the expiry of the period of limitation prescribed for the suit, and that he was present when mutation was effected in favour of the vendees and raised no objection:

Held, that the pre-emptor must be deemed to have waived his right, and his suit must be dismissed. **Ram Rattan Shah v. Kirpa Ram and Hira Nand**, 86 P.L.R. 1910.

RATTIGAN, J.

- (11) *Pre-emption—Sale in favour of one of several persons equally entitled to pre-empt—Pre-emption of part of the property sold—Oudh Laws Act, S. 9.*

Held, that the last clause of S. 9 of the Oudh Laws Act is applicable, not only where there are persons equally entitled to buy a property and the property has been sold to a stranger or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt, but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it.

Held further, that a person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists, whether such right is a superior one giving him a preferential right of purchase or only an equal right to be exercised by the drawing of lots.

Where several properties were conveyed under the same sale-deed and the plaintiff brought a suit for pre-emption in respect only of the properties in which he had a preferential right of purchase, but did not claim pre-emption of the properties in which he had an equal right of purchase with the vendee, held, that the suit must be dismissed. **Mahabir Prasad v. Ram Jivan Lal**, 13 O.C. 260.

EVANS and LINDSAY, J.C.S.

References:—3 O. C. 330, P.; 6 A. 423, R.

- (42) *Pre-emption—Custom or contract—Preamble of wajib-ul-arz—Variation.*

The use of the word "agreement" in the preamble clause of a *wajib-ul-arz* and a slight

Pre-emption—(Continued).

variation in the pre-emptive clauses of the two successive *wajib-ul-arzes* are not sufficient to establish that the document records only a contract of pre-emption. **Lala Narsingh Prasad v. Shiva Tahal Rai**, 7 Ind. Cas. 573.

KARAMAT HUSAIN, J.

References:—7 A.L.J. 519; 6 Ind. Cas. 151, P.

(43) *Pre-emption—Wajib-ul-arz—Construction—Custom or contract—Perfect partition, whether abrogates custom of pre-emption.*

The *wajib-ul-arz* of a village contained the following provisions as to pre-emption :

"If any share-holder wishes to dispose of his share, he must do so in the first place to *Baradaran*, then to co-sharers in the *putti* and after that to co-sharers *putti digar*."

Held, that it was a record of custom (a).

Held, further, that a perfect partition did not, of itself and of necessity, abrogate a custom of pre-emption that prevailed in the village (b). **Beni v. Puran Singh**, 7 Ind. Cas. 572.

KNOX, J.

References:—(a) 7 A.L.J. 213; 32 A. 201; 5 Ind. Cas. 212; 28 A.W.N. 121, D. (b) 6 A.L.J. 180; 31 A. 274; 2 Ind. Cas. 208, D.

(44) *Wajib-ul-arz—Construction—Two classes of pre-emptors—The first class of pre-emptors not claiming pre-emption—Suit by second class of pre-emptors.*

The *wajib-ul-arz* of a village gave right of pre-emption to real brothers and nephews, and after them to the person or persons who would inherit the property from the vendor in default of real brothers and nephews. The vendor had two nephews but they did not claim the right to pre-empt.

Plaintiffs, who sued for pre-emption, were entitled to succeed to the vendor's property in default of real brothers and nephews:

Held that plaintiffs were entitled to pre-empt.

The *wajib-ul-arz* should be construed as providing for two classes of pre-emptors, namely, (1) real brothers or nephews, and (2) the persons who would inherit the property from the vendor in default of real brothers and nephews. If no person in the first class claims pre-emption, the right devolves on any person in the second class. **Ram Lal v. Ram Lal**, 7 Ind. Cas. 739.

CHAMIER, J.

(15) *Guardian and minor—Guardian transferring land of minor agreeing to give*

Pre-emption—(Continued).

his own land if minor should object—Guardian compelled by suit to give his land—Pre-emption suit by sons of guardian not maintainable—Sale in execution of decree.

The guardian of a minor, when selling the share of the minor along with his in land held by him and the minor jointly, agreed that, if the minor should object, he would transfer to the vendee his other land equal to the share of the minor. The vendee afterwards obtained a decree to enforce the condition and obtained possession of land belonging to the guardian in execution of the decree. The sons of the guardian claimed the land by right of pre-emption.

Held, that the claim was not valid, for there was no sale within the meaning of Pre-emption Act, and even if it was, it being a sale completed by the execution of a decree, was not subject to a claim for pre-emption. **Nawab v. Jawaya**, 203 P.L.R. 1910.

KENSINGTON and RATTIGAN, JJ.

(46) *Pre-emption—Estoppel—Vendee purchasing property at the request of the pre-emptor.*

A pre-emptor is not entitled to claim property by right of pre-emption, when the vendee has purchased the same at the pre-emptor's request. **Chaitu v. Mussammat Niaz Begam**, 205 P.L.R. 1910.

JOHNSTONE and SHAH DIN, JJ.

(47) *Effect of not paying pre-emption money within the time allowed by the decree—Tender to Nazir after Court hours not sufficient—Incompetency of Court to extend time—S. 148, C.P.C. 1908—Ultra vires.*

Held, that a pre-emption suit stands dismissed, if the pre-emptor fails, even by mistake, to deposit whole of the pre-emption money payable under the pre-emption decree into Court within its usual working hours on the day fixed for its payment by the said decree; and that neither the first nor the appellate Court has power to extend the time—S. 148 of Act V of 1908 does not apply in such a case.

A tender in whole or part of the pre-emption money to the Court Sheriff after its usual working time is not sufficient to save the decree. **Muhammad v. Charag**, 140 P.W.R. 1910.

CHEVIS, J.

(48) *Custom (Punjab)—Pre-emption—Existence of custom in Kunjah, Gujrat District—Value of precedents where claim is admitted on such questions—Building whether*

Pre-emption—(Continued).

serai or not—Question of law—Occasional occupation by chance visitors—Effect—Appeal—S. 70 (1) (b), Punjab Courts Act.

A custom of pre-emption prevails in the town of *Kunjah*, Gujrat District. Precedents, where the custom was admitted or assumed, are not altogether valueless (a).

The word *serai* is not defined in the Pre-emption Act.

The question whether a certain building, on the facts found, is a *serai* or not, is one of law and of sufficient importance to justify the admission of appeal under S. 70 (1) (b), Punjab Courts Act, 1884.

The mere fact that some of the rooms are rented out to more or less permanent tenants, and others to chance visitors occasionally, does not convert what was originally a *tawela* into a *serai* (b). **Feroze-ud-din v. Rahim Bakh**, 96 P.R. 1910 (Civ.).

REID, G.J., and SCOTT SMITH, J.

References:—(a) 42 P.R. 1905, *Id.*; 17 P.R. 1895, *R.* (b) 108 P.R. (1895), *R.*; 2 P.R. (1903), *D.*

(49) *Pre-emption—Person entitled to ownership of property during another's life—Right to sue for pre-emption, whether exists—Pre-emptor suing for possession as mortgagee—Failure to set up right of pre-emption—Waiver—C.P.C., 1882, S. 43 (= O 2, r. 2, C.P.C., 1908).*

A person, who is the owner of a property only during the lifetime of another, has, as such owner, a right to sue for pre-emption during the lifetime of that person.

Where a person, in a prior suit, sued for his mortgage rights over a property and kept back his right to sue for pre-emption of the equity of redemption:

Held that there was no waiver of rights on his part and that S. 43, C.P.C., 1882, had no bearing, as the cause of action in the suit for possession as mortgagee was manifestly different from that in the pre-emption suit. **Roshan Din v. Khuda Baksh**, 99 P.R. 1910 (Civ.).

JOHNSTONE, J.

(50) *Pre-emption—Benami purchase—Suit against ostensible purchaser—Real purchaser not made party—Suit not maintainable.*

B purchased a property in the name of his wife D. H. brought a suit for pre-emption

Pre-emption—(Continued).

against D, the ostensible purchaser and did not make B a party to the suit. If the suit had been brought against B, it would have been dismissed, as B was a co-sharer against whom H had no right of pre-emption.

Held, under the circumstances, that the suit as brought against the ostensible purchaser was not maintainable. **Harasaran v. Dilraj**, 8 Ind. Cas. 527.

GRIFFIN, J.

(51) Money borrowed by father for pre-empting—Liability of son. See HINDU LAW (DEBTS) No. 12, 7 A.L.J. 1182.

(52) Award granting, to co-owners—Property sold in execution of decree—Right to. See AWARD, No. 4, 12 Bom. L.R. 582.

(53) Partner—Partition during pendency of suit for—Effect. See MAHOMEDAN LAW (PRE-EMPTION), No. 2, 6 Ind. Cas. 426.

(54) Decree in pre-emption suit—Lower Court fixing price to be paid and allowing costs to be deducted—Payment of decree amount after deducting costs—Appellate Court raising the price to be paid and reversing order as to costs—Payment of difference without costs previously recovered, whether sufficient compliance with decree in appeal. See CIV. PRO. CODE (1908), No. 117, 56 P.R. 1910.

(55) Court's power to extend time fixed in decree in pre-emption cases. See MORTGAGE (GENERAL), No. 38, 7 Ind. Cas. 36.

(56) Order allowing mesne profits to pre-emptor—Decree—Appeal. See CIV. PRO. CODE (1908), No. 4, 44 P.L.R. 1910.

(57) Agreement conferring right of—Agreement embodied in petition of compromise—Registration. See REGISTRATION, No. 2, 13 O.C. 241.

(58) See WAJIB-UL-ARZ.

(59) See ACT II OF 1905 (PUNJAB PRE-EMPTION).

(60) See MAHOMEDAN LAW (PRE-EMPTION).

(61) Compromise recording contract of—Not embodied in decree—Not admissible without registration. See REGISTRATION ACT (1877), No. 14, 7 A.L.J. 206.

(62) Land pre-empted with money raised by mortgage of ancestral property is not ancestral—Right of reversioner. See CUSTOM (PUNJAB)—INHERITANCE AND SUCCESSION, No. 6, 2 P.R. 1910.

Pre-emption—(Concluded).

(63) Right of pre-emptor to let in evidence showing the real nature of the transaction. See EVIDENCE ACT, No. 25, 8 Ind. Cas. 501.

Pre-emption Act.

See ACT II OF 1905 (PUNJAB).

Premature suit.

(1) Right of suit accruing during pendency of suit—Effect. See MORTGAGE (GENERAL), No. 46, 127 P.W.R. 1910.

Presidency Small Cause Courts Act.

See ACT XV OF 1982.

Presidency Towns Insolvency Act.

See ACT III OF 1909.

Presumption.

(1) Recorded co-sharer—Presumption rebuttable. See ACT II OF 1901 (AGRA TENANCY), No. 23, 6 Ind. Cas. 703.

(2) What is a—effect of “shall presume.” See ACT II OF 1901 (AGRA TENANCY), No. 24, 7 A.L.J. 682.

Priest.

Claim to officiate as, at the cremation ceremony—Agreement with Municipality to officiate as—Specific performance—License to employ cremation priest, if can be granted. See CIV. PRO. CODE (1908), No. 10, 12 C.L.J. 74.

Primogeniture.

Meaning of the term. See ACT I OF 1869 (ODDH ESTATES), No. 1, 11 C.W.N. 1010.

Principal and agent.

(1) Debt by co-sharer under power-of-attorney from other co sharers—Promissory-note executed by agent only—Loan for paying Government revenue of joint estate—Letter given by agent—Liability of principals—Negotiable Instruments Act (XCVI of 1885), Ss. 4 and 28.

The defendant No. 4 was an agent of his co-sharers, the other defendants, under a power-of-attorney, under which he had authority to borrow money generally for the management of their estate. He borrowed money from the plaintiff by executing a hand-note. The money was payable to the plaintiff. As part of the same transaction he gave a letter to the plaintiff to this effect: “I have this day borrowed from you Rs. 5,000 by executing a hand-note for paying the Government revenue of estate belonging to S and others. I deposit with you

Principal and agent—(Continued).

the agentnamah showing that I am the agent of the said persons.” The plaintiff sued all the defendants for the money:

Held, that, by taking the hand-note from defendant No. 4, the plaintiff cannot be held to have elected to treat him as his sole debtor, and that all the defendants were liable for the money:

S. 28 of the Negotiable Instruments Act does not arise for consideration when the promissory-note is not negotiable. **Sattya Priya Ghoshal v. Gobinda Mohun Roy Chowdhury**, 5 Ind. Cas. 110=14 C.W.N. 414=11 C.L.J. 236.

CASPERSZ and DOSS, JJ.

References:—18 C. 31, 15 East 62; 2 S.E.C. (O.S.) 184; 13 R.R. 62; 9 B. & C. 78; 3 S.E.C. (O.S.) 171; 4 N. & N.R. 110, &c.

(2) *Principal and agent—Limited authority of latter known third party—“Holding out,” principle of, if applies—Estoppel—Negligent or improper act of principal apparently investing the agent with extended authority, not proved—Misdirection.*

A person, who deals with an agent whose authority he knows to be limited, does so at his peril, in this sense, that, should the agent be found to have exceeded his authority, the principal cannot be made responsible.

In order that the principle of “holding out” should, in any given case of agency, apply to the act done by the agent, and relied upon to bind the principal, it must be an act of that particular class of acts, which the agent is held out as having a general authority on behalf of his principal to do.

But if the agent be held out as having a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be so limited, the party prejudiced has notice, and should ascertain whether or not that act is authorised.

Where the principal did not by any negligent or improper act allow the agent to be apparently invested with an authority beyond or greater than the limited authority which the customer knew him to possess, there could not be any estoppel as against the principal, in respect of any of the steps in a transaction whereby the customer was deceived by the agent acting

Principal and agent—(Continued).

beyond his authority. **The Russo-Chinese Bank v. Li Yau Sam**, 14 C.W.N. 381 (P.C.) = 5 Ind. Cas. 789.

LORD MACNAGHTEN, LORD ATKINSON and LORD COLLINS.

- (3) *Suit for accounts by principal—No set off pleaded by agent—Involves an undertaking to pay whatever is found due to agent—No claim for set off necessary—Civ. Pro. Code (Act XIV of 1882), Ss. 215-A, 216—Decree in account cases.*

A suit for accounts by a principal against an agent, where the agency is not denied, necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts, and it is unnecessary that the defendant should plead a set-off or counter-claim.

Hence, where a suit was brought against an agent for rendition of accounts, and the agent expressed himself as ready and willing to render the accounts, but alleged that, on such accounts being taken, money would be found to be due to him, without specifically praying for a decree, and the Court granted a decree to the agent upon the finding that money was really due to him, *held*, that the decree was justified with reference to the provisions of Ss. 215-A and 216 of the Code of Civil Procedure (1882). **Parmanand v. Jagat Narain**, 7 A.L.J. 543 = 6 Ind. Cas. 162.

RICHARDS and TUDBALL, JJ.

- (4) *Negligence of agent—Liability for negligence.*

Where the plaintiffs alleged that they purchased goods and directed the defendants to send them to a particular place, and the goods were directed to other places, on account of which they suffered loss and claimed damages from the defendants, who pleaded that the goods were misdirected through the negligence of Railway officials, *held* that the ownership of the goods vested in the plaintiffs from the date of purchase, and the defendants became their agents from that date. *Held* further that the defendants, in contracting with the Railway, contracted as agents of the plaintiffs, irrespective of the fact whether they did or did not disclose the names of their principals and that they could only be held to be liable to pay damages if negligence was brought home to them. **Kishan Dayal v. Har Prasad**, 7 A.L.J. 732 = 7 Ind. Cas. 287.

KARMAT HUSAIN, J.

Principal and agent—(Continued).

- (5) *Agent under a power of attorney—Suit for recovery of money spent by him in the course of agency—Money recoverable under S. 70, Contract Act—Period of limitation—Limitation Act, Sch. II, Arts. 61, 83, 116, applicability of—Obligation to indemnify agent—Contract Act, S. 222—Obligation not expressed in writing but imposed by law, whether to be treated as in writing—Agent's right of retainer—Lien—his right to sue for money—Period within which may be enforced.*

Where an agent under a power of attorney brought a suit for recovery of monies spent by him in the course of the agency, *held*, (1) that his expenditure of monies belonging to himself in the business of the agency would be recoverable under S. 70 of the Contract Act immediately after he expended his monies (2) and that the suit ought to be brought within three years from the date of payment under Art. 61 of the Limitation Act.

Art. 61 relates to a suit for money payable to the plaintiff for money paid to the defendant. The article is not confined to cases where the defendant is under a legal liability to make a payment (a).

Art. 116, which relates to a suit for compensation for breach of a contract in writing registered, does not apply to this case, for, in the power of attorney there is no promise to pay, and there is no breach of a contract in writing registered.

The obligation of the principal to indemnify under S. 222 of the Contract Act, which is not a term of the contract nor to be deemed a part of the contract, but a mere obligation cast on the principal by the operation of law, cannot be held to be in writing registered within the meaning of Art. 116 (b).

Art. 83, which relates to a suit upon any other contract to indemnify, ceases to be applicable to this case, since the obligation to indemnify is not a contract to do so. Even if it would apply, the starting point of limitation would be the date of payment when the agent might be said to be damaged.

Where an agent is obliged to sue for monies spent by him in the business of the agency, his right of action is not postponed until the termination of the agency, even though his right of retainer and his lien may be enforced long after the expenses have been incurred, so long

Principal and agent—(Continued).

as moneys or the goods of the principal in connection with the agency are held by the agent irrespective of the period that has elapsed since the expenses* themselves were incurred (c). **Kandasami Pillai v. Avayambal**, 8 M.L.T. 194 = 7 Ind. Cas. 399.

* **BENSON and KRISHNASWAMI IYER, JJ.**

References :- (a) 13 C.B.N. S. 458. (b) 21 M. 8 and 25 M. 55. R. and D. (c) (1880) 6 R. R. 811 and (1850) 42 Ch. D. 424, R.

(C) *Construction*—Document embodying terms of compromise—English word 'mistake' used in Tamil document—Principal exonerating agent from all 'mistakes'—What the term includes—*Fraud*.

After the termination of the agency, the plaintiffs charged their agent with misappropriation and false entries in the accounts. In complete settlement of all the differences between the plaintiffs and their agent, a compromise was arrived at and a Tamil document embodying the terms of the compromise was executed, in which the English word "mistake" was used, and a term exonerating the agent from all his "mistakes" was inserted.

Held, that the term "mistake" according to its common use in such a document was wide enough to cover all kinds of default and error including fraud. **M.S.M.S. Myappa Chetty v. Perlanan Chetty**, 8 M.L.T. 236.

BENSON and KRISHNASWAMI IYER, JJ.

(7) *Principal and Agent—Suit for accounts—Suit for surcharging and falsifying accounts—Reliefs in two classes of suit—Fraud—Errors—Inconsistent pleas—Amendment of plaint—Account stated, whether balancing of an account is—Money in agent's hands for specific purpose—Burden of proof.*

A suit by a principal for accounts on the allegation that the defendant, his agent, has not rendered any account, has manifestly an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent, has rendered accounts, but prays to have them reopened or to have liberty to surcharge and falsify them on the ground of fraud or material error.

In the first class of cases, if it is established that the defendant is the agent of the plaintiff and has not rendered accounts, a preliminary decree must follow as a matter of course. In the second class of cases, if the plaintiff seeks

Principal and agent—(Continued).

to re-open settled accounts on the ground of fraud, such fraud must be specifically alleged in the plaint and proved in the evidence. If, on the other hand, he seeks merely to surcharge or falsify the accounts, the particular grounds upon which he seeks such relief, must be specifically stated, and some substantial errors pointed out so as to enable the defendant to controvert the charges and allow the Court to judge whether the plaintiff ought to be allowed to surcharge and falsify (a).

A plaintiff may be allowed to amend the plaint and put forward two inconsistent cases, namely, first, that the defendant had never rendered accounts, and, therefore, should be called upon to render them, and secondly, that the defendant had rendered accounts but that they ought to be re-opened on the ground of fraud or the plaintiff should be given liberty to surcharge and falsify them because vitiated by overcharges and material errors.

If there are errors in the account, of sufficient number and sufficient magnitude, it is not necessary that the errors shown should amount to fraud; if they are sufficient in number and importance, whether they were caused by mistake or caused by fraud, the Court has a right to open the accounts.

Although the mere balancing of an account in a book of accounts does not, of itself, constitute an account stated, yet where the defendant and his superior officer met month by month and went over the accounts, the balance was struck and accepted as correct, it cannot be disputed that the defendant has rendered accounts.

Where an agent has been entrusted with the money of his principal to be expended for a specific purpose, he may be required to account on equitable grounds, and upon such accountings, the burden is upon him to show that his trust duties have been performed and also the manner of their performance. **Prasanna Kumar Mookerjee v. Burn & Co. Ltd.**, 7 Ind. Cas. 270.

MOOKERJEE and CARNDUFF, JJ.

References :- (a) (1803) 1 Sch. and Lef. 182; (1867) L.R. 2 H.L. 1; 36 L.J. Ch. 292; 16 L.T. 243; 15 W.R. 642; (1884) 26 Ch. D. 717 at p. 723; 54 L.J. Ch. 145; 50 L.T. 344; 32 W.R. 649; 6 C.L.J. 580; 12 C.W.N. 28, *Ref. to*.

(8) *Duty of agent—Agency when terminable.* See CIV. PRO. CODE, 1882, No. 6, 7 M.L.T. 87.

Principal and agent—(Concluded).

(9) Constructive knowledge of negligence of agent—Start of limitation. See **LIMITATION ACT (1877)**, No. 58, 6 Ind. Cas. 456.

(10) Wagering contracts—Duties of agent. See **CONTRACT ACT**, No. 22, 12 Bom. L.R. 590.

(11) Sale—Agency—Authority to sell, whether includes authority to receive purchase-money—Notice on the outer wall of house to make enquiries of vendor's vakil, whether amounts to an authority to vakil to sell the house. See **SALE**, No. 5, 8 M.L.T. 7.

(12) Power of agent to sign an acknowledgment on behalf of principal—Agent having authority to receive goods, whether has authority to sign acknowledgments. See **LIMITATION ACT (1877)**, No. 25, 55 P.R. 1910.

(13) Wagering contract—Liability of agent. See **CONTRACT ACT**, No. 23, 7 A.L.J. 1116.

(14) Account between—Nature of agent, liability. See **LIMITATION ACT (1908)**, No. 17, 12 Bom. L.R. 951.

(15) Default of principal misleading agent into doing something. See **BANKER AND CUSTOMER**, No. 10, 8 Ind. Cas. 98.

(16)—See **AGENT**.

Principal and Interest.

(1) Prior suit for interest—Subsequent suit for principal or interest. See **CIV. PRO. CODE**, 1882, No. 39, 19 P.R. 1910.

(2) Payment on account of—No specification—Effect. See **LIMITATION ACT (1877)**, No. 30, 6 Ind. Cas. 16.

(3)—See **INTEREST**.

Principal and surety.

(1) Bill of exchange—Position of holder and acceptor. See **ACT XXVI OF 1881**, (**NEG. INSTRUMENTS**), No. 1, 13 O.C. 206.

(2)—See **SURETY**.

Privilege.

Defamatory statement in affidavit—Privilege. See **EVIDENCE**, No. 2, 6 Ind. Cas. 309.

Privacy.

(1) *Easement—Right of privacy—Invasion of the right—Question of fact.*

The question whether a right of privacy exists, and whether it was been substantially infringed, is a question of fact. **Ram Narain v. Shih Lal**, 6 Ind. Cas. 398.

STANLEY, C.J. and BANERJI, J.

Reference :—10 A. 358, R.

Probabilities.

When Court justified in deciding on. See **HINDU LAW (INHERITANCE)**, No. 8, 84 P.W. R. 1910.

Probate.

(1) *Will—Probate—Parties—Revocation—Non-citation of minor reversionary heir.*

The infant son of the testator's sister, who is a reversionary heir, is entitled to be made a party, to the probate proceedings, and he should be represented by a disinterested person as guardian *ad litem*. Where he is not made a party, the probate should be revoked on his application. **Hari Taran Sarkar v. Basanta Kumari Dasi**, 5 Ind. Cas. 164.

MOOKERJEE and TEJUNO, JJ.

References :—2 C.W.N. 100; 12 C.W.N. 6; 3 Ind. Cas. 178; 10 C.L.J. 263, F.

(2) *Will Probate—Proof of the Will—Exclusion from probate of such parts of the will as do not appear to have been prepared under instructions from the testator.*

In granting probate of a will, the Court can exclude therefrom such parts of the will as are not proved to have been prepared under instructions from the testator. **Hormasji Kharsetji Sethna v. Dhanjishaw Ratanji Lalcaha**, 12 Bom. L.R. 569.

SCOTT, C.J. and DAVAR, J.

(3) *Probate proceeding—Proceeding for revocation of probate, if suit—Civil Procedure Code (Act V of 1908), S. 107, sub-section, 2, O. I, r. 10, O. 21, rr. 1 and 3—Revocation of probate by first Court—Compromise in appellate stage after revocation of probate, unlawful—Petitioner for revocation, if can withdraw entire proceeding pending appeal by the objector—Power of Court in cases not falling within letter of law—Appellate Court's power to add as party respondent person not party to the suit—Party cognisant of probate proceeding, if bound by the result—Stranger promoting litigation.*

A proceeding for revocation of a probate is not a suit within the meaning of Rules 1 and 3 of Order 23 of the Code of Civil Procedure (Act V of 1908) (a).

When probate has actually been revoked by a Court of first instance on the ground that the will propounded is a forgery, the parties are not entitled to bring the matter on appeal, and then by compromise to obtain a reversal of the decision and a revival of the probate without

Probate—(Continued).

any adjudication on the merits. Such a compromise cannot be regarded as lawful within the meaning of Order 23, Rule 3 of the Code.

The action of a Probate Court of competent jurisdiction, when it admits a will to probate or rejects it as not duly attested and executed, is in the nature of a proceeding *in rem*, and, so long as the order remains in force, it is conclusive as to the due execution and the validity of the will, not only upon all the parties who may be before the Court, but also upon all other persons whatever, in all proceedings arising out of the will or claims under or connected therewith. There is no difference in principle whether the compromise is attempted for the grant of the probate in the original Court during the pendency of the proceeding there, or whether it is attempted in a Court of appeal during the pendency of an appeal against a judgment by which the will has been pronounced to be a forgery. The essence of the matter is that the question in controversy affects not merely the parties before the Court, but also others who are bound by the decree, though not represented before the Court.

The effect of S. 107, sub-section (2) of the Code of 1908 is to entitle the appellant to withdraw his appeal, just as the plaintiff might have withdrawn his suit in the Court of first instance.

After a petitioner has instituted proceedings in the Court of first instance, for revocation of a probate on the ground that the will was a forgery, and such proceedings have terminated in his favour, it is not competent to him, in an appeal preferred by the executor or any other party who has appeared in support of the will, to withdraw the entire proceedings and thus compel the Court to revive the grant of probate of a will which has been pronounced by a Court of competent jurisdiction to be a forgery. Order 23, Rule 1, Sub-rule (1), is not applicable to cases of this character.

The action of the Court in cases not falling within the strict letter of the law is to be regulated upon sound general principles, one of which is that litigation should be shortened as far as is practicable. The Court is bound to take care that the order which it makes in the exercise of its inherent power, does not unfairly prejudice the position of any of the parties.

As an ordinary rule, a person, who was not a party to the suit in the Court of first instance, ought not to be allowed to intervene at the

Probate—(Continued).

appellate stage; but the power is vested in the Court to add him as a party respondent. Such power should be exercised with caution.

A person who is not a party to proceedings in the probate Court, in which the validity of a will is questioned, is bound by the result, if he was aware of the proceedings and had a right to intervene.

Quære.—Whether the doctrine that the mere circumstance that a stranger has promoted litigation or assisted in a suit, does not make him bound by the judgment, applies to probate proceedings. **Saroda Kanta Dass v. Gobind Mohan Das**, 12 C.L.J. 91—6 Ind. Cas. 912.

MOOKERJEE and CARNDUFF, J.

Reference :—1 C.W.N. 600, R.

(1) *Will—Probate granted in common form on compromise, if may be revoked—Persons not parties but cognisant of grant, if bound—Infants, if bound—Acquiescence—Delegation of powers by District Judge to District Delegate—Probate and Administration Act (V of 1882), S. 52.*

Proceedings in a Court of Probate are proceedings *quasi-in-rem*, and a probate granted in solemn form is binding not only on the parties who have appeared or have been formally cited, but also on privies, i.e., persons who being cognisant of the proceedings and having an opportunity to intervene have chosen not to do so (a).

It may be taken as settled law that, in a contentious proceeding, probate may be granted in common form in consequence of a compromise between the disputants, resulting in the withdrawal of opposition, and that it cannot afterwards be revoked except on proof of fraud or circumvention practised either upon the Court or upon the parties (b).

When a probate is granted in common form by reason of a compromise between the parties, the terms of the compromise cannot be embodied in the order, for the reason that a Court of probate cannot in many instances enforce the terms (c). But they may be enforced by an action if otherwise unobjectionable.

But though a probate obtained in common form as the result of a compromise is binding upon the parties to the compromise, it is not binding upon those who are not parties to it, even though they have been cognisant of the former proceedings (d).

Probate—(Continued).

When the terms of the compromise are agreed to by the parties who are *sui juris*, the Court of probate will not make an order binding infants to the terms of the compromise (e).

But though an infant has a right in such cases to apply, after he comes of age, for revocation of probate obtained by consent, yet he may be barred, by acquiescence and delay for a long time or by subsequent ratification of the dispositions of the will, from putting the executor to the proof of the will in solemn form or from contesting its genuineness (f).

Where, the caveators having by reason of a compromise withdrawn their opposition, the District Judge sent the case to the District Delegate for enquiry and report.

Held—that the District Judge had acted within the powers conferred on him by S. 52 of the Probate and Administration Act. **Kunja Lal Chowdhury v. Kailash Chandra Chowdhury**, 14 C.W.N. 1068—7 Ind. Cas. 740.

SHARFUDDIN and DOSS, JJ.

References :—(a) 2 Phillim 224 (1814), L.R. 2 P. and D. 327 (1871); (1895) L.R.P. 87, (1894) *relied on*, (b) 2 Moore's P.C.C. 88 (1837), F. (c) 30 L.J.P.M. and A. 184 (1861); 3 S.W. and Tr. 14 (1863); and L.R. 2 P. and D. 181 (1871), *It.* (d) L.R. 2 P. and D. 327 (1871), *It.* (e) L.R. 6 P.D. 219 (1880), *It.* (f) 2 Phillim 230 note (1805), (1900) L.R. Prob. 56 (1900), *relied on*.

(5) *Will—Probate—Revocation—Probate obtained by son of testator without notice to other minor heirs of testator—Title in good faith from executor—Subsequent revocation of probate—Title not affected.*

Probate of the Will of a deceased testator was granted to his son without notice to a minor daughter of the testator, who applied for revocation which was granted :

Held, that, as no notice was served on the minor daughter and no guardian was appointed to protect her interest, the probate was properly revoked, and that the executor must prove it in solemn form.

A person, who has in good faith derived title from an executor at a time when the probate was in force, is not affected by the subsequent revocation of the probate (a). **Gobind Mohan Roy Chowdhury v. Mayatunnessa Bibi**, 7 Ind. Cas. 9.

MOOKERJEE and CARNDUFF, JJ.

References :—(a) 35 I.A. 109; 12 C.W.N. 802 (P.C.); 18 M.L.J. 367; 10 Bom. L.R. 648; 8 C. L.J. 94; 35 C. 955, F.

Probate—(Concluded).

(6) *Will—Application for probate—Caveat—Caveat by judgment creditors of testator's son, beneficiary under the Will—Persons claiming an interest in the estate of the deceased.*

The judgment creditors of the son of a testator, who have attached his property, are persons claiming an interest in the estate of the deceased testator, and are entitled to oppose an application for probate of the will by the son, who is a beneficiary thereunder. **Arakal Bastian v. Narayana Iyer**, 8 Ind. Cas. 351.

WHITE, C.J. and AYLING, J.

References :—6 C. 429, 28 C. 441, F.

(7) *Jurisdiction—Probate Court, if can compel executor to produce funds in Court—Fine, imposition of, for disobedience of order, if legal—Probate and Administration Act, S. 50.*

A Probate Court has no jurisdiction to compel the executor to produce the funds in his hands in Court for the purpose of investment; neither can it pass an order imposing fine for failure to comply with the previous order. **Khetter Mohan Bhattacharjee v. Saromoni Dasi**, 12 C.L.J. 602.

MOOKERJEE and CARNDUFF, JJ.

(8) *Revocation of—Where there has been no defect of jurisdiction—Application of S. 50, Probate and Administration Act. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 5, 37 C. 387.*

(9) *Grant of—Title not concluded by the grant—Effect of—Provision of Court. See LIMITATION ACT (1877), No. 1, 12 Bom. L.R. 694.*

(10) *Executor under will not taking out—Executor accepting office and acting as executor—His right to set up adverse title to the property disposed of by the will—Estoppel. See EXECUTOR, No. 1, 8 M.L.T. 121.*

(11) *Question tried by Probate Court—Maintainability of subsequent suit. See RES JUDICATA, No. 10, 11 C.L.J. 623.*

(12)—See WILL.

(13) *Right to apply for—See WILL, No. 1, 5 Ind. Cas. 149.*

(14) *Applicability of S. 103, C.P.C. (1882), to probate proceedings—Dismissal of application for probate for default—Executor if may propound will again. See CIV. PRO. CODE (1882), No. 63, 14 C.W.N. 921.*

Probate and Administration Act.

See ACT V OF 1881.

Procedure.

- (1) *Law of procedure, change in—Procedure applicable to pending suits—Amendment of plaint, whether a question of procedure.*

In a case instituted under Act XIV of 1882, *held*, that the question, whether a plaint can be amended so as to enable the Court to give the plaintiff a declaration, is a mere question of procedure; and on the principle that a litigant has no vested right in procedure, the question of amendment arising subsequent to the passing of the new Civil Procedure Code (Act V of 1908) will be governed by it. **Gokul Prasad v. Ali Baksh and others**, 13 O.C. 152.

CHAMIER, J.C.

- (2) Court's power to regulate. See PARTITION, No. 8, 11 C.L.J. 580.

(3) Matter relating to—only, whether giving of a right of appeal is—. See ACT OF 1900 (LOWER BURMA COURTS), No. 1, 5 L.B.R. 148.

(4) Alteration in rules of—Retrospective effect. See CIV. PRO. CODE (1908), No. 33, 7 Ind. Cas. 11.

Processions.

- (1) *Public—Highway—Religious processions—Right of public to use highway for processions—Customary right of a particular sect to use a highway in derogation of the rights of another sect—Special damage—Maintainability of suit—Performance of ceremonies entitling one sect to use highway to the exclusion of another sect.*

The right to go in procession through streets attended with music, etc., is a natural right inherent in every subject of the State, and no user is necessary to the creation of such right.

The adherents of any particular religious sect cannot prevent the adherents of another religious sect from carrying on a religious procession, or from assembling for public worship in public streets, on the ground that such worship had not hitherto been carried on, or that it was opposed to religious feelings (a).

The performance of any religious rites or ceremonies by any sect or class of persons does not entitle them to appropriate a public street or any portion thereof for their religious processions or worship.

Though an action lies for the obstruction of a religious procession along a highway in the

Processions—(Concluded).

absence of special damage, yet where an order has been passed by a Magistrate, restraining such procession from passing through a public street, at the instance of one party, the other party is entitled to bring a suit for declaration of their rights (b). **Kandasawmy Mudali v. Subraya Mudali**, 1 Ind. Cas. 716 = 19 M.L.J. 617.

BENSON and SANKARAN NAIR, JJ.

References:—(a) 26 M. 554, D.; 2 M. 140 (141); 5 M. 304 (309); 6 M. 203; 26 M 376; 30 M. 185 (190), R. (b) 2 B. 457; 18 B. 698, D.; 30 M. 15, R.

- (2) *Procession, right to go in—Public street—Magisterial order prohibiting procession, whether gives a cause of action.*

Where the orders of the Magistrate prohibited procession in a public street,

held, that the Magisterial orders furnished a good cause of action for a suit by a member of the public for declaration and injunction regarding his right to go in procession. **Muthayya Reddi v. Sudalaimuthu Nadar**, 20 M.L.J. 119 = 5 Ind. Cas. 902 = 8 M.L.T. 114.

BENSON, O.C.J., and MILLER, J.

Reference:—19 M.L.J. 617.

- (3) Suit, right of—Obstruction to procession—Worshipper—Special damage. See TORT, No. 1, 20 M.L.J. 367.

(4) Marching a, on a public road—Obstruction—Public nuisance—Special damage. See PUBLIC WAY, No. 1, 12 Bom. L.R. 586.

(5) Rival religious sects—Marching in procession with music on highway—Presumption of dedication. See HIGHWAY, No. 1, 8 Ind. Cas. 175.

Produce.

Suit for share of. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 12, 7 Ind. Cas. 390.

Profits.

(1) Suit for, wrongfully appropriated—Limitation. See LIMITATION ACT (MYSORE), No. 7, 15 M.C.C.R. 98.

(2) Suit for, of immoveable property—Jurisdiction. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 16, 8 Ind. Cas. 270.

Promissory note.

- (1) *Negotiable instrument—Promissory note executed in the name of benamidar—Suit by real owner against executant and benamidar—Decree against the former—Appeal*

Promissory Note—(Continued).

by the former—Neither appeal nor memo of objection by real owner—Suit dismissed—Legality.

A executed a promissory note in favour of B who was benamidar for C. C as real owner brought a suit on the pro-note against A and against B who admittedly had received the money. The Munsiff passed a decree against A alone. On appeal by A, the District Judge dismissed the suit. C preferred neither an appeal nor a memo of objections, nor did he ask the Judge to pass a decree against B.

Held, on second appeal the suit was rightly dismissed as against both A and B. No case has been cited in which it has been held that the Judge was wrong in not passing a decree not asked for at all in any manner. **Asundi Basanya v. Bareddi Govindappa**, 7 M.L.T. 178 = 20 M.L.J. 369 = 5 Ind. Cas. 927.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—28 M. 229, F.; 31 C. 643; 35 C. 538; 18 M.L.J. 452; 18 M.L.J. 586, R.

(2) *Death of drawee without endorsing the note in favour of any one—Right of members of Tarwad to sue upon—Negotiable Instruments Act, S. 6.*

A pro-note was executed in favour of X, a member of the Tarwad, who died without endorsing the note in favour of any one. A suit was then brought on it by the members of the Tarwad, on the ground that the money advanced on the note was the money of the Tarwad, and not of X.

Held, if X were alive, she alone could have sued on the note, and her death cannot give the plaintiffs who were not suing as representatives of X, the right which they had not in her life time. **Neelu Ammah v. Krishna Panikar**, 8 M.L.T. 85.

MUNRO and SANKARAN NAIR, JJ.

Reference:—30 M. 88.

(3) *Note payable to bearer on demand—Right to recover—S. 24, Paper Currency Act (1905).*

Where the amount mentioned in the note is by its terms payable to the bearer of it on demand, the note infringes the provisions of S. 24 of the Indian Paper Currency Act of 1905, and it is a contract forbidden by law and consequently the payee could not recover on it. **Maung Po Tha v. L.D. Attalides**, 5 L.B.R. 191.

FOX, C.J.

Reference:—5 B. & A. 335, F.

Promissory Note—(Continued).

(4) *Negotiable security, when a conditional payment of a debt—When debtor can be sued as though he gave no security.*

The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest on the implied agreement to suspend his remedies. A negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realised. The doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order to bearer, whether it be the note of a country bank, which circulates as money, or the note of the debtor or of any other person. The security is offered to the creditor and taken by him as money's worth. Until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity and to sue the debtor as if he had given no security. **Ebrahim Bymeah Ismailjee v. Chas Cowie & Co.**, 5 L.B.R. 199.

HARTNOLL, J.

References:—L.R. 10 Ex. 153; 11 C.B. 191; L.J.R. 32 C.P. 266, F.; Ap. Cas. (1900) 586, R.; 13 East, 135; 9 B. and C. 208, Diss.

(5) *Payable to order—Indorsement and delivery for collection—Rights of holder—Ss. 8, 46, 50, 78, Negotiable Instruments' Act.*

In this case a pro-note was drawn by R in favour of K. K indorsed it, handed it over to V for collection and then died. V sued R on the note. It was argued on behalf of R that, as the note did not pass for consideration and as V's authority ceased on the death of K, he could not recover the money without a letter of administration or a succession certificate.

Held that, by K's indorsement and delivery to V, the property in the note passed to V under Ss. 46 and 50 of the Act, and he became the holder of it, and that by S. 78 payment had to be made to him, and that he therefore had the right to sue for the same. **Romzan Ali v. Vellasaami Pille**, 5 L.B.R. 198.

HARTNOLL, J.

(6) *Promissory Note—Negotiable instrument—Transfer without consideration—Burden of proof—Claim against the estate of the deceased—Uncorroborated evidence of plaintiff.*

The Negotiable Instruments Act applies to Government Promissory Notes.

Promissory Note—(Continued).

The *onus* is in the first place on the transferor of a Government security to establish that the transfer of the Promissory Note by him in favour of another was without consideration.

When a claim is put forward against the estate of a deceased, the evidence of the plaintiff, though uncorroborated, may be acted upon, but such evidence must be carefully tested and scrutinised. **Hira Lal Chatterjee v. Rajkumar Mookerjee**, 12 C.I. J. 470.

MOOKERJEE and CARNDUFF, JJ.

(6-a) *Negotiable Instrument Act, S. 118—Promissory note—Consideration not proved—Presumption as to consideration—Revision.*

When the parties went into evidence, and the Court discredited the evidence as to the payment of consideration for a promissory note, held, that, in revision, it is not open to rely upon the presumption as regards consideration for a promissory note under S. 118, Negotiable Instruments Act. **In re Kannusami Pillai**, 8 M.L.T. 463.

KRISHNASWAMI AIYAR, J.

(7) *Negotiable Instruments Act (XXVI of 1881), S. 4—Promissory note—Unconditional promise to pay—Specified person—Intention to make promissory-note not necessary.*

Where a document executed by one person to another contains an unconditional promise to pay a certain sum of money to the latter, who is sufficiently indicated, the document is a promissory-note, and it is not necessary to show that the maker of the document intended to make a promissory-note. **Paramasivam v. Sankaraya**, 8 Ind. Cas. 352.

ABDUR RAHIM, J.

References:—15 M. and W. 35; 15 L.J. Ex. 318, explained and D.

(8) *Promissory-note—Allocation in partition—What of endorsement—Right of person to whose share it falls to sue—Transfer of Property Act (IV of 1882), Ss. 130, 137—Instruments negotiable by custom—Assignment in writing—Partition list.*

A member of a Hindu co-parcenary, to whose share, on partition, a promissory-note executed in favour of the manager of the family, was allotted, can sue on the promissory-note, even though there was no endorsement on it.

S. 130 of the Transfer of Property Act has no application to the case, as the instrument was, by custom, negotiable (a).

Promissory Note—(Concluded).

Even if an assignment in writing was necessary to create a right of suit, the partition list in the case was sufficient to satisfy the requirements of S. 130 of the Transfer of Property Act. **Chandana v. Majati**, 8 Ind. Cas. 33.

MUNRO and KRISHNASWAMI AIYAR, JJ.

References:—(a) 17 M.L.T. 393; 3 M.L.T. 7, doubted. 24 M. 654, R.

(9) Right of a co-parcener to sue on a, passed to him. See HINDU LAW (JOINT FAMILY), No. 10, 12 Bom. L.R. 801.

(10) Bill payable to bearer on demand—Right to sue on bill. See ACT III OF 1905 (PAPER CURRENCY), No. 2, 4 S.L.R. 44.

(11) Pro-note in renewal of prior barred pro-note—No express reference to the prior note—Enforceability. See CONTRACT ACT, No. 17, 7 M.L.T. 81.

(12) Plea of execution as name lender and consequent want of consideration, whether can prevail. See CONTRACT ACT, No. 2, 7 M.L.T. 85.

(13) Plea of failure of consideration when may be raised. See CONSIDERATION, No. 2, 8 Ind. Cas. 302.

Proof.

Person not bound to keep proof of matters which the law says he need not prove. See NEGOTIABLE INSTRUMENTS, No. 1, 25 P.W. R. 1910.

Prosecution.

(1)—When commences—Complaint made, but no process issued—Effect. See MALICIOUS PROSECUTION, No. 1, 37 C. 358.

(2) Stifling of—Non-compoundable offence—Consideration of agreement—Void. See PUBLIC POLICY, No. 2, 6 N.L.R. 148.

Prostitute.

Ranjini prostitutes—Adoption of dancing girl—Custom—Training up a girl as a—Meaning of "Noochi." See HINDU LAW (SUCCESSION), No. 9, 6 Ind. Cas. 210.

Provincial Insolvency Act.

See ACT III of 1907.

Provincial Small Cause Courts Act.

See ACT IX OF 1887.

Public Demands Recovery Act.

See ACT I OF 1895 (BENGAL).

Public nuisance.

Powers of Advocate General to interfere in cases of—Mandatory injunction when will be granted. See ACT III OF 1889 (CITY OF BOMBAY MUNICIPALITY), No. 3, 12 Bom. L.R. 274.

Public policy.

(1) Agreement with Inspector of Land Records to purchase land in name of another—Public policy. See SPECIFIC PERFORMANCE, No. 3-a, 8 Ind. Cas. 441.

(2) Public policy—Payment of *dustoori* or commission. See DUSTOORI, No. 1, 91 P.R. 1910 (Civil).

Public road.

(1) What is—Passage of cattle of adjoining owners—Effect. See ACT V OF 1881 (MADRAS LOCAL BOARDS), No. 3, 8 Ind. Cas. 682.

Public servant.

(1) Assault and use of insulting language by—Notice, if necessary—Damages. See CIV. PRO. CODE (1882), No. 188, 7 A.L.J. 301.

(2) Suit for injunction against, —Notice whether necessary. See CIV. PRO. CODE (1882), No. 189, 3 Sind L.R. 175.

Public way.

(1) *Public way*—*Right of public*—*Procession*—*Marching a procession on a public road*—*Public nuisance*—*Special damage*.

The plaintiffs sued, on behalf of themselves and of other members of a religious community, in a village, to have a declaration of their right of marching in procession with a car along a particular public road to certain temples, and for an injunction restraining the defendants (members of another religious community of the village) from interfering with the plaintiffs. The defendants (who occupied land abutting upon a portion of the road) contended that the plaintiffs had no right to march along the road.

The lower Courts dismissed the suit on the ground that, as the road was public, the plaintiffs could not sue unless special damage were shown and proved. On appeal:

Held, that the suit lay, since it was not for the removal of a public nuisance, but for a declaration of the right of an individual community to use the public road.

Every member of the public and every sect has a right to use the public street in a lawful manner, and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege. **Baslingappa Parappa Chedachal v. Dharmappa Basappa Chedachal**, 12 Bom. L.R. 586.

SCOTT, C.J. and BATCHELOR, J.

Reference:—26 M. 376, F.

Public way—(Concluded).

(2) *Agreement—Consideration—Stifling of prosecution—Non-compoundable offence—Ultimate finding of compoundable offence or no offence—Void—Public policy—Facts not fully pleaded—Void as opposed to public policy—Inference—Court's power.*

Where part of the consideration for an agreement was the stifling of a prosecution, which at the time was proceeding as a prosecution of a non-compoundable offence,

held, that the agreement was void as opposed to public policy, even though the criminal Courts might ultimately have found that a compoundable offence, or no offence, at all, had been committed (a).

Even where the facts have not been fully pleaded by the parties, the Courts will deduce them from the evidence and apply the doctrine of public policy (b). **Chhatrapal v. Fundilal**, 6 N.L.R. 148.

SKINNER, A.J.C.

References:—(a) 28 B. 326; 19 M. 189, R.
(b) 27 A. 266, R.

Purchase-money.

Right of decree-holder to take, when accrues. See EXECUTION OF DECREE, No. 3, 5 Ind. Cas. 139.

Putni.

(1) *Putni lease, construction of—Covenant in contravention of the rule against perpetuities—Contingent covenant in a lease, when operative.*

Where a lessor by a putni pattah, after leasing a mouzah, exempted from its operation certain lands, and covenanted that, on certain contingencies happening, the lessee should acquire a right thereto as putnidar, but no time was specified within which the contingency was to happen in order to vest the right in the putnidar:

Held, that such a covenant was void as offending against the rule against perpetuities, even as between the parties to the covenant. **Anath Nath Maitra v. Kumar Keshab Chanbra Roy**, 14 C.W.N. 601-5 Ind. Cas. 487.

CASPERSZ and DOSS, JJ.

References:—16 C. 71 (P.C.); 24 M. 449; 5 C.W.N. 343, R.

(2) Putni created and registered after mortgage of revenue paying estate—Decree on mortgage against proprietor and putnidar—Sale of estate for arrears of revenue—Transfer of lien

Putni—(Concluded).

to sale-proceeds, if relieves putni interest from liability to sale. See **TRANSFER OF PROPERTY ACT**, No. 49, 14 C.W.N. 186.

(3) Custom *originated during - Whether binding on zemindar after extinction of. See **CUSTOMARY RIGHT**, No. 1, 11 C.L.J. 209.

When putni right merges in Zamindari right. See **LEASE**, No. 20, 7 Ind. Cas. 316.

Railway.

(1) *Negligence—Railway Company liable for negligence if the door of a carriage is open—Breach of statutory duty—Railway Company bound to carry passengers inside the carriage—Putting an arm on the widow sill of a carriage amounts to contributory negligence.*

If the door of a carriage of the railway company is open, it is evidence of negligence on the part of the Company, but not conclusive proof of it.

Where there is a statutory obligation, any breach of that which causes an accident is conclusive against the defendant, apart from special proof of negligence. But the breach of the duty must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

A Railway Company contracts to carry passengers inside and not outside their carriages. A passenger, who puts any part of his person outside the carriage of a Railway Company in which he is travelling and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage, but of contributory negligence which disentitles him to recover against the Company, provided that, no matter what negligence the Company has been guilty of, that could not have caused the passenger any injury so long as he remained inside the carriage. **Dullabhji S. Sanghani v. G.I.P. Ry. Co. and Anna Rama v. The G.I.P. Ry. Co.**, 12 Bom. L.R. 73 = 5 Ind. Cas. 676.

BEAMON, J.

(2) *Railway Company—Contract to carry goods—Risk note by consignor, meaning of the words "before, during and after transit"—Damage beyond place for which consigned.*

Plaintiff's consignor consigned cotton to be carried from Erode to Kallai by the defendant Railway Company. The goods were carried in

Railway—(Concluded).

a covered wagon, but to a station beyond its destination, where the cotton was damaged by water being poured over it to quench a fire which broke out in the wagon. The plaintiff's consignor, in a risk note which he executed to the Company, agreed to hold them free from all liability to damage to the consignment "from any cause whatever, before, during and after transit, over the Railway." The plaintiff sued the Company for compensation for the damage done to the goods.

Held, that the Company were not liable for any damage, because the words "before, during and after transit" covered the whole period, from the time the goods were delivered to the defendants at Erode, up to the time they were delivered to the plaintiffs at Kallai.

Every customer dealing with a Railway Company, whether he enquires or not, is bound not only by the ordinary route, but also by the ordinary train arrangements and hours of arrival according to which they profess to carry (a). **Arunachallam Chettiar v. The Madras Railway Company**, 6 M.L.T. 292 = 33 M. 120 = 3 Ind. Cas. 931.

SIR RALPH S. BENSON, O.C.J. and SANKARAN NAIR, J.

References:—(a) 2 Ir. Rep. 22 (35), R.; 24 R. R. 107, D.

Railways Act.

See **ACT IX OF 1890.**

Raiyati holding.

(1) *Burden of proof—Transferability of raiyati holding—Doctrine of caveat emptor.*

It is for the person alleging transferability of raiyati holding to show that the custom of transferability exists. The doctrine of *caveat emptor* applies with the greatest force to persons who undertake to purchase raiyati holdings from tenants. **Gobinda Chandra Jana v. Srimanta Charan Jana**, 6 Ind. Cas. 761.

HOLMWOOD and SHARF-UD-DIN, JJ.

(2) Zamindar's right to eject ryot from Ryoti land and recover possession thereof. See **EJECTMENT**, No. 2, 7 M.L.T. 366.

Reasonable and probable cause.

What is—Question of absence of, is mixed question of fact and law. See **MALICIOUS PROSECUTION**, No. 2, 6 Ind. Cas. 675

Receipt.

(1) Receipt, whether an instrument within the meaning of S. 39, Specific Relief Act. See **SPECIFIC RELIEF ACT**, No. 14, 7 M.L.T. 270.

Receiver.

- (1) *Step-in-aid of execution—Application for appointment of receiver after decree, whether a—Receiver, whether can be appointed after sale and pending confirmation.*

An application for the appointment of a receiver after sale, and pending confirmation thereof, is a step-in-aid of execution. A receiver can be appointed for the preservation of the property, after sale and while the sale was pending confirmation. **Sambasiva Mudali v. Krishnan and others**, 7 M.L.T. 96—5 Ind. Cas. 758.

MUNRO and ABDUR RAHIM, JJ.

- (2) *Common property belonging to community—Decree appointing receiver till a proper trustee is appointed by a community, whether proper—Decree awarding possession to plaintiffs on behalf of whole community.*

In a suit brought by certain members of a community, for a declaration that the defendants were not trustees of a rest-house, and for the appointment of a receiver for the management of the rest-house until a proper trustee is appointed by the community, it was held, that a decree, directing the appointment of a receiver for the proper management of the rest-house belonging in common to the members of the community until a proper trustee is appointed by the community, is bad; but a decree awarding possession to plaintiffs, on behalf of the whole community including the defendants on the suit, will be proper. **Narayanan Chetty v. Ramasami Chettiar**, 19 M.L.J. 669.

WALLIS and SANKARAN NAIR, JJ.

- (3) *Receiver—Execution sale of property in hands of—Illegality—Civ. Pro. Code (Act XIV of 1882), Ss. 244, 248—Non-service of notice on judgment-debtor if ground for setting aside the sale—Confirmation of sale, effect.*

Where the receiver appointed by the Court was directed to take possession of moveable properties and of the rents and profits of the immoveable properties, and was further authorised to get in and collect all debts and claims due to the estate.

Held that he must be taken to have been appointed receiver in respect of the whole estate, and had authority to apply for an order absolute on a decree nisi for foreclosure.

A sale of the foreclosure decree, while the estate was in the possession of the receiver in execution of a decree for money, without leave

Receiver—(Continued).

of the Court previously obtained, was illegal and liable to be avoided; and punishment by the procedure, for contempt was not the only remedy against such unauthorised sales.

The provisions of S. 248 are not mandatory.

A sale held without issue of notice under S. 248, C.P.C. (1882) is therefore not a nullity, but such an omission is a serious irregularity, sufficient to vacate the sale upon an application made by the judgment-debtor under S. 244 of the Code (a).

Such an irregularity is a ground for setting aside the sale even after it has been confirmed (b).

A purchaser of property at an execution sale is not protected, when grounds for setting aside the sale under S. 244 or S. 311 are established, merely because he is a stranger (c). **Mrs. Levina Ashton v. Madhabmoni Dasi**, 14 C. W.N. 560—5 Ind. Cas. 390—11 C.L.J. 489.

MOOKERJEE and TEUNON, JJ.

References:—(a) 5 C.W.N. 10; 25 Bom. 337; L.R. 27 I.A. 216; 32 Bom. 572; 21 Bom. 424 (132); 9 C.L.J. 271; 36 C. 543, R. (b) 11 C. W.N. 1011; 35 C. 61, R. (c) 13 C.W.N. 710, R.

- (4) *Receiver, if a necessary party to rent suit—Appointment of Receiver, if bars suit by creditor—Receiver how sued—Civil Procedure Code (Act XIV of 1882), S. 32—Receiver appointed by another Court, if may be added as party by Courts of its own motion.*

Where, during the pendency of a suit for rent under the Bengal Tenancy Act, a Receiver was appointed in respect of the entire property of the defendants by another Court, and the property for which the rent was claimed vested in him.

Held, that the Receiver was a necessary party to the suit, and if he was not added with the permission of the Court which appointed him, the suit was liable to be dismissed.

The appointment of a Receiver does not of itself debar a creditor of the person, over whose estate the Receiver has been appointed, from suing for his claim, provided that such suit does not in any way interfere with the possession or jurisdiction of the Court appointing the Receiver.

But where property in the hand of the Receiver is intended to be affected by the result of the litigation, the Receiver is a proper

Receiver—(Continued).

and necessary party to such suit, by way of addition to and not in substitution for the parties primarily responsible (a).

Where the plaintiffs refused to add the Receiver as a party with leave of the Court appointing him, although they had notice of such appointment.

Held, that the Court was not bound, nor was it competent to it, to add the Receiver as a party, of its own motion, under S. 32, Civ. Pro. Code, as the leave of the Court appointing the Receiver was essential.

But, as the point raised was of some novelty, and as a fresh suit by the plaintiffs might be barred by limitation, the High Court allowed the plaintiffs an opportunity of continuing the suit by taking steps to make the Receiver a party, upon their paying all costs. **Jotindra Nath Chowdhury v. Sarfaraj Mia and others**, 14 C.W.N. 653 - 6 Ind. Cas. 24.

MOOKERJEE and TEUNON, JJ.

References :—(a) 10 C. 1014; 11 C.L.J. 489; 1 C. 403; 26 C. 157 - 3 C.W.N. 90; 10 C.L.J. 23; 31 C. 305 - 5 C.L.J. 270, R.

(5) *Appointment of permanent Receiver—Suit by next reversioner—Gross mismanagement and malversation by widow—Surplus income paid to widow for her life.*

Where a suit was brought by the next reversioner to remove the widow from the management of the estate, and to appoint a Receiver on account of gross mismanagement and malversation by her, and it was proved to the satisfaction of the Court that the estate which was worth over a lakh of rupees has shrunk to a little over Rs. 20,000, that the widow never concerned herself with the management of the estate, and never enquired whether the expenditure was out of the capital or out of the income of the estate, that the management of the estate was left entirely in the hands of strangers who were misappropriating the monies, and that the widow was contracting debts not valid, and binding on the reversioners, held that under the circumstances of the case, it is unsafe to leave the estate in the hands of the widow, that it is necessary in the interests of the reversioner that a Receiver should be appointed for the proper management of the estate, and that, the widow not having been proved they have acted with any intention to defraud, was entitled to be paid the surplus income for her

Receiver—(Continued).

life. **Guruva Chetty v. Ragammal**, 8 M.L.T. 189 = 7 Ind. Cas. 534.

SANKARAN NAIR, J.

(5-a) *Receiver—Party—When Receiver is a necessary party—Suit against Receiver—Permission of Court, whether condition precedent.*

Where property in the hands of a Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to the suit (a).

The consent of the Court to an action against a Receiver appointed by the Court is not a condition precedent to the right of the party to sue, and the omission can be rectified by a subsequent application for leave to continue an action brought without such permission (b).

Where, therefore, a suit has been brought against a Receiver without the permission of the Court appointing him, it is open to the Court in which the suit has been brought to allow the plaintiff an opportunity to obtain the necessary leave and then to continue the suit. **Banku Behary Dey v. Harendra Nath Mukerjee**, 8 Ind. Cas. 1.

MOOKERJEE and TEUNON, JJ.

References :—(a) 6 Ind. Cas. 214; 14 C.W.N. 653, P.; 10 C. 1014; 5 C.W.N. 15; 5 C.W.N. 27, D. (b) 32 C. 270; 9 C.W.N. 247, diss.

(6) Directions to, if appealable. See CIV. PRO. CODE (1908), No. 147, 14 C.W.N. 183.

(7) Grounds for appointment of See CIV. PRO. CODE (1908), Nos. 144 and 145, 14 C.W.N. 248 and 14 C.W.N. 252.

(8) Suit on legal or equitable mortgage—Interest in arrears and property insufficient to pay charges or incumbrances thereon—Jurisdiction of the Court to appoint a—Principle of appointment. See CIV. PRO. CODE (1908), No. 143, 5 L.B.R. 135.

(9) Report recommending appointment of a—Order refusing to make the appointment—Appeal. See CIV. PRO. CODE (1882), No. 199, 20 M.L.J. 78.

(10) Accretions to property if vest in. See ACCRETION, No. 1, 14 C.W.N. 681.

(11) Appointment of, when allowed—Appeal from order refusing to appoint. See CIV. PRO. CODE (1908), No. 148, 53 P.W.R. 1910.

(12)—appointed to take possession—Whether bound to take out certificate. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 1, 6 Ind. Cas. 416.

Receiver—(Concluded).

(13) Examination of account of—Interlocutory order—Appeal—Duties of mortgagee as. See **MORTGAGE (GENERAL)**, No. 24, 6 Ind. Cas. 323.

(14)—when may be appointed. See **CIV. PRO. CODE (1908)**, No. 146, 7 Ind. Cas. 344.

(15) Rent suit by—Maintainability. See **ACT VIII OF 1896 (BENGAL TENANCY)**, No. 11, 7 Ind. Cas. 761.

Recitals.

Value of. See **CONTRACT ACT**, No. 17, 7 M.L.T. 81.

Rectifying.

(1) Exclusive right of. See **INJUNCTION**, No. 1, 7 Ind. Cas. 558.

Reclamation lease.

Partial eviction—Applicability of doctrine of suspension of entire rent to case of. See **LANDLORD AND TENANT**, No. 20, 11 C.L.J. 591.

Record.

Lost—Burnt—Reconstruction of lost record—Execution of decree. See **EXECUTION OF DECREE**, No. 7, 11 C.L.J. 243.

Record-of-rights.

Suit for correction or alteration of—Maintainability. See **ACT VIII OF 1895 (BENGAL TENANCY)**, No. 27, 5 Ind. Cas. 266.

Recovery of Arrears of Land Revenue Act.

See **ACT VII OF 1868 (BENGAL)**.

Reference.

Decree not final—No reference lies—Court's power. See **CIV. PRO. CODE (1882)**, No. 229, 5 Ind. Cas. 584.

Refund.

Suit by auction-purchaser for, of purchase money on failure of consideration—Maintainability. See **EXECUTION SALE**, No. 3, 12 Bom. L.R. 723.

Registration.

(1) *Registered mortgage—Prior oral mortgage—Priority—Notice—Mortgage before S. 59, Transfer of Property Act.*

A registered mortgage does not take priority over an earlier valid oral mortgage of the same property, made when S. 59, Transfer of Property Act, was not in force at the place where the property is situated, if the second mortgagee had actual notice of the oral mortgage at the

Registration—(Continued).

time when the registered mortgage was made, **Arunachellum Chetty v. Peria Curpen Chetty**, 5 B.L.R. 181.

FOX, C.J., HELL AND MOORE, JJ.

References:—P.R. 1900, p. 199; 16 M. 148; Printed Judgments, Bom. H.C. 1896, p. 775; 13 C. 70; 19 A. 115, F.; 115 P.R. 1890, p. 353, Diss.; 10 C. 250; 4 L.B.R. 26; 10 M.I.A. 220; Whitt and Tudor, Vol. 2, p. 175, 7th Ed., R.

(2) *Agreement registration of which is compulsory, embodied in a petition of Compromise—Agreement conferring right of pre-emption—Compromise filed before a Revenue Court.*

Held, that an agreement conferring a right of pre-emption, the registration of which is compulsory, is not exempted from the operation of the Registration law, on account of its being embodied in a petition of compromise filed in a mutation proceeding before a Revenue Court. **Kamta Prasad v. Sewak Ram**, 13 O.C. 241.

PIGOTT, J.C.

References:—4 O.C. 78; 32 A. 206; 10 O.C. 49, R.

(3) *“Birt” meaning of—Birt deed for less than Rs. 100—Registration—Sale of under-proprietary rights—Transfer of Property Act (IV of 1882), S. 108—Reservation of annual rent or lagan sarkari—Lease.*

The question was whether a birt deed of which the consideration was less than Rs. 100 and which reserved a fixed annual rent was valid without registration.

Held, that such a deed really implied a grant for money paid for under-proprietary rights by a superior proprietor in favor of the birt holder, and should, therefore, be treated as a sale-deed, and not as a lease, and did not therefore, require registration (a).

Birt generally implies an under-proprietary right. It is cession under which a superior proprietor parts with a certain portion of his proprietary rights either for money paid or for religious purposes. **Ram Autar v. Drigpal**, 8 Ind. Cas. 725.

CHAMIER, J.C. and EVANS, A.J.C.

References:—(a) 1 O.C. 124; 4 O.C. 31; 8 O.C. 121; 10 O.C. 318; 6 C.L.J. 693; 11 C.W. N. 913; 9 Bom.L.R. 861; 17 M.L.J. 400; 4 A.L.J. 737; 2 M.L.T. 402; 29 A. 708, R.

(4) *Suit for specific performance of contract—Unregistered document embodying terms of*

Registration—(Concluded).

contract—Admissibility in evidence. See EVIDENCE ACT (MYSORE), No. 1, 15 M.C.C.R. 216.

(5)—as notice—Extension of doctrine. See TRANSFER OF PROPERTY ACT, No. 63, 12 Bom. L.R. 940.

(6) Patta tendered to and refused by tenant—whether a lease. See TRANSFER OF PROPERTY ACT, No. 74-a, 8 M.L.T. 371.

(7) Reclamation lease granted for removal of jungle—Registration. See TRANSFER OF PROPERTY ACT, No. 81, 7 Ind. Cas. 864.

(8) Possession of title-deeds—Prior incumbrancer—Gross negligence. See TRANSFER OF PROPERTY ACT, No. 54-a, 7 Ind. Cas. 810.

(9) Registration—Arrangement by lessee to share profits with stranger—Whether necessary to be embodied in registered document. See TRANSFER OF PROPERTY ACT, No. 90, 7 M.L.T. 419.

Registration Act (1877).

(1) Ss. 3, 17—*Future rents*—"Any other benefit to arise out of land"—*Mortgage of future rents of value of over Rs. 100—Whether requires registration—Position of mortgagee who had taken an unregistered document—Trespasser.*

Future rents payable in respect of lands are "benefits to arise out of land"; with in the meaning of S. 3, Registration Act.

A mortgage of future rents, upwards of one hundred rupees in value, can be effected only by a registered instruments. Therefore, a mortgagee of such rents, under an unregistered document, is liable to be evicted as a trespasser, and the document cannot be received in evidence. **Mangalasamy Devar v. Subbiah Pillay**, 6 Ind. Cas. 501—8 M.L.T. 91.

BENSON and KRISHNASWAMI IYER, JJ.

References:—27 A. 462; A.W.N. (1905), 48; 2 A.L.J. 208; 27 A. 564; A.W.N. (1905), 100; 2 A.L.J. 692; 19 B. 663; 13 C. 262; 10 A. 133; 19 Ch. D. 312; 51 L.J. Ch. 14; 45 L.T. 567; 30 W.R. 70; 10 H.L.C. 191; 33 L.J. Ch. 192; 9 Jur. (N.S.) 213; 7 L.T. 172; 11 W.R. 171, R.

(1-a) Ss. 3, 17 (d) 49—*Lease—Agreement to lease—Registration—Admissibility, in a suit for specific performance—Transfer of Property Act, S. 4—Trusts Act, S. 91.*

An agreement in writing to grant a lease, which requires registration, cannot be received in evidence in a suit for specific performance o

Registration Act (1877)—(Continued).

such agreement, whether possession was or was not granted in pursuance of the agreement (a).

S. 49 of the Registration Act consists of two parts. It provides first "that no document, required by S. 17 to be registered, shall affect any immoveable property comprised therein." The second part of the sections says that such a document "shall not be received as evidence of any transaction affecting such property," i.e., the immoveable property comprised therein. As regards the immoveable property, other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. The two parts of the section deal with different subjects. The first part presupposes that the document itself is the transaction or the mode in which it is carried out. The second part relates to cases where the document itself is not the transaction, but is only the record of a transaction, or being itself a transaction contains a reference to or a recital of another transaction which affects the immoveable property comprised therein. **Narayanan Chetty v. Muthiah Servai**, 8 Ind. Cas. 520.

WHITE, C.J. and KRISHNASWAMI AIYAR, J.

References:—(a) 17 M. (F.B.) 456, F.; 17 M. L.J. 218, overruled; 1 M.W.N. 465; 7 M.L.T. 278; 5 Ind. Cas. 615, D.; S.A. No. 973 of 1904; 14 C.W.N. 65; 5 Ind. Cas. 38, diss.

(2) S. 17—*Dowl—Lease or agreement to lease—Varying rent—Registration.*

In considering whether a *dowl* is compulsorily registrable or not, the question to be decided is whether it embodies a special agreement between the parties. If it does, it requires registration, if it does not, registration is not needed (a).

Where, as in this case, the *dowl* (a memorandum showing the rents payable by the tenants, bearing their signature) merely evidences that there has been a commutation of rent, that the rent which was previously payable partly in kind and partly in cash would henceforth be paid in cash, it is not an instrument relating to an interest in immoveable property and does not require registration (b). **Hara Prasad Das v. Ram Narain Chowdhury**, 11 C.L.J. 22=2 Ind. Cas. 89.

MOOKERJEE and COXE, JJ.

References:—(a) 3 C. 322; 7 C. 703; 7 C. 717, considered; 24 C. 20; 22 M. 217, F.; 5 C. 864, Cons. and Appl.

Registration Act (1877)—(Continued).

- (3) *S. 17—Unregistered deed of partition, evidentiary value of suit based on unregistered document in admissible in evidence, effect of admission of defendants.*

It is no doubt the policy of the Legislature that all documents affecting immoveable property should be registered. Documents, to be admitted in evidence of any transaction affecting immoveable properties, require registration. An unregistered deed of partition is not admissible in evidence to prove the transaction in so far as it affects the immoveable properties divided among the parties, but it is admissible to prove that the co-parceners therein referred to have become divided members.

Such document is also admissible to prove the arrangement come to regarding moveables (a).

The admissions of the defendants do not make an unregistered document admissible as evidence in so far as the immoveable property is concerned, nor can secondary evidence be given of its contents, but yet a decree may be given on the admission of the defendants (b). **S. A. Subramania Iyer v. Savitri Ammal**, 4 M.L.T. 354 = 19 M.L.J. 228.

SANKARAN NAIR and PINHEY, JJ.

References:—(a) 15 M. 336, P. (b) 3 M.H. C. R. 342, JA

- (4) *S. 17—Assignment of hypothecation bond—Bond originally for Rs. 50, but assigned for Rs. 176—Whether registration is necessary.*

Where a hypothecation bond for Rs. 50 was assigned for Rs. 176, the interest having accumulated.

Held that the assignment requires registration to operate as a transfer of the hypothecation. **Ramaswami Chetty v. Pavadai Samban**, 7 M.L.T. 379 = 5 Ind. Cas. 852.

BENSON and KRISHNASWAMI AIYAR, JJ.

- (5) *S. 17—Practice—Pleadings—Ground not raised in lower Courts or in memorandum of appeal, but raised for the first time in arguments in Chief Court, disallowed—Registration Act (III of 1877), S. 17—Record of occurrences which happened at a public meeting, in the course of which the plaintiff made certain admissions disclaimers and promises regarding immoveable property, not liable to registration—Evidence—Contract Act (IX of 1872), S. 20—Agreement come to under mistake of fact void—Consideration—Compromise.*

Registration Act (1877)—(Continued).

A point, not raised in either of the lower Courts or in the grounds of appeal, cannot be allowed to be raised for the first time in arguments in the Chief Court.

A document which purports to be merely a record of occurrences, which are said to have happened at a public meeting in the course of which the plaintiff made certain admissions, disclaimers and promises, is not one purporting to create or declare a right, and, therefore, need not be registered (a).

An agreement which recites as a fact that a will was executed, while really no such will was executed, is come to under a mistake of fact common to all the parties, and, therefore, void under S. 20 of the Contract Act.

A bona fide compromise of a real claim is a good consideration, whether the claim would have been successful or not (b). **Pahu Lal v. Davlat Ram**, 6 Ind. Cas. 651 = 47 P.W.R. 1910.

SHAH DIN and WILLIAMS, JJ.

References:—(a) 51 P.R. 1898; 48 P.R. 1905; 30 P.L.R. 1905, followed. (b) 32 Ch. 266; 55 L.J. Ch. 801; 54 L.T. 592; 34 W.R. 669 and 17 B. 457, R.

- (6) *S. 17, proviso—Meaning of the proviso—Exemption of leases for a term and reserving an annual rent.*

The meaning of the proviso to S. 17 of the Indian Registration Act, exempting from the operation of the section leases for a term and reserving an annual rent, is that the exemption extends to leases whose term does not exceed five years and the annual rent Rs. 50, so that unless the lease reserves an annual rent the proviso will not apply to it. **Yenkatasawmy Chetti v. Suppa Pillai**, 4 Ind. Cas. 303 = 7 M. L.T. 30.

MILLER, J.

- (7) *S. 17—Grant of assessment—Consideration in shape of services rendered—Sale—Gift. See TRANSFER OF PROPERTY ACT, No. 37. 12 Bom. L.R. 9.*

(8) *S. 17—Usufructuary mortgage below Rs. 100—Proof of debt—Admissibility in evidence. See MORTGAGE (USUFRUCTUARY), No. 1, 7 A.L.J. 71.*

(9) *S. 17—Endorsement on mortgage—Non-extinction of mortgage—Compulsorily registration. See MORTGAGE (GENERAL), No. 23, 11 C.L.J. 551.*

Registration Act (1877)—(Continued).

(10) S. 17—Registration of deed of Dower when necessary. See CUSTOMS (PUNJAB—ALIENATION), No. 10, 71 P.W.R. 1910.

(11) S. 17—Lease for 6 months—Registration whether necessary—Evidentiary value. See LEASE, No. 14, 20 M.L.J. 298.

(12) S. 17—Immoveable property—Value not shown to be exceeding Rs. 100—Document merely admitting antecedent right. See SHAMILAT, No. 5, 94 P.L.R. 1910.

(12-a) S. 17. See No. 1, *supra*.

(13) S. 17 (c) Receipt for money paid prior to sale—Registration. See PRE-EMPTION, No. 39, 54 P.L.R. 1910.

(13-a) S. 17 (d). See No. 1-a, *supra*.

(14) Ss. 17, 49—Compromise recording contract of pre-emption—Not embodied in decree—Not admissible without registration.

A *Sulhmama* filed in a suit, in so far as it purports to create a right of pre-emption, is a transaction affecting immoveable property, and as such requires registration. Where such a document was not registered, no evidence of its contents could be given to establish a claim of pre-emption. **Kashi Kunbi v. Sumer Kunbi**, 7 A.L.J. 206—32 A. 206 = 5 Ind. Cas. 234.

STANLEY, C.J. and KARAMAT HUSAIN, J.

(15) Ss. 17, 49—Document compulsorily registrable, registered by mistake in Book I—Mistake not to affect parties—Document to be treated as properly registered—Endorsement releasing mortgaged property for a cash consideration—Endorsements need registration.

A release, whereby a father relinquished his share in the immoveable and moveable property in favour of his son, was presented for registration. The document contained no description of the property released, but it was capable of identification. The release was accepted by the Registrar and registered not in Book I but in Book IV, that is to say, not in the book kept for the registration of documents compulsorily registrable under S. 17 of the Registration Act.

Held, that the release must be considered as having been duly registered; since, the error of the Registrar in registering the document in a wrong book should not be allowed to prejudice the parties.

Registration Act (1877)—(Continued).

At the back of a deed of conveyance, an endorsement was made by the mortgagee that the property covered by the conveyance was released in consideration of the payment by the mortgagor of a sum of money. The endorsement was not registered:

Held that, in view of the provisions of S. 49 of the Registration Act, 1877, the endorsement was not admissible in evidence of either the redemption of the property or of the nature of the original transaction between the parties. **Parasharampant Sadashivpant v. Ram Yellappa Lakundi**, 11 Bom. L.R. 1921 = 34 B. 202.

SCOTT, C.J. and BATCHELOR, J.

Reference:—(1892) P.J. 5, F.

(16) S. 17, cls. (b) and (1)—Agreement to partition—Award creating or declaring title to immoveable property—Whether compulsorily registrable.

Neither an agreement to effect a partition, nor an award of arbitrators, though creating or declaring title to immoveable property, is compulsorily registrable. **Tarakanta Ghose v. Rai Kishori Ghose**, 6 Ind. Cas. 361.

MOOKERJEE and CARNDUFF, JJ.

(17) S. 17 (b) (c)—Registration—Sale-deed—Receipt.

Held, that a document of the following description is not a sale-deed falling within the purview of cl. (b), but does fall under cl. (c) of S. 17 of Act III of 1877 (now Act XVI of 1908) and is compulsorily registrable:—‘*bai karki zar-i-bai ku humn yeh chand haruf bataur rasid ke likh diye hain ke sanad ho.*’ **Ram Chand v. Chitar Singh**, 57 P.W.R. 1910.

SHAH DIN, J.

Reference:—C. 18 P.R. 1889, R.

(18) Ss. 17 (b), 49—Deed effecting or declaring partition—Registration. See PARTITION, No. 10, 6 Ind. Cas. 346.

(19) S. 17, cl. (d), proviso—Lease—Non-reservation of annual rent—Lease for a term less than five years—Registration, whether necessary.

The proviso to cl. (d) of the S. 17 of the Registration Act requires two conditions for exemption from registration. One of them is that the term does not exceed five years. The other is that the annual rent reserved does not exceed Rs. 50. This latter condition does not mean that there should be an annual rent

Registration Act (1877)—(Continued).

reserved and that it should not also exceed Rs. 50. It only means that, if an annual rent is reserved, it should not exceed Rs. 50 (a).

Quere:—Whether, in a lease where the term is for a period less than five years, and one consolidated rent, say, a thousand rupees, can it be said that, because there is no annual rent, the annual rent reserved does not exceed Rs. 50. **A. Yenkatasawmy Chetty v. Suppa Pillai**, 6 Ind. Cas. 382—8 M.L.T. 103.

SANKARAN NAIR and KRISHNASWAMY AIYAR, JJ.

References:—(a) 4 M. 38; 24 M. 421; 27 M. 43, R.

(20) **S. 17, cls. (d) and (h)**:—*Lease—Document creating right to obtain other document.*

A document by which no immediate interest is created—there is no present demise—and which is merely an agreement to create a lease on a future day, the terms of which are to be defined by documents to be executed afterwards, is not a lease, and does not fall under cl. (d) of S. 17, Registration Act, but is a document creating right to obtain another document within cl. (h) of S. 17, and is not compulsorily registrable. **Panchanan Basu v. Chandi Charan Misra**, 6 Ind. Cas. 443.

JENKINS, C.J., and DOSS, J.

(21) **S. 28—Registration—Mortgage-bond—Inclusion of property to which mortgagor has no title—Registration not invalid—Mortgage-decree—Interest after decree—Discretion of Court—Interference by appellate Court.**

Where an item of property, to which the mortgagor has no title, is included in a mortgage-bond, that circumstance is not sufficient to justify a Court in holding that, in fact, there is no such property covered by the deed situated within the jurisdiction of the Sub-Registrar as would give that officer power under the law to register the bond, and that the registration is invalid (a).

The allowance of interest after the date of the decree is a matter of discretion with the Court; and if the Court has allowed interest at six per cent. per annum and not at the bond rate, after the expiry of the period for payment of the money, it is not right for the Court of appeal to interfere without good and sufficient reasons. **Broja Gopal Mookherjee v. Abinash**

Registration Act (1877)—(Continued).

Chandra Biswas, 5 Ind. Cas. 127 = 14 C.W.N. 532.

BRETT and SHARF-UD-DIN, JJ.

References:—(a) 18 C. 556; 16 I.A. 12; 11 A.136, R.

(22) **S. 28—Registration at a place where a portion only of the property is situate—Validity of registration at a place where the property found not to belong to the executant situate—Fraudulent transfer—Transfer of Property Act (IV of 1882), S. 53—Consideration not a necessary test of bona fides—Creditors, deed executed in order to defraud—Intention to defraud makes whole deed inoperative.**

Under the Registration Act, it is not the duty of a registering officer to inquire into the title of the person registering the document. The fact that the deed relates to a property situate within the jurisdiction of the registering officer is enough to give him jurisdiction, and the validity of the document on the ground of registration cannot be questioned on the basis that the executant had no title to the property situate within the jurisdiction of the registering officer.

Where a transaction is found to have been effected with the object of preventing the property from being made available for the claims of the outside creditors, the transaction, even if with consideration, cannot be upheld. The deed, being merely a colourable transaction, cannot be treated as a genuine document, even if a portion of the consideration had been found to have been paid. The deed must, therefore, be set aside in its entirety (a).

In order to ascertain whether a transaction is fraudulent or not, we must look to the dominant or principal motive of the transferee. **Janki Bibi v. Bisheshwar Nath**, 7 Ind. Cas. 614.

EVANS, O.J.C. and LINDSAY, A.J.C.

References:—24 C. 825; 1 C.W.N. 665; 34 C. 999; 6 C.L.J. 410; 11 C.W.N. 889; 25 B. 202. F.; 35 C. 1051; 7 C.L.J. 586; 12 C.W.N. 761, D.

(23) **S. 33—Power of attorney—Not executed before the Sub-Registrar—Authentication—Presentation of document by the attorney—Validity of such presentation.**

A *purdanashin* lady executed a power of attorney and signed it before its presentation to the Sub-Registrar. The Sub-Registrar went to

Registration Act (1877)—(Concluded).

her house, satisfied himself that she had voluntarily executed it and authenticated the document by a certificate to the effect that he had so satisfied himself. *Held* that the requirements of S. 33, Registration Act, were carried out.

Held, further the presentation of a mortgage-deed for registration by the agent, who acted under such a power of attorney, was a valid presentation. **Chhuttan Lal v. Shiam Parshad**, 7 A.L.J. 157 = 32 A. 179 5 Ind. Cas. 766.

STANLEY, C.J., and BANERJI, J.

(23-a) S. 49. See Nos. 1a, 14, 15 and 18, *supra*.

(24) S. 77—*Suit for direction to register documents—Scope of enquiry Issues—Erection Compliance with requirements of law—Effect and binding nature of the documents.*

In a suit for a decree directing the registration of certain documents, the enquiry in Court is to be directed to two points only, namely, (1) whether the documents had been executed; and (2) whether certain requirements of the law as to presentation for registration in due time to the proper office, and in the manner generally prescribed by the Registration Act, had been complied with by the person presenting the documents for registration (a).

The defendant in such a suit may possibly have good reasons why he should not be bound by the documents, but the law does not allow him to advance such reasons in a suit under S. 77 of the Indian Registration Act. **W. W. Broucke v. Rajah Shaheb Mohan Bikram Shah**, 14 C.W.N. 12 = 5 Ind. Cas. 2C.

CHITTY, J.

References:—24 C. 668 (1897); 18 M. 255 (1894); 29 All. 284 (1907), *R*.

(25) S. 77—*Suit for registration of document—Limitation—Limitation Act (XV of 1877), S. 5, whether applicable.*

The provisions of S. 5 of the Limitation Act, 1877, control the special rule of limitation in S. 77 of the Registration Act, 1877.

Therefore, where the Court was closed on the 30th day after the making of an order of refusal to register a document by the Registrar, and a suit under S. 77 of the Registration Act was brought on the next open day: *Held*, that the suit was within time. **Ahad Baksh Molla v. Sheikh Babar Ali**, 5 Ind. Cas. 416.

CHATTERJEE, J.

References:—8 C. 910; 10. CL.R. 333, *F*.

Registration Act (1908).

(1) S. 49—Unregistered document which is compulsorily registrable—How far admissible in evidence. See MAINTENANCE, No. 3, 7 M.L.T. 278.

Regulation XV of 1793.

S. 10—*Redeemed, meaning of—Jurisdiction of Court—Suit for redemption of mortgage and profits valued at less than Rs. 1,000—Munsiff passing a decree for over a thousand rupees—Bengal, N.W.P. & Assam Civil Courts Act (XII of 1877), S. 19.*

S. 10 of Reg. XV of 1793 means that, once a mortgage debt has been satisfied by receipt of rents and profits, the mortgage is to be considered as satisfied and discharged. The word "redeemed" as used in the section was not used in the sense that the mortgage had been redeemed in the full sense of that word, that is, satisfied and possession given to the mortgagor. So long, therefore, as the property remains in the hands of the mortgagee, the mortgagor can bring a suit for redemption, even if the mortgage had been satisfied over twelve years before suit.

The pecuniary jurisdiction of a Court is, ordinarily speaking, determined by the value stated by the plaintiff in his plaint, and such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. Where a suit for redemption of a mortgage and recovery of rents and profits valued at less than a thousand rupees was brought in the Munsif's Court, *held* that the Munsif could pass a decree awarding more than a thousand rupees to the plaintiff. **Sudarshan Das Shashtri v. Ram Prasad**, 7 A.L.J. 963 = 7 Ind. Cas. 385.

STANLEY, C.J., and BANERJI, J.

References:—(a) 16 All. 286, *F*.; 13 C.W.N. 493, *Diss*.

Regulation XXV of 1802 (Madras).

(1) S. 4—*Lands held rent-free on service tenure before permanent settlement—Whether lakhiraj—Presumption—Right of Government to impose assessment thereon.*

From the fact that certain inams were granted by a zemindar before the permanent settlement as reward or emoluments for private services rendered to him, on condition that they should be held so long as the services continued to be rendered, no presumption can arise that the

Regulation XXV of 1802 (Madras)—(Concl'd.).

lands were at the permanent settlement exempt from the payment of public revenue, and the burden is on the Government to show that they were lakhiraj at the settlement, so as to enable it to impose full assessment on the lands. **Sree Rajah Venkatarangayya Appa Row Bahadur Zamindar v. Doranki Appalaraju**, 20 M.L.J. 728.

MILLER and MUNRO, JJ.

References:—(1866) W.R. 121; 9 L.A. 104 (121), 13 M.L.A. 438, *It.*

Regulation V of 1804 (Madras).

Debt due by ward—Acknowledgment of liability by agent of Court of Wards—Effect. See LIMITATION ACT (1877), No. 24, 6 Ind. Cas. 407.

Reg. XVII of 1806.

- (1) *Ss. 7 and 8—Mortgage by way of conditional sale—Foreclosure proceedings—Notice—Defects in—Demand of interest that was not due.*

A notice under Reg. XVII of 1806 is not defective merely because it was issued by one of the mortgagees, nor does demand of interest more than the amount due render the notice invalid. **Bawa Dalip Singh v. Bawa Jaimal Singh**, 131 P.L.R. 1910.

REID, C.J., and JOHNSTONE, J.

References:—3 All. 653; 3 All. 182; 84 P.R. 1882, *R.*

- (2) *S. 8, See MORTGAGE (FORECLOSURE), No. 2, 6 Ind. Cas. 657.*

Regulation VII of 1817 (Madras).

- (1) *Ss. 2, 7, 8, 13—Powers of Board of Revenue. See ACT V OF 1884 (LOCAL BOARDS), No. 1, 8 M.L.J. 341.*

Regulation II of 1818.

Resumption proceedings—Question whether lands are endowed or not—Adjudication not final nor foreign to enquiry. See DEBUTTER PROPERTY, No. 1, 6 Ind. Cas. 26.

Regulation III of 1818.

Deportation under—Libel—Mitigation of damages. See LIBEL, No. 1, 14 C.W.N. 713.

Regulation VIII of 1819 (Putni).

- (1) *S. 9—Agreement of putnidar with stranger for purchase by latter and reconveyance to former—Legality—Contract Act (IX of 1872), S. 23.*

Regulation VIII of 1819 (Putni)—(Concluded).

A contract entered into by a putnidar with a stranger, stipulating that the latter would purchase the putni which had been advertised for sale under Reg. VIII of 1819, and reconvey it to the putnidar receiving the amount of the purchase-money with interest and a further sum in addition from him, is invalid under the provisions of S. 23 of the Contract Act, as being in contravention of the provisions of S. 9 of the Putni Regulation. **Mohan Lal Babu v. Udai Narain Bhaduri**, 14 C.W.N. 1031.

CHATTERJEE and RICHARDSON, JJ.

- (2) *S. 17 cl. (3)—Bengal Tenancy Act (VIII of 1855), S. 65—Conflict between—Rent—First charge.*

S. 65 of the Bengal Tenancy Act cannot be held to give to the landlord the first charge on the sale proceeds of a putni mahal, for arrears of rent due beyond those of the current year in which the sale took place or of the year which had expired, if the sale took place at the commencement of the following year, inasmuch as, under the provisions of S. 17 of Reg. VIII of 1819, such antecedent balances are expressly declared to be recoverable only as personal debts of the landlord (a).

There is a conflict between S. 65 of the Bengal Tenancy Act and S. 17, cl. (3) of the Reg. VIII of 1819 (b).

Where the arrears of rent claimed are for balances due for periods prior to the current year, for which the arrears are due when the sale is held in the middle of the year, or prior to the year preceding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the Tenancy Law, and in such a case, the provisions of S. 65 of the Bengal Tenancy Act would not have any application. **Jogonath v. Syed Mohi-ud-din Mirza**, 6 Ind. Cas. 371.

BRETT and SHARF-UD-DIN, JJ.

References:—(a) 6 C.W.N. 794, distinguished. (b) 6 C.W.N. 794, dissented from.

Regulation VII of 1822.

- (1) *Wajib-ul-arz—Cess—Government sanction*

A wajib-ul-arz prepared under the authority of Reg. VII of 1822, contained a provision as to Chaukidari cess:

Held, that, unless it was shown that it was specially sanctioned by the Government, it was

Regulation VII of 1882—(Concluded).

an illegal and unauthorised cess. **Mahtab Gir v. Ramzanl**, 8 Ind. Cas. 689.

KNOX, J.

(2) See **PRE-EMPTION**, No. 31, 7 A.L.J. 1040.

Reg. XI of 1825.

S. 4—Possession, suit for—Accretion—Holding of tenant.

The rule that, when it is once admitted that the plaintiff was the landlord, then *prima facie* all the land belonged to him and he was entitled to possession of it till the contrary could be proved by those who claimed some title to the land, is not applicable, when, on the plaintiff landlord's own showing, the state of things was such that the land would be presumed to fall under S. 4 of Reg. XI of 1825 and to be an accretion of the *jote* of the defendant. **Chowdhury Mahadeo Pershad v. Mathura Tanti**, 11 C.L.J. 148 -5 Ind. Cas. 723.

HARRINGTON and CHATTERJEE, JJ.

Regulation II of 1827.

(1) *S. 11—Caste question—Suit for declaration to be called the Ayya of Hiremath—Use of name—Allegation of damages.*

The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and he asked for a perpetual injunction to restrain the defendants from using the name "Ayya of Hiremath." The first Court held that the suit was barred by S. 11 of Reg. II of 1827. On appeal, the lower appellate Court held that the plaintiff was not entitled to the office claimed by him. On second appeal, the plaintiff contended that his case fell within the principle that the unauthorised use of the name of one person by another gave a cause of action to the former where the use was calculated to deceive and inflict pecuniary loss.

Held, (i) That the question for determination was whether any damages had been incurred or not; but the plaint did not afford any clear indication that what was complained of was the user of a name by the defendant in a manner calculated to deceive any one.

(2) That all that the plaintiff complained of was that the defendant had assumed a name to which the plaintiff alone had the exclusive right; and that that assumption would enable,

Regulation VII of 1827—(Concluded).

and had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriated to himself fees, which would have gone into his (plaintiff's) pockets. It was, therefore, a claim to a caste office or to enjoy certain privileges and honours at the hands of the members of a caste in virtue of that office. That was a caste question, not cognizable by Civil Court (a).

The law does not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The mere assumption of a name which is the 'patronymic of a family, by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which law affords no redress (b). **Gadigea Adivaya Hiremath v. Basaya Mallaya Rapati**, 12 Bom. L.R. 358 = 6 Ind. Cas. 519 = 34 B. 455.

CHANDAVARKAR and KNIGHT, JJ.

References:—(a) 6 Bom. 725, *applied*. (b) (1869) L.R. 2 P.C. 430, *F*.

Reg. XVI of 1827.

Ss. 19, 20—Acquisition of larger interest by the mortgagor after the date of the mortgage—Rights of mortgagee. See **MORTGAGE (GENERAL)**, No. 7, 12 Bom. L.R. 143.

Reg. II of 1877 (Ajmere Land and Revenue).

(1) *S. 41—Usufructuary mortgage—Proprietary rights, losing or parting with—Ex-proprietary tenant.*

Per Richards, J.—A usufructuary mortgagor, by placing the usufructuary mortgagee in possession temporarily, loses his proprietary rights within the meaning of S. 41 of Reg. II of 1877 of the Ajmere Code. The mortgagor, who before the mortgage was and since the mortgage remains, in cultivation of lands, is an occupancy tenant in respect to those lands.

Per Karamat Husain, J.—An owner of a holding, who makes a usufructuary mortgage of his holding, does not lose or part with his proprietary rights, either temporarily or permanently, within the meaning of Reg. II of 1877, of the Ajmere Code, and does not become an expropriary tenant of his khudkasht in that land.

Held, further, that, where a mortgagor in the mortgage-deed promises to make over possession of the mortgaged property, which is his

Reg. II of 1877 (Ajmere Land and Revenue)
—(Concluded).

khudkashī to the mortgagee, S. 41 of the Ajmere Land and Revenue Regulations does not apply. Rules of interpretation of statutes discussed. **Nemi Chand v. Ganesh**, 7 A.L.J. 370 = 5 Ind. Cas. 503.

RICHARDS and KARAMAT HUSAIN, JJ.

Regulation III of 1879 (Assam Local Rates).

- (1) *S. 317—Rates payable by tenant, amount of contract by tenant to pay in excess of maximum—Realisation in excess, whether gives landlord any right.*

The maximum rate at present imposed under S. 3 of the Assam Local Rates Regulation is one anna in the Rupee. And although a contract between the landlord and tenant for the latter to pay the full amount of local rate may be justified, one to pay anything in excess of that maximum is not legal.

A landlord cannot get a decree for rates at more than one anna in the Rupee, even if for a long time he had been realising more than that. **Ugendra Nath Sen v. Kameswar Kolita**, 5 Ind. Cas. 80.

CASPERSEN and DOSS, JJ.

Regulation VIII of 1882.

- (1) *Settlement from Government—Rate of rent recorded—Letting lands to tenants—Rate of rent.*

Where a person takes settlement of land from Government at a certain rate which is recorded under Regulation VIII of 1882, he is not bound by such rate but may let the land to tenants at any other rate that may be agreed upon. **Zemir Mandal v. Tarini Charan Singh**, 11 C. L.J. 60 = 5 Ind. Cas. 296.

O'KINEALY and GUPTA, JJ.

Regulation XI of 1882 (Bengal Government Indemnity).

- (1) *S. 34—Representation—Entire estate in Collector's rent-roll. See ACT XI OF 1859 (REVENUE SALE LAW), No. 5, 12 C.L.J. 407.*

Regulation I of 1886 (Assam Land Revenue).

- (1) *S. 6, Rule 80 (i) of the Government Rules—Settlement of land, first applicant if entitled to—Jurisdiction of Civil Court.*

Rule 80, cl. (i) of the rules framed under Regulation I of 1886 lays down a principle for the guidance of settlement officers, and does not confer a right on the first applicant to a settlement. It directs that, in cases where settlement is not made with the first applicant, the

Regulation I of 1886 (Assam Land Revenue)
—(Concluded).

reasons therefor should be stated in writing. It does not follow from this that if the reasons are not recorded, the first applicant is entitled to a settlement (a).

Under S. 6 (a) of the Regulation, no right to settlement arises merely by reason of the fact that the Plaintiff was the first applicant. **Ananda Kishore Sen v. Secretary of State for India in Council**, 14 C.W.N. 990 = 7 Ind. Cas. 90.

WOODROFFE and RICHARDSON, JJ.

References:—(a) 17 C. 819 (1890), and 24 C. 239 (1896), D.

Regulation VII of 1894 (Mysore Land Acquisition).

- (1) *S. 54—Appeal from award—Jurisdiction.*

An appeal from an award made under the Regulation, lies to the Chief Court, even though the award may have been made by a Subordinate Judge (a). **K. Srinivasaiyengar v. Puttamma**, 15 M.C.C.R. 252.

STANLEY ISMAY, C.J. and KRISHNA RAO, J.

Reference:—(a) (1896) 23 Cal. 526, F.

Regulation VII of 1901 (Mysore Succession Certificate).

- (1) *S. 16—Joint certificate—Right of the holder of the certificate.*

It is not open to a Court to grant a joint succession certificate to two or more persons, its duty being to determine, on a summary enquiry, which of the applicants has *prima facie* the best title (a).

Though, under S. 16 of Reg. VII of 1901, the debtor is precluded from questioning the right of the holder of the certificate to collect a subsisting debt, there is no objection to any other person contesting such right. **Saheb Peera v. D. Ninge Gowda**, 15 M.C.C.R. 283.

ISMAY, C.J. and CHANDRASEKHARA AYYAR, OFFG, J.

References:—(a) 16 A. 21; 15 B. 684, F.

Re-hearing.

- (1)—of an application—Jurisdiction of Courts. See CIV. PRO. CODE (1909), No. 112, 37 C. 259.

Release.

- (1) Release, conditional upon future event—Validity—Agreeing to release, whether a mere contract. See CONTRACT ACT, No. 32, 7 M.L. T. 392.

Release—(Concluded).

(2)—of one wrongdoer—Effect—Applicability of doctrine—Splitting up claims—Joint decree, if can be passed. See *MESNE PROFITS*, No. 1, 11 C.L.J. 503.

Reliefs.

When, are cumulative and not alternative. See *GUARDIAN AND MINOR*, No. 7, 86 P.W.R. 1910.

Religious Assembly.

(1) *High priest—Removal from office—Election—Voters, qualifications of—Meeting, notice of—Quorum—Majority, how determined.*

To validate the removal of a high priest from his office by a majority of a religious brotherhood, it is necessary, *first*, to ascertain the voters and their qualifications, *secondly*, to determine whether steps have been taken to enable the brotherhood to express their decision and, *thirdly*, to determine whether a majority have expressed their wish in favour of removal.

The qualifications of voters may depend upon membership of the brotherhood, age, sex, and residence. A question may also arise whether a member or a family is the unit for this purpose.

In order that the decision of members assembled at a meeting may be operative, it must have been convened after sufficient notice and due proclamation.

The decision of the majority must be determined by reference to votes given at the meeting and cannot be made to depend upon views indicated subsequently in the course of a suit brought to contest the validity of the removal.

Whether a quorum is necessary to legalise the decision of the meeting must depend upon the custom of the brotherhood, in the absence of statutory provision or express direction in that behalf by the founder. *Juro Ram Das v. Gobind Deb Misra*, 12 C.L.J. 497.

MOOKERJEE and DOSS, JJ.

Religious endowment.

(1) *Trust property—Shebait failing to nominate a successor—Who should manage—Adverse possession—Pleadings and proof, variance between—Test—Arrangement authorising joint management, if operative.*

The devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created or the usage

Religious endowment—(Continued).

of the particular institution where no express trust deed exists (a).

Where the worship of an idol is founded, the office of *shebait* is vested, in the heirs of the founders in default of evidence to show that he has disposed of it, otherwise (b).

Hence where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character (c).

The right of a person lawfully entitled to the office of a *shebait* may be extinguished by adverse possession (d).

A plaintiff is not entitled to succeed on a case not to be found in the pleadings nor involved in or consistent with the case thereby made (e).

On the other hand, even if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may afford him the relief to which he has a right under the prayer for general relief, provided it is such a relief as is conformable to the case made in the plaint (f).

The test in each case is, whether the relief sought may be granted upon the facts stated in the plaint and established by the evidence and whether the variance, if any, between the pleading and proof will take the defendant unfairly by surprise.

Quere.—Whether any arrangement made by a *shebait* authorising two persons to hold the office jointly is operative in law. *Sital Das Babaji v. Protap Chandra Sarma*, 11 C.L.J. 2=3 Ind. Cas. 408.

MOOKERJEE and VINCENT, JJ.

References:—(a) 11 M.L.C. 405 (128); 8 W. R. (P.C.) 25; 1 I.A. 209; 10 I.A. 32; 9 C. 766; 11 I.A. 94 (105); 10 C. 901, R. (b) 17 C. 3; 16 I.A. 137, R. (c) 5 B.L.R. 181; 13 W.R. 396; 17 C. 3; 16 I.A. 137; 12 C. 375; 25 C. 354; 18 All. 227; 28 All. 689; 29 All. 663; 15 M. 44; 14 M. 1, R. (d) 27 M. 192; 29 M. 283; L.R. 33 I.A. 139; 6 C.L.J. C21; 14 M. 153; 10 I.A. 90; 6 All. 1; 17 C. 3; 16 I.A. 137, R. (e) 11 M. I.A. 7 at 20; 11 M.L.A. 469 (473); 9 W.R. (P.C.) 9; 12 M.I.A. 470 (475); 11 W.R. P.C. 27; 2 B.L.R. (P.C.) 64, R. (f) 6 B.L.R. 273; 9 B.L.R. 11 (29), R.

Religious endowment—(Continued).

- (2) *Suit by worshippers for declaring an alienation of temple-property invalid—Nature of decree—Trustees can be placed in possession in the same suit, and need not be referred to a separate suit.*

Suit by worshippers in a temple against the trustees thereof and their alienee, to declare an alienation of temple property invalid.

Held that, where the alienation is declared invalid, possession of the property may be awarded to such of the defendants as are trustees. The suit being one to enforce the claim of the temple, against the person who holds temple-property without title, there is no reason why the trustees should be referred to a separate suit to obtain possession on its behalf, when possession may be given to them in this suit.

No injunction, as against the trustees, against the alienation, is necessary, as they will hold possession, not on their own behalf, but only as trustees. **A. Subramania Iyer v. Nagarathna Naicker**, 20 M.L.J. 151 : 8 M.L.T. 114—5 Ind. Cas. 901.

BENSON, O.C.J. and SANKARAN NAIR, J.

- (3) *Temple-lands—Power of trustee to grant permanent lease—Occupancy rights.*

The suit lands were ryotwari lands with patta in the name of the temple. The defendants set up occupancy rights, relying upon certain documents in which such words as "permanent," "you and your heirs" were used.

Held that those terms did not confer a permanent right, having regard to the history of the Revenue Settlement of the district.

Held also that it is not competent to the trustee of a temple, in the absence of special circumstances, to grant a permanent lease of temple property. **Muthuvelu Pillai v. Aiyasami Naik**, 7 M.L.T. 386—6 Ind. Cas. 7.

BENSON and KRISHNASWAMI IYER, JJ.

Reference :—27 M. 291 (P.C.), *Appl.*

- (4) *Hindu Law—Religious endowment—Succession to the Gadi of a mahant—Custom—Evidence—Burden of proof—Plaintiff should succeed on the strength of his own title—Pleadings—Practice.*

In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be

Religious endowment—(Continued).

found in custom and practice which must be proved by evidence. The plaintiff, in order to succeed, must prove the custom of the math entitling him to recover the office and the property appertaining to it (a).

The plaintiff succeeds upon the strength of his own title, rather than upon the weakness of the defendant. **Gobind Parpan Ramanuj Das v. Balu Saran**, 6 Ind. Cas. 709.

STANLEY, C.J. and GRIFFIN, J.

References :—(1) 9 A. 1 ; 13 I.A. 100, F.

- (5) *Religious endowment—Temple property—Permanent lease of, at unvarying rent—Invalidity—Power to alienate corpus of temple property—Necessity justifying such alienation—Instances—Powers of shebait, extent of.*

An alienation of temple property on a permanent lease at an unvarying rent or a fixed premium is not sustainable (a).

The fact that the property leased is a building site does not appear to be any justification for leasing the property at an unvarying rent.

There is no rule of Hindu law which absolutely prohibits the alienation of a corpus of the temple property, where there are sufficient circumstances of necessity requiring it.

That such alienations ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple may well be accepted as the canon of the judgment in regard to the validity of particular alienations (b).

The powers of the shebait of an idol are those of a manager of an infant heir.

Necessity which may be sufficient for the charging of the rents and profits is not sufficient for the alienation of the corpus.

The physical and moral requirements of a human infant are different from the requirements of an idol or an object of public worship suited to the faith and rituals and religious traditions of the community for whose spiritual ministration it has been set up. The requirements of daily worship, of buildings suitable for the carrying on of such worship, and even of the essential festivals intended to cultivate the religious emotions of the public for whose benefit the temple is dedicated, may afford grounds for the alienation of part of the corpus of the property of the temple. **Breemuth**

Religious endowment—(Concluded).

Devasikamani Pandara Sannadhi alias Nataraja Deskar v. Palaniappa Chetty, 20 M.L.J. 969.

WALLIS and KRISHNASWAMI IYER, JJ.

References :—(a) 13 M.I.A. 270; 27 M. 291; 36 C. 1003, *F.*; 19 M.L.J. 208; 28 M. 391, *R.* (b) 27 M. 435; 27 M. 465, *Doubted*; 36 C. 1003, (**P.C.**); 4 I.A. 52, *Expl.*; 27 M. 466; 6 B. 346; 12 B. 247; 2 I.A. 345; 6 M.I. A. 393, *It.*

(6) Succession to the management of a, as *shebait*—Usage of the institution. See **HINDU LAW (SUCCESSION)**, No. 7, 7 A.L.J. 430.

Religious Endowments Act.

See **ACT XX OF 1863**.

Religious office.

(1) *Religious office—Trusteeship—Private trust—Relinquishment in favour of person next entitled—Absence of binding rule of succession—Effect.*

Where there is no provision in the partition deed nor any rule of succession binding on the family, *held*, that the renunciation of a non-hereditary religious office, *e.g.*, the trusteeship of a private temple, which vested in the senior member of the family by virtue of a partition-deed, in favour of his next senior, is invalid: **Sennayan Chetty v. Sinnappan Servai**, 20 M.L.J. 654 - 8 M.L.T. 325.

MUNRO and SANKARAN NAIR, JJ.

(2) Powers of Manager of religious institution—Evidence and burden of proof of necessity for alienation. See **ALIENATION**, No. 1, 13 O.C. 79.

Relinquishment.

(1)—of portion of claim—Effect. See **PLAINT**, No. 1, 8 M.L.T. 436.

Remand.

(1) *Remand by a District Judge—Findings recorded—Appeal against decision after remand—Successor in office of District Judge reversing facts found by predecessor Legality*—S. 562, C.P.C., 1882.

Where a District Judge found against the existence of an oral will and in favour of an absolute division of properties between co-widows, and remanded the case with instructions to the Munsif to try the question as to the date of the partition, and where, in an appeal preferred against the decree passed in favour of the plaintiff by the Munsif after a trial on remand, the successor in office of the District Judge reversed the findings of his predecessor on the question of the existence of the

Remand—(Continued).

oral will and that of absolute partition between the widows, *held*, that the findings of the predecessor in the office of the District Judge were binding on his successor, and that the latter was not competent to reverse those findings. **Lachumammal v. Gengammal**, 8 M.L. T. 233.

BENSON and KRISHNASWAMI AIYAR, JJ.

(2) *Finding returned by lower appellate Court—Questions of fact—High Court's power to consider questions of fact—Remand.*

Held that, where there has been a remand from the High Court to the lower appellate Court, the High Court, in considering the finding returned by the lower appellate Court, has no power to go into questions of fact. **Ram Dulare v. Misri Lal**, 13 O.C. 352.

LINDSAY, J.

Reference :—24 Cal. 98, *It.*

(2-a) Remand, order of—Appeal against. See **CIV. PRO. CODE (1908)**, No. 160-h, 101 P. R. 1910.

(3) Judgment in appeal not in conformity with S. 574, C.P.C.—Order of—in second appeal. See **CIV. PRO. CODE (1882)**, No. 218, 7 M. L.T. 120.

(4) Appeal—Order of remand directing addition of parties—Legality. See **CIV. PRO. CODE (1882)**, No. 216, 37 C. 171.

(5) Irregular remand. Revision. See **CIV. PRO. CODE (1908)**, No. 158, 17 P.L.R. 1910.

(6) Validity of an order of—When to be impeached after the passing of final decree. See **PRE-EMPTON**, No. 17, 5 Ind. Cas. 667.

(7) Order of, in a case in which no appeal lies—Effect—Finality of remand order passed without jurisdiction. See **CIV. PRO. CODE (1882)**, No. 65, 6 Ind. Cas. 464.

(8)—by High Court to District Judge—Remand by District Judge to Munsif—Jurisdiction. See **CIV. PRO. CODE (1908)**, No. 157, 6 Ind. Cas. 400.

(9) Illegal remand—Effect. See **CIV. PRO. CODE (MYSORE)**, No. 27, 15 M.C.C.R. 54.

(10)—by appellate Court when suit not disposed on preliminary point—Inherent power of Court. See **PARTIES**, No. 3, 7 Ind. Cas. 75.

(11) Suit for winding up of partnership—Order for taking accounts—High Court's order on, for fresh taking of accounts—Effect. See **CIV. PRO. CODE (1908)**, No. 56, 7 Ind. Cas. 622.

Remand—(Concluded).

(12)—by District Judge—Appeal after remand heard by Sub-judge—Sub-judge cannot go behind remand order. See **LANDLORD AND TENANT**, No. 47, 7 Ind. Cas. 846.

(13) Fixation of limit of time for cross examination—Exclusion of evidence—Ground for. See **CIV. PRO. CODE** (1908), No. 70-b, 8 Ind. Cas. 418.

(14) Appeal against order of, whether lies. See **MESNE PROFITS**, No. 4, 8 Ind. Cas. 162.

Remission.

Lease deed providing for, in case of excess or failure of rains, whether implies remission during "middling" season. See **LEASE**, No. 1, 7 M.L.T. 39.

Rent.

(1) Party, addition of—Rent suit—Suit against some of the tenants—Application by rest to be made parties—Dispossession—Rent decree against some of the tenants, whether causes dispossession of other joint tenants.

*After the death of the original tenant, the landlord obtained a rent decree against some only of the deceased tenant's representatives. A second rent suit was brought against the same persons, in which the petitioners applied to be added as parties defendants, on the allegation that they were co-sharers of the tenants defendants and were in possession of the holding in that character :

Held, that the Court ought to have determined summarily whether the petitioners were representatives of the original tenant and were in joint possession of the holding, and that, if it was proved that they were interested in the tenancy, they should have been added as defendants in order to avoid multiplicity of litigation :

Held, also, that the petitioners, who allege that they are in actual occupation of the lands of the tenancy, cannot be said to have been dispossessed in the eye of the law, simply because the landlord chose to obtain a decree for rent against some only of the representatives of the original tenant. **Basli Bibi v. Hanif-ud-din Mandal**, 6 Ind. Cas. 570 = 12 C.L.J. 267.

MOOKERJEE and CARNDUFF, JJ.

(2) *Kabuliyat*, construction of—Terms clear as to payment of rent partly in kind and partly in money—Fixed rent—Later documents not between the same parties—Evidentiary value.

Rent—(Continued).

Where the terms of a *Kabuliyat* clearly point to the fact that the rent is to be as to part in money and as to part in kind, and this is further emphasized by express provisions relating to the delivery of paddy in a particular month, it cannot be held that fixed rent was in the contemplation of the parties.

No canon of construction would allow the Court to construe an earlier document by reference to a later document which is not between the same parties. **Baneswar Mukherji v. Umesh Chandra Chakravarthi**, 97 C. 626.

JENKINS, C.J. and DOSS, J.

(3) *Landlord and tenant*—*Kabuliyat*, construction of—Rent, partly in money and partly in kind—Grant in perpetuity—Oral evidence, not admissible to vary terms of *kabuliyat*—*Evidence Act* (1 of 1872), S. 92.

A *quabulyat* was granted in perpetuity, the rent was made payable partly in kind and partly in cash, and the parties expressly provided that, if the rent payable in kind was not duly delivered, the tenant would be liable for a specified fixed sum :

Held, that oral evidence was not admissible to prove that the tenant had agreed to pay the price of the paddy at the current market rate, and not at the rate specified in the *kabuliyat*, upon failure to deliver it duly (a). **Afar alias Godai Moral v. Surja Kumar Ghose**, 7 Ind. Cas. 812.

MOOKERJEE and SHARF-UD-DIN, JJ.

Reference :—(a) 2 Ind. Cas. 160 ; 6 Ind. Cas. 577, F. ; 3 C.W.N. 151 ; 14 C.W.N. xcii, D.

(4) *Landlord and tenant*—Claim for *varum rent*—Absence of contract for rent—*Madras Rent Recovery Act* (Mad. Act VIII of 1865), S. 11 (2).

In the absence of a contract for rent, express or implied, a landlord is entitled to demand *varum* from his tenant. To such a case cl. 2 of S. 11 of the *Madras Rent Recovery Act* has no application. **Suppan Servai v. Dorasingam**, 8 Ind. Cas. 156.

MUNRO and SANKARAN NAIR JJ.

(5 & 6) *Kabuliyat*—Construction—Remission of rent on account of *Mondoloi*—*Mondoloi's services dispensed with*—Rent of holding, what is to be considered as.

The defendant executed a *kabuliyat* to the plaintiff in 1865 in the following terms :—"The rent, at the rate of 5 annas a *digla*, has been settled at Rs. 2,434 ; on the prayer of the

Rent—(Continued).

tenant and in consideration of his services as *mondol*, a sum of Rs. 811 is remitted and the tenant admits a rent of Rs. 1,623 and agrees to pay the same year by year in accordance with certain instalments." The plaintiff in 1909 removed the defendant from his position as *mondol* and brought this suit for rent at the higher amount. It appeared that, in certain *qgrars* executed by the defendant, the rent actually fixed was declared to be the smaller amount, and in the rent receipts granted the rent payable as the *jama* was stated at the lower figure, and that, when on one occasion an attempt was made to state the *jama* at the higher figure and below this the remission, the tenant objected and the attempt was abandoned :

Held, that, on a true construction of the *Kabuliyat*, the lesser sum agreed to be paid was the rent of the holding, and that the remission granted was not contingent upon, or held in abeyance as payment for, services to be rendered, but represented a permanent and irrevocable abatement. **Rahim Baksh v. Sasi Kanta**, 8 Ind. Cas. 18.

MOOKERJEE and TEUNON, JJ.

(7) Suit for—Purchaser from tenant has no right to deposit. See LANDLORD AND TENANT, No. 22, 6 Ind. Cas. 357.

(8) Right to suspension of, on account of scarcity. See LEASE, No. 17, 13 O.C. 146.

(9) Prevalence of money rent for a number of years—Presumption of usage. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 4, 33 M. 177.

(10) Decision in rent suit—*Ex parte* decree—*Res judicata*. See RES JUDICATA, No. 14; 6 Ind. Cas. 960.

(11) What is. See ACT IX OF 1887 (PROV. S. C. COURTS), No. 9, 14 C.W.N. 994.

(12) Suit to recover "Kandayam" or rent newly levied. See JURISDICTION OF SMALL CAUSE COURT, No. 2, 15 M.C.C.R. 150.

(13) Right to realise rents and profits due before confirmation of sale. See CIV. PRO. CODE (1882), No. 161, 7 Ind. Cas. 65.

(14) Interest over arrears of rent payable in kind—Right to recover. See MULGENI LEASE, No. 1, 12 Bom. L.R. 831.

(15) Suit to recover money deposited as security for payment of rent—Limitation. See LIMITATION ACT (1909), No. 21, 13 O.C. 286.

Rent—(Concluded).

(16) Transfer of arrears of—Interest whether passes to transferee. See STAMP ACT, No. 6, 7 Ind. Cas. 582.

(17) Suit for—Rent in kind or cash—Construction. See LEASE, Nos. 24, 23 and 22, 12 C.L.J. 589, 593 and 595.

(18) Acceptance of reduced rent—Effect—when it will operate as binding contract—Waiver. See EVIDENCE ACT, No. 22, 12 C.L.J. 439.

(19) Contract for fixed money rent—Enhancement of—Sanction of Collector. See LANDLORD AND TENANT, No. 43, 8 M.L.T. 436.

(20) See KABULIAT.

(21) See LANDLORD AND TENANT.

(22) Partial eviction—Suspension of—Suit for. See LANDLORD AND TENANT, No. 20, 11 C.L.J. 591.

(23) Limitation—Pendency of rent suit before Collector and Civil Courts—When arrears of, become due. See LANDLORD AND TENANT, No. 22, 7 M.L.T. 429.

(24) Dispossession by paramount title—Abatement of. See CIV. PRO. CODE (1882), No. 214, 6 Ind. Cas. 206.

(25) Suit for Jarib rent—Jurisdiction. See SMALL CAUSE COURT, No. 1, 7 M.L.T. 359.

(26) Rent suit—Subsequent title suit. See RES JUDICATA, No. 23-a, 8 Ind. Cas. 715.

(27) Suit for possession—Subsequent suit for—Not barred. See CIV. PRO. CODE (1908), No. 101-a, 8 Ind. Cas. 445.

Rent Act.

See ACT XXII OF 1886 (OULAI).

Rent Recovery Act.

(1) See ACT X OF 1859 (BENGAL).

(2) See ACT VIII OF 1865 (MADRAS).

Repeal.

—of one statute by another by implication—What amounts to. See LEASE, No. 15, 6 Ind. Cas. 685.

Representation.

Estate of deceased—Decree when estate not properly represented—Effect. See DECREE, No. 7, 6 Ind. Cas. 627.

Res judicata.

(1) *Applicability of the rule of—Competence of the Court of first instance regulates its application—Commencement of litigation not material for operation of rule.*

Res judicata—(Continued).

The rule of *res judicata*, so far as it relates to the retrial of an issue, refers not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue (d).

It is the competency of the Court of first instance to entertain the former as well as the subsequent suit that regulates the application of the rule of *res judicata*. Where therefore, a lessor brought a suit against his lessee for recovery of rent in respect of a period during which the lessee was out of possession, and the lessee subsequently brought a suit for compensation in respect of the same period, the suit of the lessee being decreed, held that the decree in the latter suit, having become final, operated as *res judicata*, irrespective of the facts that the suit was subsequent in date and that the appeal in the former lay to the Civil Court and in the latter to the Commissioner. **Beni Madho v. Indar Sahai**, 6 A.L.J. 991—3 Ind. Cas. 707—32 A. 67.

BANERJI and TUDBALL, J.J.

Reference :—11 A. 148, F.

(2) *Res judicata—Plea not raised in lower Court—Whether can be raised in Court of revision.*

The fact that the plaintiff did not set up the plea of *res judicata* in the lower Court does not preclude him from raising it in the Court of Revision. **Srirajah Velugoti Govinda Krishna Yachendraluvaru Bahadur, Zemindar Garu of Yenkatagiri v. Yadlapudi Chinna Yenkananna**, 7 M. L. T. 175—5 Ind. Cas. 925.

WHITE, C.J.

Reference :—4 A. 69, F.

(3) *Civ. Pro. Code (Act V of 1908), S. 11—Res judicata—Previous suit for a share as heir—Subsequent suit for maintenance—Plea of res judicata whether can be taken in second appeal—Pleading—Practice.*

In a previous suit, the plaintiff claimed her share under the Muhammadan Law and repudiated a will, under which the defendants held exclusive possession. In a subsequent suit she claimed maintenance under the will :

Held, that the subsequent suit was not barred by *res judicata* (a).

The plea of *res judicata* can be allowed in second appeal although it was not taken in the

Res judicata—(Continued).

first appellate Court (b). **Abdul Aziz v. Musammat Azlman**, 5 Ind. Cas. 294.

PIGGOT, J.

References :—(a) 21 C. 157; 20 I.A. 155, F.; 25 B. 189; 11 M.I.A. 50; 10 W.R. 1 (P.C.), D.; 21 A. 446; 4 A. 69, F.

(4) *Res Judicata—Material irregularity—Sec. 11 of Act V of 1908—Sec. 70 (a) and (b) of Act XVIII of 1884 as amended by Act XXV of 1899.*

Held, that, throwing out a case upon a mistaken view of the rule of *res judicata* is even a good ground of revision, under S. 70 (a) of Act XVIII of 1884 as amended by Act XXV of 1899.

Held, also, that an issue is not *res judicata*, if (a) it has not been finally heard and decided; (b) the parties were not the same—co-defendants do not fall within the category of “same parties,” and (c) it was immaterial for the decision of the previous case. **Raman v. Charan Singh**, 42 P.W.R. 1910.

RATTIGAN, J.

(5) *Civ. Pro. Code (Act V of 1908), S. 11—Res judicata, basis of—Identity of title, not identity of subject-matter.*

It is the identity of title, and not the identity of subject-matter of the suit, on which the doctrine of *res judicata* is based (a).

The lands in dispute in the previous and subsequent suits were parts of the same area. In the previous suit, the plaintiff had claimed the ownership of the part then in dispute, on the basis of a sale certificate in his favour. The Court gave him a decree for possession of that part, holding that he was the owner in possession of the whole area comprised in the sale certificate. Without such a finding, a decree for possession of the then disputed part could not have been given to the plaintiff.

Held, in the subsequent suit relating to the remaining portion of the same area, that, as the decision as to the ownership of the entire area covered by the sale certificate was material and essential in the previous suit, that decision operated as *res judicata* as regards the plaintiff's title to the part of the area in dispute in the subsequent suit. **Pandit Ram Krishna v. Shiam Chand**, 5 Ind. Cas. 278.

KARAMAT HUSAIN, J.

References :—(a) 24 A. 112, F.; 17 A. 174, D.

(6) *Determination of validity of assignment after notice to parties bars fresh enquiry.*

Res judicata—(Continued).

The question as to whether an assignment ought to be recognised or not was previously determined after notice duly served upon the appellant, who did not choose to appear in that proceeding where he could have taken the objection.

Held that the question was res judicata.
Appasami Iyengar v. Sundaram Iyengar, 7 M.L.T. 224 - 6 Ind. Cas. 286.

BENSON and ABDUR RAHIM, JJ.

(7) *Res judicata—Judgment—Findings essential to sustain judgment—Re-agitating to defeat direct object—Will, construction, suit for—Representative of trustee, if necessary party—Party having no present interest praying for construction of Will—Party, if bound Co-defendants—Adjudication defining rights—Erroneous decision on question of law, if operates as res judicata—Trustee, dealing with trust property for his benefit—Trustee, who to be appointed—Costs.*

An estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or ground-work; in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment.

The rule against re-agitating matters adjudicated is subject to the restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to his immediate and direct object be, those facts are not all necessarily established conclusively between the parties, and, that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object (a).

In a suit for construction of a will, the representatives of the original trustees appointed thereby are necessary parties (b).

Where a party did not ask the Court to be dismissed from the suit on the ground that, as he disclaimed all present interest in the estate, he was not a necessary party, but raised the question of construction of the will in that suit, he is bound by the decree (c).

Where an adjudication between defendants, who had a conflict of interest between them,

Res judicata—(Continued).

was necessary to give the appropriate relief to the plaintiff and there was such adjudication, the adjudication which defined the real rights of the defendants *inter se* will be *res judicata* between the defendants, as well as between the plaintiff and the defendants (d).

So far as an issue of mixed law and fact is concerned, it stands on the same footing as an issue of fact, and decision thereon operates as *res judicata*. Cases of construction of Wills fall within this class (e).

As regards applicability to decisions erroneous in law, the rule of *res judicata* applies where the parties seek to litigate again the same cause of action as had been decided between them in a prior suit; but where the dispute relates to matters which had already been in controversy and formed the subsidiary consideration in the previous suit, although the causes of action in the two suits may be distinct, the estoppel is to be limited to matters distinctly put in issue and determined in the prior action, and it should further be restricted to questions of fact or mixed questions of fact and law.

Cases on the subject reviewed.

The same words in different parts of a will should be given the same meaning, unless there is some clear indication that the testator intended to use the word a second time in a restricted sense (f).

Although the cardinal rule in the construction of wills is to give effect to the intention of the testator, the duty of the Court is to discover, not what the testator meant, but what is the meaning of his words (g).

Those who claim under an instrument are bound by the testator's expressed intention.

A trustee, who deals with the trust property for his own personal advantage, renders himself liable to be removed.

A man should not be appointed a trustee who is likely to misappropriate trust money, but poverty alone is not a sufficient ground for exclusion from the office of trustee.

Where difficulty has been created and litigation has been in a manner rendered necessary by the act of the testator, for instance, by reason of the ambiguity or inconsistency in the provisions of his will, the Court orders costs of all parties to come out of the estate (h).

Res judicata—(Continued).

Aghore Nath Mukerjee v. Srimati Kamini Debi, 11 C.L.J. 461 = 6 Ind. Cas. 551.

MOOKERJEE and TEUNON, JJ.

References:—(a) 57 B.R. 461 (465); F. (b) 3 C.L.J. 224, R. (c) L.R. 17 Eq. 252 (267), R. (d) 5 C.L.J. 611; 36 C. 193; 5 C.L.J. 653, F. (e) 28 C. 318; 29 M. 225, R. (f) (1903) App. Cas. 379 (384), R. (g) 7 H.L.C. 68 (114); 11 E.R. 28, (1892) App. Cas. 342 (344), R. (h) 3 C.L.J. 224, R.

- (8) *Res judicata—Mahomedan Law—Effect of wife's conversion to Christianity—Her reconversion to Muhammadanism—Execution of decree—Meaning of dissolution of marriage—Civil Procedure Code, 1908, S. 11.*

Where execution of a decree for custody of wife was refused on the ground that her conversion to Christianity dissolved the marriage, and the decree-holder again applied for execution, contending that his marital rights were revived by her re-conversion to Muhammadanism, and that the term used in the original text of Mahomedan Law in case of apostasy means suspension or separation and not dissolution:

Held, that the decision in the previous litigation bars the subsequent application for execution and the new contention. In applying the rule of *res judicata*, words of the former judgment are to be used in their ordinary sense. Such words as "the marriage is dissolved" can only have one meaning in English, viz., that the marriage tie has ceased to exist. **Imam-ud-din v. Nur Din**, 59 P.W.R. 1910.

RED, C.J. and CHEVIS, J.

References:—85 P.R. 1906, F. 132 P.R. 84, R.

- (9) *Civil Procedure Code (Act I of 1908), S. 11—Res judicata—Decree by Court not having jurisdiction to pass it—Evidence Act (I of 1872), Ss. 40, 44—Jurisdiction—Burden of proof—Agra Tenancy Act (II of 1905), S. 32—Division of holding made with the consent of landlord—Not illegal—Suit to enforce an agreement to divide a holding—Not maintainable.*

Per Tudball, J.—If a decree is made in a suit of such a nature that no Civil or Revenue Court could entertain it, it would be null and void, and no decision therein can operate as *res judicata* between the parties.

If a party to a suit raises a plea that a certain decision does not operate as *res judicata* on

Res judicata—(Continued).

account of its having been delivered by a Court incompetent to deliver it, the burden is on him to prove that the decree was passed without jurisdiction.

Partition of a holding made by the co-sharers thereof with the sanction of the landlord is not an illegal act, and, if once made, could be maintained in a suit brought in a Civil Court for possession in case of dispossession by either party, and it cannot be said that a decree for possession in such a suit would be one made without jurisdiction.

Per Piggott, J.—A suit to enforce an agreement, under which a certain occupancy holding had been divided, is not maintainable in any Court, by reason of the provisions of Sec. 32 of the Tenancy Act, 1901 (a).

If an objection is raised to a suit that it is barred by S. 32 of the Agra Tenancy Act, 1901, and an issue is raised on the point and decided against the defendant, it is not open to the defendant to subsequently treat the decision as a nullity and plead, under S. 44 of the Indian Evidence Act, in a subsequent proceeding that it was passed without jurisdiction (b). **Baladeen Kalwar v. Raghunath Kalwar**, 6 Ind. Cas. 98.

TUDBALL and PIGGOTT, JJ.

References:—(a) A.W.N. (1906) 274; 3 A.L.J. 735; 31 A. 348; 6 A.L.J. 343; 1 Ind. Cas. 591, R. (b) 12 M. 228; 21 B. 205; 26 A. 522, R.

- (10) *Res judicata—Question tried by Probate Court—Subsequent suit—Maintainability of suit—Declaration of reversionary interest—Specific Relief Act (I of 1877), S. 42.*

Where, in a contested application for probate the Court of Probate has held that a certain person was not the next reversioner of the deceased, and such finding has been affirmed on appeal, no suit by the said person to have it declared that he was such reversioner, would lie. The previous judgment would bar the subsequent suit.

Where the real object of the suit was not merely to get a declaration but also to protect the present interest of the plaintiff, the suit would not be barred under S. 42 of the Specific Relief Act. **Ramnandan Pershad v. Sheoparsan Singh**, 11 C.L.J. 623 = 6 Ind. Cas. 301.

CASPERSZ and CHATTERJEE, JJ.

Reference:—6 C.W.N. 912, F.

Res judicata (Continued).

- (11) *Res-judicata—Partition among tenants—Suit by one for possession of certain plots—Second suit for declaration that the decree is null and void.*

The parties were joint tenants of certain occupancy holding. Disputes arose between them, which were referred to arbitration. The arbitrators partitioned the tenure. In 1906 the present defendants brought a suit in the Civil Court for possession of the plots now in dispute, alleging that they belonged to them. The plaintiffs claimed some of them exclusively for themselves. The present defendants obtained a decree. The plaintiffs thereupon brought this suit for a declaration of their right, on the ground that the former decree was null and void, the Court having no jurisdiction to entertain that suit. *Held*, that the former suit was not a suit for partition, and the Civil Court had jurisdiction to entertain it. The same question could not be raised in the present suit.

Per Stanley, C.J.—Joint tenants can agree themselves to occupy and cultivate distinct parts of the joint holding, provided their so doing in no way prejudices the land-holder. Under such an agreement, the tenants continue to be liable to the landlord for the entire rent, and the agreement between them is not a partition which is enforceable as between them and the landlord. A partition, to bind the landlord, must be a partition with his consent. **Raghunath Kalwar v. Baladeen Kalwar**, 7, A.L.J. 918 - 7 Ind. Cas. 398.

STANLEY, C.J. and BANERJI, J.

- (12) *Res judicata - Same issue in two suits—Finding in one incorporated in the other—Appeal against one decree only—Effect of.*

In two suits for sale upon different mortgages, one of the defendants, a prior mortgagee, pleaded that his mortgage had not been satisfied. The Subordinate Judge found in the one case that the mortgage had not been satisfied and incorporated that finding in the other case. The plaintiff appealed in the one case against that finding, but allowed the decree in the other to become final. *Held* that the judgment in the case not appealed against operated as *res judicata* (a). **Dakhni Din v. Syed Ali Asghar**, 7 A.L.J. 995.

STANLEY, C.J. and BANERJI, J.

Reference :—(a) 7 A.L.J. 816 (F.B.), F.

- (13) *Civil Procedure Code (Act XIV of 1882), S. 13—Res judicata—Co-defendants—Suit*

Res judicata—(Continued).

for partition - Pleadings—Plea of self-acquisition not raised—Plea raised in a subsequent suit—Bar of plea.

A previous suit for partition of the plaint properties was dismissed without any reference to the question whether they were first defendant's self acquisitions. In that suit the present first and second defendants were, co-defendants. First defendant raised that plea for the first time in the present suit :

Held, that the former suit did not operate as *res judicata* and did not bar the plea being raised in the present suit. **Palla Maruthi v. Sagiraju Bangaraju**, 6 Ind. Cas. 889 = 8 M. L. T. 220.

BENSON and KRISHNASWAMY AIYAR, JJ.

- (14) *Res judicata—Decisions in previous rent suit—When res judicata—Civil Procedure Code (Act XIV of 1882), S. 43.*

A decision in a rent suit is *res judicata* as regards the years in suit and the area admitted, but it does not operate as *res-judicata* for all future time.

But although the decision in a previous rent suit does not as a rule operate as *res judicata*, yet, in establishment of a formal contract, whether written or oral, between the parties finding by a rent Court that the rate of rent is as fixed by such contract, does operate as *res judicata* (a). **Srinarain Singh v. Sundarabati Kumari**, 6 Ind. Cas. 860.

HOLMWOOD and SHARP-U'D-DIN, JJ.

References :—(a) 1 C.L.J. 248 ; 2 Ind. Cas. 11 and 6 Ind. Cas. 860, F.

- (15)—*Res judicata—Decision in rent suit—Ex-parte decree—Civil Procedure Code (Act XIV of 1882), S. 13.*

The rule of *res judicata* may be applied, although the decree in the former suit was passed *ex parte*.

Where an issue was raised on the points now called in question, and the issue was heard and finally decided by the Court on the previous occasion in the rent suit, the rule of *res judicata* applies, although the suit was decided *ex parte* (a). **Hara Chandra Bairagi v. Bepin Behary Das**, 6 Ind. Cas. 860.

JENKINS, C.J. and DOSS, J.

Reference :—(a) 2 Ind. Cas. 11, affirmed.

- (16) *Rent suit—Plea of title of third party—Defendant claiming title in himself adversely to plaintiff—Test of res judicata, what is—Civil Procedure Code (Act XIV of 1882), S. 13.*

Res judicata—(Continued).

When the title of a third party is pleaded by the defendant in a rent suit and that third party is not a party to the suit, the question of title is not *res judicata*.

When, however, the defendant in a rent suit claims a title in himself adversely to the plaintiff and there is no question as to the controversy in the subsequent title suit, being between the same parties, the matter is not quite free from difficulty (a).

The test of *res judicata* in cases of this kind is whether issue of title was directly and substantially raised in the rent suit.

The plaintiff brought a rent suit, and the defendant denied that the lands were *mal* lands of the plaintiff and asserted that they were his *lakheraj*. The Court held that the lands were not the *mal* lands of the plaintiff but the *lakheraj* of the defendant, and that no relationship of landlord and tenant was made out, and the suit was dismissed. The plaintiff brought a title suit for a declaration of his *mal* rights and for eviction of the defendant for having denied the title of plaintiff :

Held, that the question whether the land was the *mal* land of the plaintiff was *res judicata* and the suit must fail on this ground.

As soon as the relationship of landlord and tenant is found to be wanting, the defendant becomes a trespasser and the provisions of the Bengal Tenancy Act are no longer applicable. **Ram Chandra Roy v. Girish Chandra**, 7 Ind. Cas. 15.

CHATTERJEE, J.

References :—(a) 15 C.756; 25 C. 136; 11 C. 301; 6 C.W.N. 66; 10 C.W.N. 826; 9 C.L.J. 493; 4 Ind. Cas. 175, R.

(17) *Civ. Pro. Code (Act V of 1908)*, S. 11—*Res judicata between co-defendants*.

Where it is necessary to adjudicate between co-defendants the question of the title of one of the defendants in order to give relief to the plaintiff, the adjudication would be *res judicata* between the defendants as well as between the plaintiff and the defendant (a). **Purshotama Nand Gir v. Lakhpatti**, 7 Ind. Cas. 67.

BANERJI, J.

References :—(a) 22 A. 386; 18 A. 65, F.

(18) *Civ. Pro. Code*, S. 13—*Res judicata—Order in execution proceedings*.

In order that a point adjudicated in execution proceedings may be conclusive as between the

Res judicata—(Continued).

parties, it must have been contested either directly or by implication; it is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon.

Balaji Rao v. Krishnappa, 15 M.C.C.R. 146.

KRISHNA RAO and SETLUR, JJ.

(19) *Civ. Pro. Code (Act V of 1908)*, S. 11—*Res judicata—First suit between the parties deciding on merits, but failing on account of non-payment of deficiency in Court fee—Second suit for trial on the same merits—Practice*.

In a previous suit between the parties, there was a decision on the merits; but the suit failed on the ground that the plaint had been undervalued and the plaintiff had refused to pay the additional Court-fee. A subsequent suit having been brought between the parties for determining the same issues, the decision in the first case was pleaded as *res judicata* :

Held, that, the failure of the first suit on non-payment of additional Court-fees was sufficient by itself for the dismissal of the previous suit; and that, therefore, the findings on the issues on the merits, not having been necessary for the decision of the suit, could not have the force of *res judicata*. **Irawa Laxmana Mugali v. Satyappa Shiddappa Mugali**, 12 Bom. L.R. 766.

CHANDAVARKAR and HEATON, JJ.

(20) *Civil Procedure Code*, S. 13—*Res judicata—Different subject matter—Identity of matter in issue*.

The rule of *res judicata*, which requires identity as regards the matter in issue, will apply even when the subject-matter, the cause of action and the relief are different. **Kenche Gowda v. Shankariah**, 15 M.C.C.R. 210.

STANLEY ISMAI, C.J. and KRISHNA RAO, J.

(21) *Civil Procedure Code (Act XIV of 1882)*, S. 13—*Suit to recover property as trustee—Subsequent suit by heirs after plaintiff's death—Res judicata*.

Plaintiffs' father sued to recover certain property as its trustee. That suit was dismissed. After plaintiff's father's death, plaintiffs brought the present suit to recover the same property as trustees :

Held, that, whether the plaintiffs succeeded their father as trustees or the trusteeship was

Res judicata—(Continued).

joint family property of which the father was the manager, the plaintiffs were concluded by the decision in the previous suit by their father. **Ramappaya v. Althu Melanta**, 7 Ind. Cas. 184.

WALLIS and KRISHNASWAMI IYER, JJ.

(22) *C.P.C. (Act V of 1908), S. 11—Res judicata—Different subject-matter.*

Two houses A and B were purchased under a sale-deed, dated, 15th June, 1881. There was a previous litigation between the same parties in respect of the house A, in which it was decided that the house A belonged beneficially to M and not to S. The present suit was brought in respect of the house B: *Held* that the decision in the previous suit did not operate as *res judicata*, inasmuch as the question of title to the house B was never determined, nor was it in dispute in the previous litigation. **Khalik Yar Khan v. Mobarik Begam**, 7 Ind. Cas. 388.

STANLEY, C.J. and BANERJEE, J.

(22-a) *Will—Letters of Administration—Suit by widow—Legatee made party—Subsequent grant of Letters of Administration—Suit by legatee—Whether doctrine of res judicata applicable.*

B executed a Will and died leaving him surviving his widow (defendant No. 1), his second sister (plaintiff) and a son of his third sister, defendant No. 3. Under the Will, plaintiff was entitled to the estate of B, and defendant No. 3 was the executor who took possession of the estate after B's death. The widow then brought a suit for possession against the nephew and the sister. The latter in her written statement said that she had heard of a Will under which she was entitled to the property left by B. The widow then entered into a compromise with the nephew executor, and a decree by consent was made against the latter and an *ex parte* decree was made against the sister. The sister then obtained Letters of Administration with the copy of the Will annexed and sued to recover possession on the strength of her title as legatee:

Held, that this suit was not barred by *res judicata*, that the Court in which the first suit was brought was not competent to determine the question of the genuineness of the Will, and as Letters of Administration were not then in existence, it was impossible for the

Res judicata—(Continued).

plaintiff to establish her title thereunder. A litigant is not bound to assert his title under a Will till it has been proved. **Akhil Sundari Dasl v. Nanibala Dasl**, 8 Ind. Cas. 28.

MOOKERJEE and SHARF-UD-DIN, JJ.

(23) *C.P.C. (Act XIV of 1882), S. 13—Suit to declare plaintiff's right as karnam—Prior suit between parties for invalidation of pattahs granted by plaintiff—Decision that plaintiff was not karnam—Res judicata.*

Plaintiff sued for declaration of his right as hereditary *karnam* of a certain temple. In a prior suit between the parties (wherein plaintiff was third defendant) it was sought to invalidate certain *pattahs* granted by plaintiff in respect of the temple lands.

An issue was raised as to whether plaintiff was *karnam* of the temple and was decided against him:

Held, that the present suit was barred as *res judicata*.

Obiter:—The suit will not be *res judicata* if it were based on a subsequent appointment of plaintiff as *karnam*. **Antharyami Patnaik v. Haribandhu Sabuto**, 8 Ind. Cas. 427.

KRISHNASAMI Aiyar, J.

(23-a) *Evidence—Chitta—Admissibility—Res judicata—Rent suit—Subsequent title—Suit.*

A decision in a rent suit does not operate as *res judicata* in a subsequent suit brought for establishment of title to land. **Harl Narain v. Khetra Sardar**, 8 Ind. Cas. 715.

CASPEBSZ, J.

References:—10 C.W.N. 820; 26 C. 428; 3 C.W.N. 266, R.

(24) Former suit by mortgagee to enforce his rights—Subsequent suit by his sons and reversioners to protect their interests—Opposite finding in two cases, illegal—Duty of Judge. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 139 P.W.R. 1909.

(25) Pre-emption suit decreed on the ground that an ostensible mortgage is in reality a sale—Subsequent suit by vendor's son against vendee to impugn alienation—*Res judicata*. See PRE-EMPTION, No 1, 157 P.W.R. 1909.

(26) Question of Khanadarnadi—*Res judicata*. See CO-SHARERS, No. 1, 145 P.W.R. 1909.

(27) Interpretation of decree in a particular sense—Effect. See CIV. PRO. CODE (1908), No. 25, 7 A.L.J. 190.

Res judicata—(Continued).

(28) Civ. Pro. Code (1882), S. 13—"Heard and finally decided," meaning of—Effect of appeal in former suit having abated—Partition suit. See PARTITION, No. 3, 5 Ind. Cas. 325.

(29) Order to sell properties in a certain order—Subsequent application not to sell property in that order—*Res judicata*. See EXECUTION OF DECREES, No. 9, 5 Ind. Cas. 210.

(30) Partition suit—Parties in subsequent suit arranged on same side in previous litigation—Effect. See PARTITION, No. 4, 7 A.L.J. 451.

(31) Suit for injunction—Subsequent suit for possession—Cause of action. See CIV. PRO. CODE (1882), No. 15, 6 Ind. Cas. 233.

(32) Wrong decision as to—When a ground for revision. See REVISION, No. 2, 2 P.R. 1910 (Rev.).

(33) Former suit declaring possession in favour of Tarwad—Right of Karnavan to claim possession in subsequent suit—*Res judicata*. See MALABAR LAW, No. 5, 7 M.L.T. 431.

(34) *Res judicata*—Prior suit for declaration of title to moiety of property—Dismissal—Subsequent suit for declaration of title to whole property and injunction. See MORTGAGE (GENERAL), No. 19, 7 M.L.T. 405.

(35)—as between co-defendants. See MORTGAGE (GENERAL), No. 26, 6 Ind. Cas. 331.

(36) Property undivided and subject to mortgage—Power of one sharer to redeem—Lien over other shares—*Res judicata*. See MORTGAGE (REDEMPTION), No. 17, 8 M.L.T. 186.

(37)—between co-defendants—Previous rent suit—Subsequent title suit. See APPEAL (SECOND APPEAL), No. 3-a, 7 Ind. Cas. 123.

(38) Decision under Ss. 105, 106, 809, Bengal Tenancy Act—*Res judicata*. See ACT VIII OF 1935 (BENGAL TENANCY), No. 39, 7 Ind. Cas. 71.

(39) Effect of *obiter dictum*. See SHAMILAT, No. 5, 94 P.L.R. 1910.

(40) Finality of *ex parte* decree—Suit to set aside decree—Fraud—Limitation. See 'EX PARTE' DECREE, No. 2, 47 P.L.R. 1910.

(41) Decree for money rent—*Res judicata*. See LEASE, No. 22, 12 C.L.J. 595.

(42) Previous suit for partnership debt—Widow as co-plaintiff—Application of old or new Code on the question of. See PARTNERSHIP, No. 8, 142 P.W.R. 1910.

Res judicata—(Concluded).

(43) No judgment defining rights and obligations of defendants *inter se*—Applicability of principle of. See WITHDRAWAL OF SUIT, No. 2, 7 Ind. Cas. 892.

(44) Application of doctrine of, to execution proceedings. See EXECUTION OF DECREES, No. 2, 5 Ind. Cas. 89.

(45) Mortgage suit—Person joined as defendant failing to set up paramount title—Effect. See MORTGAGE (GENERAL), No. 55, 6 N.L.R. 156.

(46) Object of. See CIV. PRO. CODE (1882), No. 14, 8 Ind. Cas. 9.

Restitution of conjugal rights.

(1) *Suit for restitution—Limitation Act (1877), Art. 35—Madras Act III of 1873, S. 16—Agreement for present and future separation—Legality—English and Indian law—Public policy.*

In this case a suit was brought, after a demand and refusal, for restitution of conjugal rights, in 1903, and that was compromised in 1904.

By the compromise the parties agreed to live together "according to the custom of the world." The agreement further provided "If on any day subsequent to this and for any reason whatever you (the wife) should not like to live with me, but want to go away from me, I agree to give you Rs. 350."

The parties never lived together after the agreement. The husband brought the present suit for restitution in 1907.

Held, that, though Art. 35, Limitation Act, 1877, would bar a suit for restitution if there has been a demand and refusal more than 2 years before suit (*a*), it is impossible to contend, after the above agreement, that the previous demand and refusal furnish the starting point for the running of time, and that, unless there is a fresh demand and refusal, time cannot run against the present claim for restitution.

Courts should be strict in applying Art. 35, according to the letter. Moreover it does not find a place in the new Limitation Act.

The parties in this case being Hindus and Brahmins, the law to be applied in determining their marital obligations is the Hindu law. See S. 16 of Madras Act III of 1873. It may be doubted whether, under that law, any agreement between husband and wife to live apart from each other is valid. It may well be deemed to be forbidden by the Hindu law (*b*).

Restitution of conjugal rights—(Concluded).

Even apart from the Hindu law, the agreement must be regarded as opposed to public policy and therefore not enforceable (c).

Even under the English law, an agreement providing for future separation is invalid, though an agreement for a present separation is enforceable (d). **Krishna Iyer v. Balammal**, 8 M.L.T. 314.

SANKARAN NAIR and KRISHNASWAMI IYER, JJ.

References—(a) 28 M. 436; 25 B. 614; 34 C. 79, R. (b) 28 C. 751, R. (c) 7 Bom. L.R. 602. (d) 9 E.R. 870; 5 P.D. 19; 10 P.D. 188; 12 Ch. D. 605, R.

(2) Suit for—Jurisdiction. See VALUATION OF SUIT, No. 2, 6 Ind. Cas. 636.

(3) Apostacy—Effect upon marriage—Maintainability of suit for. See MAHOMEDAN LAW (MARRIAGE), No. 2, 7 A.L.J. 956.

Restoration of suit.

See SUIT, No. 1, 14 C.W.N. 558.

Resumption of land.

(1) Suit for—*Plea of service in lieu of land—Burden of proof.*

Where, in a suit for resumption of certain lands, the defendants pleaded that the grant was burdened with service, *held* the burden of proving such service, or the grant burdened with such service, lay on the defendants, and that the enjoyment of the land for 40 years will not shift the burden of proof. **Visweswara Nissenka Bahadur v. Gorla Budaradu**, 8 M.L.T. 82=7 Ind. Cas. 401.

BENSON and KRISHNASWAMI IYER, JJ.

References :—7 M. 268 (272); 11 M. 365 (375) and 26 M. 403, R.

(2) Circumstances telling against right of permanent occupancy. See PERMANENT TENURE, No. 1, 8 M.L.T. 258.

Reuter.

(1) Mistake of. in transmitting message—Effect. See SALE, No. 11, 8 M.L.T. 353.

Revenue Court.

(1) Judgment of—*Suit for declaration that judgment was not binding on plaintiff.*

No suit can lie to declare that the judgment of the Revenue Court was not binding on the plaintiff, who was a party to it. **Thiruvengadam Pillai v. T. Ramanjulu Naidu**, 8 M.L.T. 380.

MILLER and KRISHNASWAMI AIYAR, JJ.

Revenue Manual (Mysore).

Rule 23—Agent appointed under—Not a “recognised agent.” See JURISDICTION OF SMALL CAUSE COURT, No. 2, 15 M.C.C.R. 150.

Revenue officer.

Nature of proceedings by a. See ACT III OF 1901 (U. P. LAND REVENUE), No. 1, 13 O.C. 198.

Revenue Recovery Act.

See ACT II OF 1864 (MADRAS).

Revenue sale.

(1) Encumbrance or undertenure if *ipso facto* avoided by. See MESNE PROFITS, No. 1, 11 C.L.J. 503.

(2) Effect of issue of certificate. See CO-SHARERS, No. 8, 7 Ind. Cas. 772.

Revenue Sale Law.

See ACT XI OF 1859 (BENGAL).

Reversioner.

(1) One of several reversioners taking possession of whole property—Suit by other reversioners for their shares after 12 years—Limitation. See ADVERSE POSSESSION, No. 5, 6 Ind. Cas. 695.

(2) Right of a. to sue for share of another. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 21, 143 P.W.R. 1910.

Review.

(1) Review, granting of—*Appeal—Delay.*

Where the plaintiff applied on 12th March for review of a decree passed on 21st January, and the review was granted on 9th April.

Held that there was no decree from which an appeal could be preferred, until the order granting the review is set aside.

Excuse of delay is a matter of discretion with the Court, and if it had been properly exercised, the High Court will not interfere. **Ramaswami Iyengar v. Janaki Ammal**, 7 M.L.T. 387.

BENSON and KRISHNASWAMI AIYAR, JJ.

(2) Appeal against order granting review, ground of—*Appeal on merits against the final order passed on review—Civ. Pro. Code, O. 43, r. 1 (w) and O. 47, r. 7.*

Held, that an appeal against an order granting review can be made only on the specific grounds mentioned in O. 47, r. 7, Civ. Pro. Code, and no others. The right of appeal granted under O. 43, r. 1 (w), is a right of appeal subject to the restrictions set forth in O. 47, r. 7.

Review—(Concluded).

Held further, that there is no right of appeal upon the merits against the final order passed on review. **Indar Kuar Rani v. Thakur Baldeo Bakhah**, 13 O.C. 248.

EVANS and LINSLEY, J. CS.

- (3) Order granting—Scope of appeal—Powers of appellate Court. See CIV. PRO. CODE (1908), No. 166, 11 C.L.J. 161.

(4) Decree admitted to be fully satisfied—Mistake—Review. See EXECUTION OF DECREE, No. 6, 5 Ind. Cas. 148.

(5)—of judgment—Mistaken admission on a point of law, when constitutes a ground for. See HINDU LAW (STRIDHAN), No. 2, 6 N.L.R. 3.

(6)—when may be admitted—Appeal again order admitting, if lies. See CIV. PRO. CODE (1882) No. 232, 11 C.L.J. 26.

(7) Order passed on review of previous order in execution proceedings. Appeal. See CIV. PRO. CODE (1882), No. 110, 5 Ind. Cas. 483.

(8) Application to restore appeal made after expiry of thirty days—Application treated as. See CIV. PRO. CODE (1882), No. 76, 7 P.L.R. 1910.

(9) Point not raised in the lower Court even in an application for a review, whether can be raised in revision. See REVISION, No. 3, 8 M.L.T. 85.

(10) Order refusing to grant—Revision. See REVISION, No. 4, 6 Ind. Cas. 707.

(11) Setting aside *ex parte* decree—Review of judgment. See CIV. PRO. CODE (1908), No. 108, 12 Bom. L.R. 886.

Revision.

(1) *Revision—Interlocutory order—Material irregularity—Section 115 of Act V of 1908—Arbitration—Section 70 (a) of Act XVIII of 1884.*

Held, that the word "case" should not always be strictly construed, and that interlocutory orders, i.e., orders which do not finally dispose of a case, may form the subject of revision, if the matter they relate to, though part of and connected with a case, stands by itself and is a definite part of a case, and in which the ends of justice would be defeated if the power of revision is not exercised.

So, where a claim was based on the award of a private arbitrator and on the merits in the alternative, the defendant attacked the award but not on the ground of misconduct, the

Revision—(Continued).

plaintiff, seeing the force of the defendant's objection, consented to limit his claim to the award, and the lower Court allowed the defendant at a very late stage of the proceedings to plead misconduct of the arbitrator, but refused to grant the plaintiff's prayer to fall back upon the alternative causes of action originally alleged in the plaint:

Held that the order of refusal amounts to a material irregularity within the meaning of S. 70 (a) of Act XVIII of 1884, and the plaintiff is entitled to get it set aside in revision without waiting for the final result of the case. **The Delhi Cloth and General Mills Company, Ltd. v. R. B. Hardhian Singh**, 72 P.W.R. 1910 6 Ind. Cas. 939.

SHAH DIN and CHEVIS, JJ.

References:—C. 60 P.R. 1897; C. 51 P.R. 1899, F.

(2) *Wrong decision as to res judicata when a ground for—Financial Commissioner when would interfere in.*

A wrong decision as to *res judicata* would naturally be a good ground for revision, if it prevented a case being heard on the merits.

The discretion of the Financial Commissioner to exercise revisional powers in any case is quite unfettered, and the broad principle to follow is to interfere only when a refusal would result in injustice or failure of justice. **Imam Din v. Jiwani**, 2 P.R. 1910 (Rev.) 6 Ind. Cas. 735.

DOUIE, FINANCIAL COMMISSIONER.

(3) *Practice—Point not raised in the lower Court in an application for review, whether can be raised in revision.*

A point, which is not raised in the Courts below even in an application for review, will not be allowed to be raised in the Court of revision. **Muniappa Chettiar v. Balarangaya Chetty**, 8 M.L.T. 85.

MILLER, J.

(4) *Review—Order refusing to grant review—Revision—Amendment of decree.*

No revision lies against an order refusing to grant an application for review.

An application for revision can be made, if the Court has refused to exercise its jurisdiction in the matter of amendment of an order absolute so as to bring it into conformity with the judgment. **Balbahdar Singh v. Chunni Lal Sahu**, 6 Ind. Cas. 707.

BANERJI, J.

Revision—(Continued).

- (5) *Revision—Finding of fact—Misinterpretation of evidence of witnesses—Not considering the loss of an important document in the case—S. 70 (1) (a) of Act XVIII of 1884—Long delay in suing.*

Held, that an obvious misinterpretation of the testimony of witnesses or other evidence, or not considering the loss of an important document in a case, is material irregularity within the meaning of S. 70 (a) of Act XVIII of 1884, which justifies interference with the finding of fact by the lower Courts. Unnecessary long unexplained delay in suing goes against plaintiff. **Umra v. Ilahi Baksh**, 97 P.W.R. 1910=7 Ind. Cas. 713.

SCOTT-SMITH, J.

- (6) *Punjab Courts Act (XVIII of 1884) as amended, S. 70 (1) (a), Revision—Civil cases—Material irregularity—Assumption by Court against evidence on record.*

Where the lower Appellate Court reversed the judgment of the Original Court more on an assumption, and there was no evidence in support of it, the Chief Court, on revision, set aside the judgment of the lower Appellate Court and restored that of the Original Court. **Thakar Das v. Barkhurdar**, 127 P.L.R. 1910.

SCOTT-SMITH, J.

- (7) *Revision—Alternative remedy being available not necessarily a bar to revision—Arbitration, reference by Court to—Munsarim's power to fix date for hearing—Hearing of case fixed for a date subsequently declared a holiday—C.P.C. (V of 1908), S. 115—C.P.C. (V of 1909), Sch. II, cl. (8).*

Although the practice of the Court has been to discourage applications for revision where other remedies are available to the applicant, yet the existence of an alternative remedy is not necessarily a bar to the exercise of revisional jurisdiction.

A suit was referred to arbitration. Several applications were made for extension of the time fixed for filing of the award, and ultimately May 28th was fixed for that purpose. On that date no award was filed and neither party appeared. At the instance of the Court, the plaintiff's pleader applied for further extension of time and the Court then fixed June 20th. On that date also no award was filed and neither party appeared, but the Subordinate Judge was himself unable to attend the Court

Revision—(Continued).

on that day, and the Munsarim made an order adjourning the case to June 24th. Subsequently this date was declared to be a holiday and the case was taken up on June 25th when the subordinate Judge made an order superseding the arbitration and dismissing the suit.

Held, that the Munsarim had no power to fix a date for the next hearing of the suit.

Held further, that, as the case could not be taken up on the 24th on account of the holiday and there was nothing to show who fixed the following day for the hearing of the case, there was no justification for calling the case up on the 25th, the day on which it was dismissed.

Held also, that the words "and in such case shall proceed with the suit", in cl. (8) of the second schedule to the Code of Civil Procedure do not necessarily mean that the Court shall proceed at once on that same day to examine witnesses. **Kundan Lal and another v. Chainu Lal and another**, 12 O.C. 341.

CHAMIER and EVANS, JJ.

- (8) *Improper order for withdrawal of suit—Revision. See CIV. PRO. CODE (1908), No. 132, 11 C.L.J. 45.*

- (9) *Error in law—Substantial justice done to parties—Whether revision lies. See GUARDIAN AND MINOR. No. 2, 5 P.W.R. 1910.*

- (10) *Order under S. 18 (Act XX of 1863) whether open to. See ACT XX 1863 (RELIGIOUS ENDOWMENTS), No. 5, 7 M.L.T. 126.*

- (11) *Decree of Small Cause Court—High Court not bound to interfere in every case in revision. See ACT IX OF 1877 (PROVL. S. C. COURTS), No. 15, 5 Ind. Cas. 322.*

- (12) *Burden of proof thrown on wrong party—Revision. See NEGOTIABLE INSTRUMENTS, No. 1, 25 P.W.R. 1910.*

- (13) *Refusal to add party—Revision. See CIV. PRO. CODE (1908), Nos. 100 and 92, 11 C.L.J. 420 and 11 C.L.J. 426.*

- (14) *Order under S. 36, Legal Practitioners Act—High Court's power of. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 9, 11 C.L.J. 513.*

- (15) *Misappreciation of evidence, whether a ground for—Whether there is any difference between Berar and the Central Provinces with regard to High Court's power of. See CIV. PRO. CODE (1908), No. 59, 6 N.L.R. 49.*

Revision—(Concluded).

(16) Wrong decision on limitation or as to jural relation between the parties—Revision. See CIV. PRO. CODE (1908), No. 60, 6 Ind. Cas. 745.

(17) Order of District Judge that he has jurisdiction to entertain application for letters of administration—Revision. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 10, 94 P.W.R. 1910.

(18) Amendment of plaint whether allowed in. See LIMITATION ACT (1908), No. 7, 9 M. L.T. 199.

(19) Lower Appellate Court ignoring vital facts—Material irregularity—Revision. See LANDLORD AND TENANT, No. 34, 35 P.L.R. 1910.

(20) Point of limitation involving questions of law and custom—Ground for. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 20, 141 P.W.R. 1910.

(21) Delay of five and a half months in filing revision. See ACT II OF 1901 (AGRA TENANCY) No. 20-a, 8 Ind. Cas. 529.

(22) Right decision—Defect of jurisdiction—Revision whether lies. See LANDLORD AND TENANT, No. 53-a, 8 Ind. Cas. 733.

(23) Grant of sanction by Collector for removal of Mohunt—Revision. See CIV. PRO. CODE (1882), No. 210-a, 104 P.R. 1910.

Right to sue.

(1) Joint family, member of—Lending money—Benamidar—Debtor objecting to creditor's power to lend.

A member of a joint family, who was at liberty to use the funds in his hands, whether they belonged to the joint family or not, is not a *benamidar* for the family when he lends money in his own name to some body else. Even if he were a *benamidar*, he would be entitled to sue in his own name the person to whom he lent the money. Such suit need not be brought by all the members of the joint family. **Hara Gobinda Shaha v. Purna Chandra Saha**, 11 C.L.J. 47=1 Ind. Cas. 522.

HOLMWOOD and SHARFUDDIN, JJ.

References :—24 C. 644, *Appl.*; 30 C. 265, D.

(2) Right to sue for damages for breach of contract is not transferable. See TRANSFER OF PROPERTY ACT, No. 6, 7 M.L.T. 228.

Riparian owners.

Right of, in a natural stream—Suit for contribution among. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 7, 7 M.L.T. 74.

River.

Dried up bed of a—Ownership. See BOUNDARY, No. 2, 12 C.L.J. 216.

Riwaj-i-am.

(1) Interpretation and value of—Value of—Entry of custom in, unsupported by instances. See HINDU LAW (INHERITANCE), No. 8, 84 P.W.R. 1910.

(2) Value of, as evidence of custom stated therein. See EVIDENCE ACT, No. 2, 8 Ind. Cas. 728.

Sale.

(1) Right of delivery of goods, whether can be sold—Contract to sell goods C.I.F., at a port named—Incidents attaching to sale by trade usage—Breach of contract of sale—Damages, measure of.

There is no such thing known in law as a sale of a right to delivery.

The incidents attaching to a sale C.I.F., by trade usage are these :—On a sale C.I.F., the seller undertakes to ship the goods sold on a vessel bound to the port mentioned, and to deliver the goods on board such vessel by tendering to the buyer a bill of lading for them, together with a policy of insurance covering their insurance to the port to which the goods are to go, and the seller must be ready and able to endorse the bill of lading and to transfer the policy to the buyer, on receiving payment of the price (a).

In case of a breach of contract to deliver the goods, the buyer is entitled to receive from the seller the difference between the contract rate and the rate at the place on the day on which delivery ought to have been made. **Abdul Hamed v. Torab Ali**, 5 L.B.R. 144.

FOX, C.J. and PARLETT, J.

Reference :—(a) (1872) L.R. 5 H.L. 395 (408), R.

(2) Sales by and under Court, distinction between.

There are two classes of sales in suits :—(1) sales by the Court and (2) sales under the Court. Sales by the Court are cases, in which the Court makes a title to the purchaser and confirms the sales and issues a sale certificate. The second class is where the Court authorizes a trustee, receiver or other person holding property, to sell the property, and the sale is made out of Court; the Court does not make any title to the purchaser, nor does it grant a sale certificate or confirm the sale. **Golam**

Sale—(Continued).

Hossain Cassim Arif v. Fatima Begum, 6 Ind. Cas. 300.

FLETCHER, J.

Reference :—21 C. 479, *dissented from*.

- (3) *Sale—Conveyance executed bona fide—No consideration paid—Sale not void—Vendor can sue for and recover the purchase money but cannot recover the property.*

Where, in a *bona fide* sale transaction, the conveyance is properly executed, the mere fact that the consideration for the sale is not paid does not render the document absolutely void. The vendor might recover from the purchaser the purchase-money, which was agreed to be paid, but cannot ignore the transaction and claim back the property. **Nasir-ud-din Khan v. Hikmatullah Khan**, 6 Ind. Cas. 117.

STANLEY, C.J. and GRIFFIN, J.

- (4) *Contract for sale of goods—Stipulations as to the time of delivery, whether of the essence of contract—Sale of Goods Act, S. 10.*

Held, that, unless a different intention appears from the terms of the contract, stipulations as to the time of delivery are not deemed to be of the essence of a contract of sale of goods. **The Instalment Bank, Ltd., Fyzabad v. Lala Kaudhaya Lal and another**, 13 O.C. 143.

EVANS, J.C.

- (5) *—of immoveable property—Agency—Authority to sell, whether includes authority to receive purchase money—Sale of goods and sale of immoveable property distinguished—Notice on the outer wall of house to make enquiries of vendor's vakil, whether amounts to an authority to vakil to sell the house.*

A person having a general authority to sell immoveable property does not by necessary implication have the authority to receive the purchase-money (a).

Per Abdur Rahim, J.—In case of a sale of goods, if an agent, for instance, an assistant in a shop, has authority to sell goods, it may be presumed that he should have authority to receive the price of those goods (b).

Notice put up on the outer wall of a house for sale, that enquiries were to be made of the vendor's Vakil, does not amount to an authority to the Vakil to sell the house on behalf of the vendor. **Narasimhulu Chetty v. Sundra**

Sale—(Continued).

Charlar, 8 M.L.T. 7=20 M.L.J. 479=7 Ind. Cas. 189.

WHITE, C.J. and ABDUR RAHIM, J.

References :—(a) *Dart on vendors and purchasers*, p. 213; *Mynn v. Tolfie* (42 Revised Reports; 802), R.; *Viney v. Chaplin* (27 L.J. Ch. 434 (437), F. (b). *Chapel v. Thornton* (33 Revised Reports 673) and *Howard v. Chapman* (34 Revised Reports 814), R. and D.

- (6) *—of timber—Breach of warranty of title—Rights of buyer—Measure of damages.*

In the case of a sale of goods, where there was a distinct breach on the part of the seller of warranty of title, the buyer is entitled to a refund of the money paid by him for the goods, and having regard to the nature of the goods sold and what was within the contemplation of the parties, the expense incurred in removing the timber must be taken into account as loss to the buyer naturally flowing from breach of the warranty. **Bamanunni Nair v. Karumathil Narayanan Nair**, 8 M.L.T. 216=7 Ind. Cas. 757.

ARNOLD WHITE, C.J. and ABDUR RAHIM, J.

- (7) *Sale of tank and lands—Severance of land from the tank from common ownership—Rights of owner of land—Irrigation—Continuous easement.*

A tank and certain lands originally belonged to a Zamindar. They were sold by him to the defendant. The plaintiff subsequently became owner of portion of land under the tank. The lands were being irrigated with the water of the tank. *Held* that, as the right to irrigation was an apparent and continuous easement, when the plaintiff acquired his right to the above portion of the land, he is entitled to the continuance of the easement. But the plaintiff cannot ask that there should be no tank bed cultivation, provided it does not interfere with or reduce the customary flow to the plaintiff's lands. Nor is the plaintiff entitled to insist as dominant owner that the defendant should keep the tank in good repair.

Held also that the sale of the land did not in any way enlarge the plaintiff's rights beyond what he was entitled to on the severance of the lands from the common ownership. **Abboy Chetty alias Authiappa Chetty v. K. C. Desika Charlar**, 8 M.L.T. 241.

BENSON and KRISHNASAWMI IYER, JJ.

Sale—(Continued).**(8) Dispossession by Government—Stipulation for refund of purchase-money—Legality.**

In this case the parties stipulated that, in case the Government dispossessed the plaintiffs of the lands purchased by them from the defendants, the latter would have to refund the purchase money. *Held* that such a stipulation is lawful. **Yagadhu v. Haddu Maharanna**, 8 M.L.T. 312.

ABDUR RAHIM and KRISHNANAWMI IYER, JJ.

(9) Sale—Contract to sell—Payment of part consideration—Specific performance—Discretion—Delay—Pleadings—Amendment—Suit on sale—Appeal, second—Prayer for specific performance—Pleadings.

The payment of a part of consideration money does not necessarily imply that there is an out-and-out sale and not a contract to sell (a).

Where a suit is based on an alleged completed sale, the plaintiff cannot be allowed to urge in second appeal that the suit may be regarded as one for specific performance of a contract to sell. The latter suit is inconsistent with the position based on an alleged completed sale and cannot be entertained without an amendment of the plaint being allowed.

In a suit to enforce specific performance of a contract to sell, where the plaintiff slept over his alleged rights for very nearly twelve years and made no attempt, until a few months of the institution of the suit, to pay to the defendant the balance of the sale price and to get a sale-deed executed and registered in his favour:

Held that, under the circumstances, the Court would not be justified in exercising its discretionary power to decree specific performance of the contract. **Barkhudar v. Haji Munawar Din**, 7 Ind. Cas. 568.

SHAH DIN and CHEVIS, JJ.

Reference :—(a) 65 P.R. 1893, R.

(10) Sale—Description of subject-matter—Quantity of land exactly described—Boundaries uncertain—Intention of parties.

In a sale-deed the quantity of land sold was exactly described, but its boundaries, as set forth in the deed, were such as should be applied to the entire plot of land of which the quantity sold was only a portion : *held* that the intention of the parties was to sell the specific area described in the deed, and not the entire plot

Sale—(Continued).

covered by the boundaries. **Moti Begam v. Abhab Ali**, 7 Ind. Cas. 574.

KARMAT HUSAIN, J.

References :—37 C. 293 ; 10 C.L.J. 570 ; 4 Ind. Cas. 713, *Appr.* ; 14 W.R. 301 ; 15 W.R. 394 ; 16 W.R. 5 ; 5 B. 208, R.

(11) Same broker for both vendor and vendee—Sale effected by bought and sold notes—Terms altered by Reuter in course of transmission—Liability of broker and of seller—Contract Act, Ss. 230, 235.

In this suit plaintiff sued in respect of the non-delivery of certain shares in M. Company, which he alleged to have purchased from first defendant through brokers, the second and third defendants. The brokers having been authorised by plaintiff to buy at 20 cabled through Reuter Agency to the first defendant who was then in England that they could sell for him at Rs. 20. Reuter varied the message in the course of transmission by inserting the word "profit" before 20, and the first defendant cabled back "sell", which the brokers read as an acceptance of the offer actually made by them, whereas it was in fact an acceptance of the offer as altered by Reuter.

Held that, as regards the first defendant, his acceptance was an acceptance of the offer he actually received in the cable as altered by Reuter, and he cannot be held liable to the plaintiff in this suit, as in such a case there was no contract between the plaintiff and the first defendant (a).

A broker may act for both sides, and if he does not exceed the limits of his authority, he incurs no personal liability.

To render the agent liable under S. 235, Contract Act, it is only necessary that the representation should have been untrue in fact, and it is not necessary to show that the agent was in any way to blame (b). **Hajee Ismail Sait v. James Short**, 8 M.L.T. 353.

WALLIS, J.

References :—(a) (1870) L.R. 6 Ex. 7, F. (b) 8 El. and Bl. 647 ; (1910) 1 K. B. 215 ; 9 T.R.R. 488 ; 33 L.J.Q.B. 335, R.

(11-a) Verbal sale followed by possession—Validity of sale.

Where the second and third respondents had the sold certain land to the first respondent, and sale was verbal but was followed by possession and mutation of names :

Sale—(Continued).

Held, that such sale was valid, and the appellant, who was a subsequent purchaser of the same land by a registered deed, could not recover the land from the first respondent. **Maung Tun E. v. Maung Thet Pyo**, 8 Ind. Cas. 443.

LOWIS, J.

Reference :—4 L.B.R. 26, *F*.

(12) Consideration in shape of services rendered or to be rendered—Grant of assessment—Registration. See **TRANSFER OF PROPERTY ACT**, No. 37, 12 Bom. L.R. 9.

(13) Of unascertained goods—Completion of—Ss. 79 and 83, Contract Act. See **CIV. PRO. CODE** (1882), No. 24, 3 Sind L.R. 156.

(14) Suit for cancellation of sale-deed by vendor and for recovery of properties—Decree for unpaid purchase money—Jurisdiction. See **CIV. PRO. CODE** (1908), No. 104, 8 M.L.T. 433.

(15) Registration of deed of—Non-payment of consideration—Proof of non-payment. See **TRANSFER OF PROPERTY ACT**, No. 29, 6 Ind. Cas. 477.

(16) Construction of document—Sale or mortgage—Condition to retransfer. See **MORTGAGE (GENERAL)**, No. 25, 6 Ind. Cas. 512.

(17) Sale falling through owing to vendor's neglect—Agent negotiating sale—Right to commission. See **CONTRACT**, No. 7, 8 M.L.T. 40.

(18) Sale deed—Warranty of title—Interest sold whether a subsisting interest. See **TRANSFER OF PROPERTY ACT**, No. 33, 7 A.L.J. 752.

(19) Property already in vendee's possession—Necessity for registered document. See **TRANSFER OF PROPERTY ACT**, No. 30, 6 Ind. Cas. 763.

(20) Sale subject to agreement executed on the same day—Reserving right to vendor to repurchase—Effect. See **MORTGAGE (BY CONDITIONAL SALE)**, No. 2, 7 A.L.J. 998.

(21) Perpetual lease when amounts to a. See **PRE-EMPTION**, No. 30, 7 A.L.J. 1022.

(22) Sale-deed executed—Executant cannot obtain declaration of his title unless he gets the deed set aside. See **SPECIFIC RELIEF ACT**, No. 16, 6 Ind. Cas. 891.

(23) Property belonging to one or other of two persons—Purchase from both—Alternative causes of action. See **CIV. PRO. CODE (MYSORE)**, No. 3, 15 M.C.C.R. 86.

Sale—(Concluded).

(24) Vendor's title—Whether attestation amounts to representation as to validity of title. See **ATTESTATION**, No. 1, 8 M.L.T. 171.

(25) Agreement by purchaser to pay price in discharge of incumbrances—Failure to pay—Payment after suit by vendor—Cause of action. See **CAUSE OF ACTION**, No. 1, 8 M.L.T. 188.

(26) Railway receipt in name of vendee as consignor—Effect. See **DELIVERY**, No. 1, 4 S.L.R. 10.

(27)—of unascertained goods when complete. See **ACT IX OF 1899 (ARBITRATION)**, No. 1, 4 S.L.R. 20.

(28) Consideration for—Burden of proof. See **PLEADINGS**, No. 7, 40 P.J.R. 1910.

(29) Purchase money unpaid—Rights of buyer and seller. See **TRANSFER OF PROPERTY ACT**, No. 32, 6 N.L.R. 98.

(30) Vendor's power to resell goods in his possession. See **CONTRACT ACT (MYSORE)**, No. 1, 15 M.C.C.R. 254.

(31) Attestation whether amounts to a guarantee of title in the vendor. See **ATTESTATION**, No. 1, 7 Ind. Cas. 174.

(32) Money left with vendee for payment to decree-holder not inconsistent with continuance of vendor's lien for unpaid purchase money. See **TRANSFER OF PROPERTY ACT**, No. 35, 7 Ind. Cas. 639.

(33) See **VENDOR AND PURCHASER**.

(34) Charge—Invalid sale—Right of vendee to a charge. See **TRANSFER OF PROPERTY ACT**, No. 36-a, 8 M.L.T. 464.

(35) Purchase money not paid—Vendee entitled to possession—Vendor's lien for unpaid purchase money. See **TRANSFER OF PROPERTY ACT**, No. 32-a, 8 Ind. Cas. 364.

Sale certificate.

(1) Period for applying to obtain a. See **CIV. PRO. CODE** (1882), No. 160, 5 Ind. Cas. 263.

(2) Rule of construction of. See **DECREE**, No. 4, 6 Ind. Cas. 75.

Sale proclamation.

(1) Application for amendment of—Appeal. See **CIV. PRO. CODE** (1882), No. 107, 6 Ind. Cas. 180.

(2) Misrepresentation of value of property in—Decree-holder bidding through benamidar—Substantial injury—Fraud—Setting aside sale. See **CIV. PRO. CODE** (1882), No. 141, 6 Ind. Cas. 135.

Sale proclamation—(Concluded).

(3) Fraud and misrepresentation in—Effect—Right of certified purchaser to set aside sale—Limitation. See CIV. PRO. CODE (1882), No. 148, 8 M.L.T. 154.

Sanction to prosecute.

- (1) *Crim. Pro. Code (Act V of 1898), Ss. 195, 476—Sanction to prosecute and order for prosecution—Offence against public justice—Penal Code (Act XLV of 1860), S. 209—Offence committed before Small Cause Court—Sanction granted by such Court revoked by District Judge—High Court or District Judge, if may order prosecution under S. 476—High Court, if may grant sanction under S. 195, or set aside order revoking sanction—Powers of revision—Civ. Pro. Code (Act V of 1908), S. 115—Acting illegally in exercise of jurisdiction.*

When a Small Cause Court Judge granted sanction to the District Magistrate to prosecute the petitioner for an offence under S. 209, I.P.C., and the sanction was revoked by the District Judge on the ground that a sanction could not be granted to a third party, but the District Judge nevertheless ordered the prosecution of the petitioner under S. 476, *Crim. Pro. Code*, there being, in his opinion, a *prima facie* case against the petitioner :

Held, that neither the District Judge nor the High Court had power to order the prosecution of the petitioner under S. 476, *Crim. Pro. Code* (a).

That the High Court was not, for the purpose of S. 195 of the Code, the Court to which the Small Cause Court was subordinate, and so could not grant sanction under cl. (b) of sub-sec. (1) of S. 195.

That the High Court had jurisdiction to set aside the order of revocation and to restore the original sanction, under S. 115 of the Civil Procedure Code, the District Judge having acted illegally in the exercise of his jurisdiction in revoking the sanction which had been properly granted by the District Magistrate.

Quare :—Whether the High Court had power under cl. (b) of sub-sec. (1) of S. 195, to interfere with the order of the District Judge revoking the sanction. 10 C.W.N. 1026 is on this point in conflict with 5 C.L.J. 222 and has been dissented from by a Full Bench of the Madras High Court in 30 M. 383.

There is nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed

Sanction to prosecute—(Continued).

at was committed. Sanction to prosecute for an offence against public justice may best be granted to a public officer, for there can be no better recipient of such sanction (b).

The principles relating to the grant of sanctions to prosecute and the reasons for the safeguards provided by Ss. 195 and 476, indicated.

"Offences against public justice ought to be pressed primarily in the interests of public justice and never as a means of satisfying a private grudge." **Ram Proshad Malla v. Raghubar Malla**, 13 C.W.N. 1038 = 4 Ind. Cas. 6 = 10 Cr. L.J. 454 = 37 C. 18.

CHITTY and CARNDUFF. JJ.

References :—(a) 34 C. 551 (F.B.), F. (b) 3 C.W.N. 3, D.

- (2) *Criminal Procedure Code (Act V of 1898), Ss. 195, 195 (6), 439—Sanction to prosecute—Procedure—Court if bound to take evidence—Revision of order of Civil Court refusing sanction—Civil Procedure Code Act V of (1908), S. 115, High Court, Original Side—Revisional jurisdiction over Presidency Small Cause Court—Practice—High Court Rules, Appellate Side, Rule IV (a).*

There has been a well established practice of the High Court that applications for revision of orders by the Calcutta Small Cause Court are heard by a single Judge on the Original Side of the High Court (a).

Rule IV (a) of the Appellate Side Rules confirms the practice, and under it jurisdiction for revision of orders by the Small Cause Court is vested in a single Judge on the Original Side.

A Civil Court, in making an order under S. 195 of the Criminal Procedure Code, does not exercise criminal jurisdiction. The Criminal Revisional Bench of the High Court has therefore no jurisdiction to interfere with such an order (b).

But the High Court can interfere with such order under S. 115 of the Civil Procedure Code.

The jurisdiction of the High Court to interfere under S. 115, Civil Procedure Code, is not ousted by S. 195, sub-sec. (6) of the Criminal Procedure Code inasmuch as an application under the latter is not an appeal but a substantive application (c).

In disposing of the application for sanction to prosecute for bringing a false suit under

Sanction to prosecute—(Continued).

S. 195 of the Criminal Procedure Code, the Court has to decide whether the original suit was false, and whether, if it was false, sanction should be granted, and must make a full enquiry into the matter even if it involves trying the case *de novo*.

So where there was no evidence in the records of the original case to prove that it was false, and Small Cause Court refused sanction on the ground that it was not bound to go beyond the record, the Court ordered the case to be sent back and tried according to law. **Sew Bollok Singh v. Ramdhin Bania**, 11 C.W.N. 806 : 6 Ind. Cas. 473.

PUGH, J.

References :—(a) 29 C. 498; 30 C. 588; S.C. 7 C.W.N. 547, (1903); 30 C. 986; S.C. 7 C.W.N. 843 (1903), *discussed*. (b) 28 A. 554; 26 A. 249; 1 C.W.N. 400 (1897); 7 C.W.N. 112 (1902); 8 C.W.N. 73 (1903); 26 M. 98, R. (c) 26 A. 244 (247), R.

(3) *Crim. Pro. Code, S. 195—Sanction to prosecute—Appeal.*

An appeal from an order made by a Munsiff under S. 195 of the Code of Criminal Procedure lies to the Court of the District Judge and cannot legally be referred for disposal to the Court of the Subordinate Judge. **Kotti Setti v. Balt Mindoss**, 15 M.C.C.R. 73.

STANLEY ISMAY, C.J.

(4) *Criminal Procedure Code (Act V of 1898), Ss. 195, 176—Order under S. 476 infructuous—Order under S. 195 not illegal—Application under S. 195 presented by minor should be presented through next friend.*

After action has been taken under S. 476 of the Crim. Pro. Code, and an order has been made, which proved infructuous because not made in accordance with that section or because it is defective in form, there is no reason why an application properly made under S. 195 should not be entertained. The position would be different if the order under S. 476 was set aside on the merits.

An application presented under S. 195 of the Crim. Pro. Code to a Civil Court, for sanction to prosecute a person, by a person who is an infant, ought to be presented on his behalf by a properly appointed next friend. The Court will not entertain an application which is not so presented.

The objection goes to the root of the matter, and may be taken successfully in the appellate

Sanction to prosecute—(Concluded).

or the Revisional Court. **Rajendra Nath Das v. Mukta Rani Das**, 6 Ind. Cas. 367.

MOOKERJEE and TEUNON, JJ.

References :—19 M. 127; 22 C. 270, R.

(5) *Sanction to prosecute—Appeal pending against the judgment—Should not be granted.* **Mohant Kirpalban v. Musammat Ramdel**, 7 A.L.J. 647.

KARAMAT HUSSAIN, J.

Sanyasi.

—becoming a Grihasta—Succession. See **MAHANT**, No. 1, 41 P.W.R. 1910.

Saranjam.

(1) *Saranjam—Inam—Miras, permanent tenancy—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.*

In an ejectment suit brought by an Inamdar, against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure, and that the present incumbent of the Saranjam was the plaintiff. The defendants, resisted the plaintiff's claim to eject them, on the ground that the Inam rights were merely the rights to receive the royal share of the revenue, and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, and had descended to his heirs independently of the Inam, and furnished the permanent leasehold or Mirasi right.

Held, that the defendants' contention involved the denial of the title to the reversionary rights, in the lands in the defendants' occupation, of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title (a).

The rights of the successive holders of hereditary and impartible estates not governed by ordinary rules of inheritance, but subject to the condition that Government shall approve of the heir, may be barred by adverse possession (b).

Where, in an ejectment suit by Inamdar, it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants.

Saranjam—(Concluded).

Held, that the defendants had acquired a title to the limited interest claimed by them, and could not be objected. **Trimbak Ramachandra Pandit v. Shekh Gulam Zilzni Walker**, 12 Bom. B.R. 209 = 5 Ind. Cas. 965.

SCOTT, C.J. and BATCHELOR, J.

References :—(a) 8 B.H.C.A.C.J. 175 ; 4 Q.B. 367, R. (b) L.R. 12 I.A. 197, R.

Scribe.

(1) Signature of—Whether attestation. See **ATTESTATION**, No. 4-a, 6 N.L.R. 152.

Security.

(1) Deposit of—Deposit made with third person under the master—Servant dismissed from service—Right to deposit. See **MASTER AND SERVANT**, No. 1, 12 Bom. L.R. 780.

(2) Suit to recover money deposited as security for payment of rent—Limitation. See **LIMITATION ACT** (1908), No. 21, 13 O.C. 286.

Separate Assessment Act.

See ACT I OF 1876 (MADRAS).

Service.

(1) Lands given for japam service—Failure to perform service—No hereditary right to lands—Effect.

Where lands were granted to person for the japam service alone, and he had no hereditary right to them ; *held*, that failure to perform the service for a long time entailed dismissal. **Muthu Alagappa v Ramalinga Gurukkal**, 8 M.L.T. 364.

MILLER and KRISHNASWAMI IYAR, JJ.

(2) Land given in lieu of—Non-performance—Suit for damages—Jurisdiction. See **DAMAGES**, No. 3, 12 C.L.J. 480.

(3) Possession granted for doing prohibit service—Cessation of—Effect. See **ADVERSE POSSESSION**, No. 6, 7 Ind. Cas. 252.

Set off.

(1) What may be set off. See **INSOLVENCY ACT** (11 and 12 Vic., Chap. 21), No. 5, 33 M. 53.

(2) Mutual credit—Claim for unliquidated damages, whether can be set off. See **INSOLVENCY ACT**, No. 1, 7 M.L.T. 207.

(3)—when cannot be claimed. See **CIV. PRO. CODE** (1908), No. 105, 11 C.L.J. 406.

(4) Tenant's right to deduct expenses of repairs—Set off. See **LANDLORD AND TENANT**, No. 21, 6 Ind. Cas. 131.

Set off—(Concluded).

(5) Breach of contract—Right to set off unascertained damages. See **CONTRACT**, No. 4, 37 C. 334.

(6) Set off—Jurisdiction. See **CIV. PRO. CODE (MYSORE)**, No. 6, 15 M.C.C.R. 116.

(7) Kinds of—Equitable, when may be allowed. See **CIV. PRO. CODE** (1908), No. 106, 77 P.R. 1910.

(8) Settling off of decree for simple money against decree for money by enforcement of charge—Legality. See **CIV. PRO. CODE** (1908), No. 120, 7 A.L.J. 1179.

Settlement.

Construction of deed of. See **CONSTRUCTION OF DEEDS**, No. 3, 20 M.L.J. 519.

Settlement papers.

Entry in—Rebuttal of its correctness. See **SHAMILAT**, No. 1, 138 P. W.R. 1909.

Shamilat.

(1) Shamilat—Entry in settlement papers—Rebuttal of its correctness—Ownership claimed by a person recorded as a tenant—Emergent land—Presumption from long possession—Apportionment—Estoppel.

Where H.M., who in the settlement papers were entered as tenants at will of a certain area out of the *Shamilat* of the village, contended that they were its exclusive owners :

Held, that their contention is good, inasmuch as the following circumstances are sufficient to rebut the presumption arising from the settlement entry :—

(1) That their proprietary holding immediately adjoins the area in dispute. The rule is that, when land is emerged, the person who owns the adjacent land is entitled to get it.

(2) That they have been in possession as owners, ever since the area emerged and have reclaimed it.

Held, also, that in land acquisition cases persons deliberately omitting to claim the property to be acquired, or accepting the award treating the land as *shamilat*, are ordinarily estopped from afterwards asserting their rights before the Civil Court. **Haji Umar Din v. Khair Din**, 138 P.W.R. 1909.

CLARK, C. J.

(2) Grant of shamilat land by Government—"Family"—Meaning of the word used in the grant.

Shamilat—(Continued).

The word "family" has various meanings; and it has to be construed with reference to the context in each particular case (a).

The Government of Punjab made a grant of a certain land, out of the *shamilat* of a village, to A rent free for life, and it was stipulated that the proprietary right was to remain in the family of the grantee on his demise, subject to assessment. Before this grant was made, the father of A had died, and the brothers of A were not living together as members of a joint family at the time of the grant.

Held, since the grant was made under those circumstances to A, in consideration of his personal services as a military man, the word "family" used in the *sanad* must be taken to be employed in its restricted sense, i.e., as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man (b). **Jaimal Singh and Nehal Singh v. Gurumukh Singh**, 20 P.R. 1910=28 P.W.R. 1910=5 Ind. Cas. 898.

RATTIGAN and SHAH DIN, JJ.

References:—(a) Stroud's Judicial Dictionary, Vol. II, p. 694, R. (b) L.R. 3 Ch. D. 672.

(3) *Punjab Land Revenue Act (XVII of 1887), S. 117—Partition proceedings—Jurisdiction of Civil and Revenue Courts—Shamilat land—Partition of—Right to retain possession of land broken up and cultivated for many years by one of the co-sharers.*

At a partition of *shamilat* land, the plaintiff alleged that the land in dispute in the present suit was broken up by him and was in his possession for many years, and contended that according to custom his possession should not be disturbed. The Revenue authorities did not accept the contention and the land was allotted to a different co-sharer. The plaintiff sued in the Civil Court for a declaration that he was entitled to retain possession of the land by custom.

Held that the Civil Court had no jurisdiction to take cognizance of the case. **Khuda Baksh v. Kaim Din**, 3 P.L.R. 1910=6 Ind. Cas. 486=116 P.W.R. 1910.

RATTIGAN and SHAH DIN, JJ.

(4) *Shamilat—Sale—Interpretation of the deed of sale of original holding.*

Held, that the rights of a proprietor in the *shamilat* of a village are not merely accessory

Shamilat—(Continued).

to the land owned by him, and a sale of the latter does not ordinarily convey *shamilat* rights to the purchaser, unless the contrary intention is clearly and unequivocally established. The *onus*, in such cases is on the purchaser, and this *onus* is not discharged by the mere fact that expressions such as noted below have been used in the deed of conveyance.

(1) *Haq-i-milk-i-khud* (which means "right title and interest").

(2) *Shamilat Chah* (which is distinct from *shamilat deh*).

(3) *Bajami huyaq dakhili wa khariji* (which only mean external and internal rights in the area actually sold).

Held, also, that an entry in the *wajib-ul-arz* of a village, to the effect that *shamilat* will be partitioned in proportion to *khewat*, does not confer on the vendee any right to get a share in the *shamilat* not expressly conveyed to him.

Held, further, that the facts of vendee's incurring expenses incidental to *shamilat*, without showing that the vendor was asked but refused or failed to pay, or vendee's getting some compensation under Act I of 1894 for a portion of it or vendee's getting a share of *shamilat* in incomplete partition proceedings and possessing it for a short time, are insufficient to show that the vendee has also purchased the vendor's share in the *shamilat*. **Ahmad v. Ahmad**, 75 P.W.R. 1910.

JOHNSTONE and SHAH DIN, K.B., JJ.

References:—C. 113 P.R. 1901; C.A. 628 of 1905, F.; 8 P.L.R.=P.W.R. 1907, D.

(5) *Common land—Village divided into tarafs and occupied by different tribes—Holdings not equivalent in extent but similar in kind—Settlement Records—Entries in, when not made after full inquiry—Res judicata—Obiter dictum—Admission, when not binding—Statement made by several persons representing all the proprietors—Registration Act, III of 1877), S. 17—Immoveable property—Value not shown to be exceeding Rs. 100—Document merely admitting an antecedent right.*

The plaintiffs, *Dhamials* of the village *Jhurmat Khurd* in the Rawalpindi District, sued for a declaration of their rights as proprietors of the land in suit in the village and to shares in the common land. It was found that the village was occupied by members of three tribes, the *Budhals*, who had a *taraf* of

Shamilat—(Concluded).

their own, and the *Kathrils* and *Dhamials* who had seven *tarafs* between them, the *Kathrils* owning three *pattis* out of it and the *Dhamials* one.

There was nothing to show that the *Dhamials* acquired their holding in village in any manner different to the *Kathrils* and *Bhudals*; their holdings were not equivalent in extent but were presumably similar in kind.

At the summary settlement of 1853, the *Dhamials* were shown as having a share in the *shamilat* of their *taraf*.

When the settlement of 1860 was proceeding, the *Kathrils* sued the *Dhamials* to eject them from the lands in their possession, alleging that the latter were their tenants. The suit was dismissed, but the Court observed in the judgment that the *Dhamials* had no right in the *shamilat*. In the regular settlement it was decided that the *Dhamials* had no share in the *shamilat*. In 1863 the *Dhamials* secured from several *Kathril* proprietors a stamped acknowledgment that the former were entitled to share in the *shamilat*. It was contended for the defendants that the document was not admissible in evidence for want of registration. In 1885 settlement, the *Dhamials* were only recorded as *malukhan cabza* of their proprietary holdings and as tenants *ghair maurusi* of two *shamilat* fields.

Held that the plaintiffs were entitled to the declaration prayed for. The observation in the judgment in 1860 case was a mere *obiter dictum* and was not *res judicata*.

That the acknowledgment was not inadmissible in evidence, for (1) it was not shown that plaintiff's share in *shamilat* in 1863 had a money value of Rs. 100. and (2) the document merely admitted antecedent right (*a*).

It was not shown that the rights the plaintiffs had in the land and to the *shamilat* were in any way lost or transferred to the defendants. **Kalu v. Farman**, 94 P.L.R. 1910.

WILLIAMS and SHAH DIN, JJ.

References:—(*a*) 26 P.R. 1891; 95 P.R. 1894, R.

(6) Suit by co-sharer for possession of—Dismissal on the ground that remedy lay in suit for partition—Revision. See ACT XVII of 1884 (PUNJAB COURTS), No. 1, 13 P.R. 1910.

Share certificates.

Sale of—Loss resulting by fall in value of shares detained by vendor—Suit to recover loss in value—Limitation. See LIMITATION ACT (1877), No. 47, 12 Bom. L.R. 513.

Shares.

"Goods" in S. 178, Contract Act, includes shares in joint stock Companies. See CONTRACT ACT, No. 58, 12 Bom. L.R. 870.

Shebait.

(1) *Hindu Law*—Shebait of *thakur*—Right of indemnity—Expenses incurred in defending title as Shebait and in performing obligations of trust, a first charge on trust estate—Shebait if bound to spend only income in hand—Suit to recover amount spent by Shebait out of personal estate—All claimants to office made parties—Amendment directing determination of question of right to office—Character of suit, if altered—"New defendant"—Limitation Act (XV of 1877), S. 22, Sec. II, Art. 120.

Where the legal representatives of a deceased shebait of an idol sued for recovery of amounts alleged to have been spent by him in protecting the *debutter* estate and performing his obligations as a shebait, making the appellant, along with all other possible claimants to the office of shebait, as parties, but the Court directed an amendment in the prayer of plaint so as to raise directly the question as to which of the claimants was entitled to the office of the shebait and should represent the estate, and the appellant was found, upon a trial of this issue, to be the shebait.

Held that the amendment did not alter the nature of the suit, and the appellant was not brought on the record as a "new defendant" within the meaning of S. 22 of the Limitation Act.

The period of limitation for the suit was six years from the date of the death of the shebait.

The right of indemnity is incident to the position of the trustee. The liability in respect of the indemnity is the first charge on the trust estate.

A shebait is entitled to be reimbursed all moneys properly expended by him in defending his position as shebait against an unsuccessful claimant to the office (1).

The shebait is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the founder.

Where the income of a *debutter* estate suffered diminution owing to the wrongful acts of a rival claimant to the office of the shebait, but it was not unreasonable to expect that, on the cessation of those acts or of the interposition of the Court, whose aid had been invoked, the

Shetbait—(Concluded).

income would be sufficient to defray expenses incurred in the meantime by the *shetbait* and paid out of his own personal estate for the *shetbait* of the idol;—*Held* that, in the absence of any provision by the founder directing that the *shetbait* must not spend more than what he at any time actually received and create no outstanding claim against the estate, the *shetbait* was entitled to be reimbursed the moneys so spent by him out of his personal estate. **Raja Peary Mohun, Mokerji v. Narendra Nath Mukerjee and others**, 7 M.L.T. 63-14 C.W. N. 261 (P.C.)=7 A.L.J. 133-11 C.L.J. 220=12 Bom. L.R. 257-37 C. 229=20 M.L.J. 171=5 Ind. Cas. 401.

LORD MACNAGHTEN, LORD COLLINS
and SIR ARTHUR WILSON.

Reference :—(1) L.R. 7 Ch. D. 504, *F*.

(2) Extinction of family of—Reversion to family of grantor. See DEBUTTER PROPERTY, No. 1, 6 Ind. Cas. 26.

(3) Powers of. See RELIGIOUS ENDOWMENTS, No. 5, 20 M.L.J. 969.

Shet-sanadi.

(1) *Shet-Sanadi—Rules framed under Bombay Act, XI of 1852—The Shet-Sanadi discharged by Government without any fault on his part—The lands continued to him on payment of full survey assessment—The new Shet-sanadi remunerated from out of the assessment by Government—The Shet Sanadi lands converted into ryotwari holding—Resumption of lands by Government.*

In 1865, *Shet-sanadi*, on being discharged without fault from his office by Government, was, under the rules then in force, allowed to remain in possession of the *Shet-sanadi* lands, but full survey assessment was imposed thereon. The defendant No. 2, who was appointed the new *Shet-sanadi*, was remunerated from the extra assessment levied upon the *Shet-sanadi* lands. In 1905, the Government resumed the lands and handed them over to defendant No. 2:—

Held, (1) that the order passed, and the action taken, under the rule, by the Government, had in law the effect of converting the lands from a *Shet-sanadi vatan* into a ryotwari holding, and of investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment;

Shet-sanadi—(Concluded).

(2) that the defendant No. 2 had held the office of *Shet-sanadi* independently of the lands in dispute; and all that was done in 1865 was that his remuneration for that service was increased, and the enhanced amount was made payable not from the lands in dispute, but out of the assessment payable to Government by the occupant; that that was an arrangement between defendant No. 2 and Government, which could not prejudice the rights of the preceding *Shet-sanadi* in the absence of any law affecting that right;

(3) that the proceedings adopted by the Collector in 1905 were on the supposition that what was done in 1865 had the effect of continuing the land in dispute as one reserved for *Shet-sanadi* service; but that was not its effect, and the proceedings in question were *ultra vires* of the Collector. **Sellappa Ramappa Kuri v. Marlingappa Chavadappa**, 12 Bom. L.R. 577.

CHANDAVARKAR and HEATON, JJ.

Ship.

(1) Vendee of share in—Absence of bill of sale in his favour—Right to be registered as owner. See STATUTE, 57 & 59 VIC., C. 60 (MERCHANT SHIPPING), No. 1, 8 M.L.T. 407.

Signature.

—in account books—Effect. See ACKNOWLEDGMENT, No. 1, 7 M.L.T. 84.

Singing.

(1) Exclusive right of—Injunction. See INJUNCTION, No. 1, 7 Ind. Cas. 558.

Site.

Adverse possession of house—. Suit in respect of—. Limitation. See LIMITATION, No. 1, 7 M.L.T. 309.

Small Cause Court.

(1) *Suit for jarib cent—Cognisability—Want of jurisdiction to try suit—Return of plaint—Proper course.*

A suit for *jarib* rent is cognisable by a Court of Small Causes.

In the case of a suit, to try which a Court has no jurisdiction, the Court should not dismiss the suit, but return the plaint for presentation in the proper Court. **Yenkatadri Appa Row Bahadur Garu v. Pamidiparti Yenkata Ratnam**, 7 M.L.T. 350=6 Ind. Cas. 702.

MILLER, J.

Reference :—4 M.H.C.R. 393, *R*.

Small Cause Court—(Concluded).

(2) Suit of nature cognisable by—Second appeal. See CIV. PRO. CODE (1908), No. 48, 6 Ind. Cas. 415.

(3) Lease—Possession not given as per covenant—Suit for recovery of money—Second appeal. See ZURPESHJI LEASE, No. 1, 6 Ind. Cas. 704.

(4) Failure of consideration—Suit by auction-purchaser for refund of purchase money—Jurisdiction of. See EXECUTION SALE, No. 3, 12 Bom. L.R. 723.

(5) Judge of—Duty to record reasons for finding. See CIV. PRO. CODE (1908), No. 114, 4 S.L.R. 17.

(6) Power to make up deficiency of Court-fee—Power of Registrar of, to enlarge time. See CIV. PRO. CODE (1908), No. 78, 7 Ind. Cas. 578.

(7) Revisional jurisdiction over Small Cause Court (Calcutta). See SANCTION TO PROSECUTE, No. 2, 14 C.W.N. 806.

(8) Small Cause nature, suit of—Whether suit for 'begar' is a. See ACT XVIII OF 1881 (CENTRAL PROVINCES LAND REVENUE), No. 1, 6 N.L.R. 117.

Specific performance.

(i) *Suit for—Agreement to lease—Registration if necessary—Indian Registration Act (III of 1877), Ss. 3, 17 (d), and 49—Transfer of Property Act (IV of 1882), S. 54—Present demise—Interest in land.*

Unless an agreement to lease certain premises operates as a present demise, it does not of itself, create any interest in or charge on the property agreed to be demised, and can, therefore, be given in evidence for the purpose of enforcing specific performance of it, without its having been registered under the provisions of the Indian Registration Act.

An unregistered agreement to leases provided for the grant of lease for a period of five years commencing from the day following the day on which the agreement was entered into, and also provided that the proposed lessee would get a proper *kabuliyat* granted to him to be registered at his own cost :

Held, that, on the day the agreement was made, there was no present demise, and, therefore, the agreement could be adduced in evidence for the enforcement of specific performance thereof. **Satyendra Nath Bose v. Anil**

Specific performance—(Continued).

Chandra Ghosh, 14 C.W.N. 65 = 5 Ind. Cas. 98.

FLETCHER, J.

References :—(a) 10 Bom. 101 (1885) ; 17 M. L.J. 218 (1907), *F*.

(2) *Contract for sale—Specific performance—Mother guardian of minors—Contract with—Collector's permission—Form of decree.*

The mother of the defendants, who were minors at the time, agreed to sell a particular share in lieu of a debt due by the father of the defendants to the plaintiff. The permission of the Collector was obtained and a sale-deed was executed. The mother refused to register it, but no suit was brought for compulsory registration. Plaintiff sued the defendants for specific performance of the contract. *Held* that a Court has jurisdiction to direct specific performance of the contract and do not require the defendants to do all necessary acts for the purpose of fulfilling the obligation into which through their guardian they had entered, and that the plaintiff was entitled to have a fresh sale-deed executed and registered. **Amer Chand v. Nathu**, 7 A.L.J. 887.

STANLEY, C.J. and BANERJI.

(3) *Suit for—Agreement to lease—Lease not registered—Contract, if divisible.*

Although a document, which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance.

It is not an inflexible proposition of law that every contract to grant a lease is an indivisible contract. **Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh**, 12 C.L.J. 464.

MOOKERJEE and CARNDUFF, JJ.

(3-a) *Specific performance—Contract—Public policy.*

The plaintiff Company engaged the first defendant, an Inspector of Land Records, to purchase certain land in the name of the second defendant as their agent, and agreed to pay a certain remuneration. The lower Court dismissed the suit for specific performance on the ground that the contract was against public policy: *Held*, reversing the decree, that the District Judge had invented a new head of public policy, and the dereliction of duty on the part

Specific performance—(Concluded).

of the first defendant was not a thing contrary to law or something having the force of law. **George Gillespie and Co., Ltd. v. Maung Maung**, 8 Ind. Cas. 441.

FOX, C.J. and PARLETT, J.

References :—(1853) 4 H.L.C. 1 ; 23 L.J. Ch. 348 ; 18 Jur. 71 ; (1902) L.R.M.A.C. 484 ; 71 L.J.K.B. 957 ; 87 L.T. 372 ; 51 W.R. 142 ; 7 C.C. 268, R.

(4) Lease—Possession not given as per covenant—Suit for recovery of money—Suit for. See **ZURPESHJI LEASE**, No. 1, 6 Ind. Cas. 704.

(5) — of agreement with Municipality to officiate as priest. See CIV. PRO. CODE (1908), No. 10, 12 C.L.J. 74.

(6) Payment of part consideration—Delay in paying balance—Suit for—Discretion of Court. See **SALE**, No. 9, 7 Ind. Cas. 568.

(7) Suit for, and possession against certified purchaser—Maintainability. See CIV. PRO. CODE (1882), No. 164a-i, 8 Ind. Cas. 258.

Specific Relief Act.

(1) Ss. 3, 21 (e)—Agreement by administrator in excess of his powers—Not specifically enforceable. See **COMPROMISE DECREE**, No. 1, 14 C.W.N. 451.

(2) Ss. 8, 9—Suit for possession based on title—Title not proved—No decree for possession can be given—Defendant trespasser—Plaintiff in continuous peaceful possession.

When a plaintiff brings a suit for possession on the basis of title and fails to establish title, he cannot be granted a decree under the first paragraph of S. 9 of the Specific Relief Act, 1877 (a).

Obiter—In some instances previous possession may afford evidence of title, and where the defendant is a trespasser and the plaintiff has been in continuous and peaceful possession, he would be entitled to retain such possession. **Lachman v. Shambu Narain**, 7 Ind. Cas. 495.

BANERJI and KARAMAT HUSAIN, JJ.

References :—(a) 15 A. 384, overruled ; 25 M. 448 ; 11 M.L.J. 403 ; A.W.N. (1884), 39 ; A.W.N. (1889), 89, relied upon. A.W.N. (1897), 145, D.

(3) S. 9—Decree against landlord for khas possession—Ouster of tenants in execution—Tenant's remedy—Civil Procedure Code (Act XXV of 1882), S. 332.

Specific Relief Act—(Continued).

Where, in execution of a decree for khas possession obtained against the landlord, the plaintiffs who were tenants were dispossessed.

Held, that the plaintiffs were not dispossessed otherwise than in due course of law, within the meaning of S. 9 of the Specific Relief Act. **Kamini Sundari Dasaya v. Sabed Sheikh**, 14 C.W.N. 403 = 5 Ind. Cas. 798. "

CHITTY and CARNDUFF, JJ.

(4) S. 9—Suit for possession—Plaintiff dispossessed without his consent, otherwise than in due course of law.

In a suit for possession of immoveable property, if the finding is that the plaintiff was dispossessed of his immoveable property, without his consent, otherwise than in due course of law, he is entitled to possession under S. 9 of the Specific Relief Act, although the suit was not expressly brought under that section. **Musammatt Maktula v. Kuleswar Misra**, 5 Ind. Cas. 482.

KARAMAT HUSAIN, J.

References :—A.W.N. (1907), 244 ; 4 A.L.J. 601 ; 15 A. 384 ; A.W.N. (1897), 145, F.

(5) S. 9—Evidence of title—Proof of nature of possession—Evidence of kind of possession—Exclusion—Material irregularity—Jurisdiction—Remedy by way of suit—Revision—S. 115, C.P.C., 1908.

In a possessory suit under S. 9, Specific Relief Act, 1877, evidence of title is admissible for the purpose of ascertaining the nature of possession, and the exclusion of evidence of the nature of possession itself is not justifiable and amounts to a material irregularity in the exercise of jurisdiction.

Where another remedy by way of suit is open to parties for settling their disputes, the Courts will decline to exercise powers of revision under S. 115, C.P.C., 1908. **H. Bawa Chatagir v. Matanomal Dewanmal**, 4 S.L.R. 80.

HAYWARD, J.C.

(6) S. 9—Possessory suit—Question of title not to be gone into—Possession to be proved—Acts of trespass over property not sufficient—Judicial possession, what constitutes.

The question of title is not to be determined in a suit under S. 9 of the Specific Relief Act.

It is immaterial, if the plaintiff was in possession, that such possession was without title. But the plaintiff will have to prove juridical

Specific Relief Act—(Continued).

possession and not mere isolated acts of trespass. He must prove that he exercised acts which amounted to acts of dominion, the nature of which must vary with the nature of the property.

Acts of dominion, though exercised over a part only of the property, may be evidence of possession of the whole.

Acts of dominion should be exclusive.

If the plaintiff's occupation has been peaceable and uninterrupted and has extended over a sufficient length of time, the possession would be sufficient for a possessory decree. **Raj Krishna Parul v. Muktaream Das**, 7 Ind. Cas. 700.

MOOKERJEE and CARNDUFF, JJ.

References:—15 B. 685; 7 B.H.C.R.A.C.J. 82, *Rel. upon*.

(7) *S. 9—Dispossession—Possession through tenant—Possessory suit, whether lies at landlord's instance.*

A landlord holding possession through a tenant can bring a suit under S. 9 of the Specific Relief Act to recover possession of land of which he has been dispossessed by the act of a third party. **Nobind Das v. Kailash Chandra Dey**, 7 Ind. Cas. 924.

MOOKERJEE and TEUNON, JJ.

References:—13 C.W.N. 303; 1 Ind. Cas. 150; 28 M. 239, *F.*; 19 C.W.N. 307, *note*; 1 Ind. Cas. 151; 13 C.W.N. 305; 1 Ind. Cas. 152, *R.*; 14 C. 619; 6 C.W.N. 616; 19 C. 514 (**F.B.**), *D.*

(7-a) *S. 9—Party entitled to bring suit under—Failure—Effect.* See ACT XVIII OF 1884 (PUNJAB COURTS), No. 1, 13 P.R. 1910.

(8) *S. 9—What amounts to taking possession in due course of law—Suit by tenant for recovering possession.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 84, 11 C.L.J. 433.

(8-a) *S. 9.* See No. 2, *supra*.

(9) *Ss. 15, 16, 17—Agreement to sell land—Agreement on behalf of minors—Contract not for purposes binding on minors—Adult parties cannot be compelled to specifically perform the contract on behalf of minors—Specific performance permissible as against adult parties to the extent of their shares in the property.*

The defendants Nos. 1 and 4 for themselves and also as guardians of defendants Nos. 2 and 3 agreed to sell certain lands to plaintiff for

Specific Relief Act—(Continued).

Rs. 1,400. Plaintiff sued defendants for specific performance of the contract. It was found that the agreement was for purposes not binding on the minor defendants:

Held (1), that no decree could be passed compelling a conveyance of the interest of second and third defendants as well by the first and fourth defendants;

(2) that plaintiff was, however, entitled to a conveyance, by first and fourth defendants, of their interest in the property agreed to be sold, on payment of the full consideration stipulated without abatement or compensation. **Ponaka Subba Rani Reddy v. Yadamadi Seshachellam**, 5 Ind. Cas. 79 = 7 M.L.T. 137 = 20 M.L.J. 328.

WHITE, C.J., and KRISHNASWAMI AYYER, J.

References:—5 M. 337; 32 M. 320; 4 Ind. Cas. 506, *D.*; L.R. 19 Ch. D. 175; 51 L.J. Ch. 296; 45 L.T. 606; 30 W.R. 310; 46 J.P. 135; 26 M. 74, *R.*

(9-a) *S. 16.* See No. 9, *supra*.

(10) *S. 17—Performance of contract—Document signed by only one of the executants on the understanding that others would join it—Proposed agreement—Imperfect contract.*

A deed of sale purporting to have been executed by three persons was signed by only one of the executants. The other two executants did not sign it. The contract embodied in the deed was to take effect only on its execution by all the parties: *Held*, that the document constituted merely a proposed agreement which had never been perfected, and one of the executants having executed it on the understanding that the others would join in its execution, the contract could not be enforced. **Marha Singh v. Mohammad Umar**, 7 Ind. Cas. 393.

STANLEY, C.J., and BANERJI, J.

References:—25 M. 389; 12 M.L.J. 17, *R.*

(10-a) *S. 17.* See No. 9, *supra*.

(11) *S. 18.* See BENAMIDAR, No. 1-a, 7 Ind. Cas. 218.

(12) *S. 21—Contract to refer to arbitration—No time fixed for award—Revocation of the contract—Just cause—Onus—Revocation inferred from conduct of parties—Civ. Pro. Code (Act XIV of 1882), S. 523—Right to enforce decision by arbitrators—Limitation—Existence or non-existence of the contract to refer after limitation.*

Specific Relief Act—(Continued).

The plaintiff and the defendant agreed to refer their disputes to arbitration. The defendant attended the meetings of the arbitrators, but the plaintiff did not, and gave a notice to the arbitrators not to proceed with the award. The arbitrators dropped further proceedings. The defendant did not attempt to put in force the provisions of the Code of Civil Procedure to force on the award, and allowed the limitation to expire :

Then the plaintiff sued and the defendant resisted the claim on the strength of S. 21 of the Specific Relief Act :

Held (1) that a contract to refer disputes to arbitration implies a contract to do all things necessary to the making of a valid award, so far as the parties were concerned ;

(2) that a contract to refer to arbitration could be rescinded by mutual agreement of both parties or by one of them for a just cause ;

(3) that the burden of proving the existence of just cause for revocation lay upon the party who revoked the contract.

Per Richards, J.—If, after a contract to refer is entered into, nothing is done for a long time, the Court might infer that the parties rescinded it by mutual consent. But this is not a necessary inference.

If the contract to refer was never rescinded, it must be in existence ; the mere fact that there might be difficulty in applying the provisions of the Code of Civil Procedure to the case does not render the contract non-existent.

Per Tudball, J.—If one of the parties to a contract to refer refuses to go on with the arbitration, the other party might resort to one of the following courses open to him :

(a) He might take action within the period of limitation, under the provisions of the law as contained in the Civ. Pro. Code, to enforce a decision by the arbitrators, or

(b) He might sue for damages for breach of contract

If the party entitled to the above remedies has resorted to neither of the two courses within the period of limitation, the contract can no longer be said to be in existence in the eye of the law. **Ram Kumar Singh v. Jagmohan Singh**, 6 Ind. Cas. 420.

RICHARDS and TUDBALL, JJ.

(12-a) S. 21(e). See No. 1, *supra*,

Specific Relief Act—(Continued).

(13) S. 31. See EVIDENCE ACT, No. 26, 190 P.L.R., 1910.

(14) S. 39—*Suit for cancellation of a forged receipt—Maintainable—Receipt whether an "instrument."*

Held that, under S. 39, a suit may be brought for the cancellation of a forged instrument. [*Vide Ill: (b)*] since, if it is not cancelled and left outstanding, it may cause serious injury.

Held also that a receipt is an instrument within S. 39 of the Act. **Yenkata Srinivasa-charlu v. Kadambal Kundalam Andalamma**, 7 M.L.T. 270.

SANKARAN NAIR and ABDUR RAHIM, JJ.

(15) S. 39—*Suit for declaration that a deed is inoperative—Cause of action—Limitation.* See LIMITATION ACT (1877), No. 59, 5 Ind. Cas. 497.

(16) Ss. 39, 42—*Cancellation of instrument—Declaration of title—Sale deed executed—Executant cannot obtain declaration of his title unless he gets the deed set aside.*

The executant of a sale-deed cannot obtain a declaration of his title to the property sold, unless and until he first gets the sale-deed set aside. **Panna Bibi v. Habiba**, 6 Ind. Cas. 891.

RICHARDS and GRIFFIN, JJ.

(17) S. 41—*Sale by minor vendee deceived and acting in good faith—Refund of purchase-money—Equity—Ss. 64, 65, Contract Act.*

Plaintiff, when within 39 days of being *sui juris*, sold some land for Rs. 400 to the defendant, who was not aware that the vendor was an infant, but was deceived and acted in good faith. In a suit for possession of the land, *held* that plaintiff was liable to refund the purchase-money as a condition precedent to obtaining a decree for possession. The fact that Ss. 64 and 65 of the Contract Act do not apply to the facts of this case does not exclude the application of S. 41 of the Specific Relief Act and the rule of equity therein contained. **Baluk Ram v. Dadn**, 76 P.R. 1910.

REID, C.J., and SCOTT-SMITH, J.

References :—26 A. 342 ; 28 B. 181 ; 30 C. 539 ; 31 A. 21, F.

(18) S. 42—*Suit for declaration of abstract right—Cause of action—Succession Certificate Act (VII of 1889), S. 8.*

Where a Hindu widow applied for a succession certificate to enable her to collect the

Specific Relief Act—(Continued).

debts of her deceased husband and was opposed by the next reversioners, upon the ground that they had no objection to her enjoying only the interest on the money during her life, and an order to that effect was passed, whereupon she brought a suit for declaration that she was entitled to the whole sum of money, held, that the suit was maintainable; the limitation upon her power to get in the money, having been placed at the instance of the reversioners. **Kesho Ram Singh v. Ram Kuar**, 7 A.L.J. 311 = 5 Ind. Cas. 593.

KNOX and KARAMAT HUSAIN, JJ.

- (19) S. 42—*Rent-decrees obtained by defendant against plaintiff's tenants, if amount to dispossession—Throwing cloud on title—Declaratory suit, proper remedy.*

Where the plaintiff sued for declaration of title to certain lands, alleging that the same were in possession of his tenants, but that the defendant had thrown a cloud on his title by recovering rent-decrees against some of the tenants:

• *Held*, that the plaintiff could not in this suit ask for any further relief than a mere declaration of title, and was proceeding in the right manner in suing for declaration of title only. **Satish Chunder Bhattacharya v. Satya Churn Majumder**, 14 C.W.N. 576—5 Ind. Cas. 531.

CASPERSEN and DOSS, JJ.

References:—13 C. 147; 15 M. 307; 26 C. 11, relied on.

- (20) S. 12—*Claim of private right by plaintiff over land—Claim of public right by defendants—Cause of action—Criminal Procedure Code, S. 133—Parties—Persons claiming public right are alone necessary parties—Civil Procedure Code (Act XIV of 1882), S. 30—Irregularity in not recording formal order.*

Where the plaintiff claims a private right upon a certain land, over which a public right of way is claimed by the defendants, who initiated proceedings under S. 133, Crim. Pro. Code, and there has been an order by the Magistrate upon the plaintiff to remove certain structure which the Magistrate found to be an obstruction upon the alleged public right of way:

Held, that, as a cloud had been thrown upon his title by the proceedings under S. 133, Crim. Pro. Code, the plaintiff had a cause of action to bring a suit for declaration of his title:

Specific Relief Act—(Continued).

Held, also, that the plaintiff had a right to bring the suit against the defendants alone, without impleading any other member of the public.

Where notices under S. 30 of the Civ. Pro. Code, 1882, were issued one year before the trial, mentioning the defendants and other residents of the neighbouring villages, and the defendants put in written statement after the service of the notices, and adduced evidence in support of the public right of way, the notices must be considered to be definite enough, and the simple fact that particular person was not directed, by an express order of the Court before the trial, as authorized to defend the suit, did not affect the result of the case (b). **Sheik Ekhar Ali v. Anu Manjhi**, 6 Ind. Cas. 46.

CHATTERJEE, J.

References:—(a) 17 C. 460 (F.B.), F. (b) 21 C. 180; 29 C. 100, F.; 17 C. 906, R.

- (21) S. 42—*Mortgagee's possession is that of mortgagor—Mortgagor can maintain a suit for declaration.*

The possession of a usufructuary mortgagee is the possession of his mortgagor. If any third person effects a transfer of the property to the detriment of the interest of the mortgagor, he can sue for a declaration of his title, notwithstanding the fact that the mortgagee is in possession. S. 42 of the Specific Relief Act does not bar such a suit. **Mussammat Akasi v. Jutagir alias Pararamgir**, 6 Ind. Cas. 166.

STANLEY, C.J., and BANERJI, J.

- (22) S. 42—*Mahomedan Law—Waqf—Persons entitled to use the property—Declaration of right—Code of Civil Procedure (Act V of 1909), Sec. 92, 93—Permission to sue.*

The plaintiffs, without permission of the Legal Remembrancer, brought a suit for declaration that a certain *Idgah* and the lands adjoining were *wakf* property. The Court below found the property in dispute to be endowed property. *Held* that the plaintiffs were entitled to maintain the suit, as they were Mahomedans resident in the district and had a right to frequent and use the mosque for devotion, and the lands adjoining were appurtenant to the mosque. **Muhammad Alum v. Akbar Hussain**, 7 A.L.J. 797.

STANLEY and GRIFFIN, JJ.

References:—5 A. 497; 7 A. 178, F.; 8 A. 31, D.

Specific Relief Act—(Continued).

(23) S. 42—*Suit for declaration and injunction—Declaration that a certain person is not plaintiff's son—Civ. Pro. Code (1st V of 1908), S. 9th—Suit of a Civil nature—Suit for declaration—Minors, suits against—Stay of suit—Practice and procedure.*

The plaintiff sued for a declaration that the defendant No. 2 was not his son, and that he was not born to defendant No. 1 (wife of plaintiff), and for an injunction restraining defendant No. 1 from proclaiming to the world that defendant No. 2 was plaintiff's son, and from claiming maintenance for him as such son. It was contended that the suit as framed would not lie :

Held, that, having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son not admitted by him had been born to his wife, his contention as to his right under S. 42 of the Specific Relief Act was perfectly reasonable, and the suit was, therefore, one which fell within the purview of S. 42.

Held, further, that the Court of first instance in entertaining the suit had exercised a proper discretion in the matter ; for the plaintiff's own hand had been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff was entitled to repel at a time when the material evidence was obtainable.

The general power vested in the Courts in India under the Civ. Pro. Code to entertain all suits of a civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute.

It is not the practice to stay suits against infants until they have attained full age, as it is generally considered that an infant's case can be sufficiently placed before the Court by a duly constituted guardian. **Bai Shri Yaktuba v. Agarsingji**, 12 Bom. L. R. 697 - 34 B. 676.

BASIL SCOTT, C.J., and BATCHELOR, J.

(24) S. 42—*Denial of plaintiff's title—Cause of action—Declaratory—Suit—Agreement—Document of legal value—Nudum pactum.*

A suit for the declaration of an abstract right cannot be maintained. There must be some infringement or threatened infringement of the plaintiff's right. The plaintiff must allege and

Specific Relief Act—(Continued).

prove a denial of his right before his plaint is filed ; the cause of action must be antecedent to the suit, and not subsequent.

An agreement between representative Hindus and Mahomedans, by which the Hindus undertook to stop the playing of musical instruments during their festivals, and the Mahomedans promised that there would be no dispute about the slaughter of cows, cannot be interpreted as a denial of the title of a Mahomedan to slaughter cows, so as to enable him to maintain his suit for a declaration of his title.

Some Mahomedans signed a document in which they promised that they would not create any quarrel or disturbance or litigation in connection with the sacrifice of cows : *Held*, that the document was a mere *nudum pactum* of no legal force or efficiency. **Mahomed Yakub v. Mangru Rai**, 7 Ind. Cas. 318.

STANLEY, C.J., and KNOX, J.

(25) S. 42—*Suit to declare mortgage invalid—Some items under mortgage not in plaintiff's possession—Rest in his possession—Entire suit not to be dismissed—Suit maintainable as regards latter.*

A suit to declare that a mortgage of several items of property was not binding on the plaintiff is not liable to be wholly dismissed, under S. 42, Specific Relief Act, merely because no prayer was asked for recovery of possession of some items which were not in plaintiff's possession (a).

The declaration prayed for by the plaintiff may be given in respect of the items in his possession. **Chomu Hengau v. Sankara Belchampada**, 8 M.L.T. 358.

MILLER and KRISHNASWAMI IYER, JJ.

Reference :—(a) 5 M. 255, N.F.

(26) S. 42—*Suit by reversioners for possession—Uncertainty of widow's death—Competency of Court to pass declaratory decree. See CUSTOMS (PUNJAB—ALIENATION), No. 2, 1 P.W.R. 1910.*

(27) S. 42—*No denial of legal character—No consequential relief—Maintainability of suit—Whether S. 42 controls S. 539, C.P.C. See CIV. PRO. CODE (1882), No. 31, 7 M.L.T. 45.*

(28) S. 42—*Suit for declaring that decree passed on hypothecation is not binding—Consequential relief. See DECLARATORY SUIT, No. 2, 7 M.L.T. 155.*

Specific Relief Act—(Continued).

(29) S. 42—Defendant not in possession—Plaintiff cannot claim possession as "further relief." See **HINDU LAW (PARTITION)**, No. 7, 5 Ind. Cas. 343.

(30) S. 42—Suit for mere declaration. See **DECLARATORY SUIT**, No. 4, 7 M.L.T. 311.

(31) S. 42—Declaration of reversionary interest—Protection of present interest of plaintiff—Maintainability of suit. See **RES JUDICATA**, No. 10, 11 C.L.J. 623.

(31-a) S. 42. See No. 16, *supra*.

(31-b) S. 42—Difference between S. 283, C.P.C. (1882) and—Grant of declaratory decree—Interference with discretion of Court. See **CIV. PRO. CODE** (1882), No. 130-b, 8 Ind. Cas. 608.

(32) S. 45—Mandamus, issue of. See **ACT I OF 1902 (MADRAS COURT OF WARDS)**, No. 1, 7 M.L.T. 73.

(33) S. 45—Application to High Court to require a public officer to do a specific act. See **ACT III OF 1888 (CITY OF BOMBAY MUNICIPAL)**, No. 1, 12 Bom. L.R. 737.

(34) Ss. 54, 56—Injunction—Restraining defendant from executing decree—Multiplicity of suit.

The defendant obtained a decree for recovery of possession of certain land from which, he said, he had been wrongfully ousted. But before he had taken any steps to execute his decree or had threatened to execute it, the plaintiff brought a suit for perpetual injunction to restrain the defendant from taking possession of the lands decreed to him, by executing the decree:

Held, that the case did not fall under S. 54 of the Specific Relief Act, and that the plaintiff was not entitled to an injunction. **Karnodhar Halder v. Hari Prasad Rai Chowdhury**, 6 Ind. Cas. 444 = 14 C.W.N. 878 = 12 C.L.J. 86.

JENKINS, C.J., and DOSS, J.

(34-a) S. 56. See No. 34, *supra*.

(35) S. 57—Breach of contract—Injunction—Damages—Proper remedy.

Suit for specific performance of an agreement entered into with defendants, and for injunction restraining defendants from committing a breach of the agreement and for damages. The defendants were the owners of mica mines and the agreement for financing them was that the plaintiffs were to give them a standing advance of Rs. 55,000, for a period of five years, that the plaintiffs were to appoint a manager to assist the defendants in the management of their business, and also to assist them with

Specific Relief Act—(Concluded).

their advice, that the sales were to be made jointly by the plaintiffs and the defendants, and that the plaintiffs should be entitled for their advice and services to a commission of 5 per cent. The defendants broke the agreement by parting with their mica to third parties without the intervention of the plaintiffs.

Held, that, though the contract could not in all details be specifically performed, the plaintiffs were entitled to an injunction under S. 57, Specific Relief Act, to enforce the negative covenant that the defendants would not part with their mica without the plaintiff's consent (a).

Held also that damages could not be awarded in this suit for the present breach, as damages would not prevent the defendants from committing fresh breaches and driving the plaintiffs to fresh suits in future. **South Indian Export Co. v. A. Subba Naidu**, 8 M.L.T. 149 = 7 Ind. Cas. 243.

WALLIS, J.

References:—(a) 26 M. 168; L.R. (1901) 2 Ch. 799, R.

(36) Suit for correction or alteration of Record of Rights—Maintainability. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 27, 5 Ind. Cas. 266.

Speed.

(1) Rule of speed limit in navigable channels—Contributory negligence—Bad light. See **TORT**, No. 3, 8 Ind. Cas. 611.

Spes Successionis.

(1) Agreement by expectant heir to give property which he hopes to get after his adoption—Effect. See **HINDU LAW (ADOPTION)**, No. 8, 12 Bom. L.R. 910.

(2) Agreement not to divide—Validity—Effect upon minors. See **MAHOMEDAN LAW (GUARDIANSHIP)**, No. 2, 20 M.L.J. 946.

Stamp.

(1) Pro-note bearing a stamp not cancelled, admitted by first Court—Appellate Court, whether can question admissibility.

Though a promissory note bearing a stamp not properly cancelled is inadmissible in evidence, yet, when the Court of first instance has admitted it, the appellate Court cannot question its admissibility in appeal. **Mi Ke v. Nga Kan Gyi and Nga Po Sin**, U.B.R. (1909), 4th Qr., Stamp 3.

SHAW, J.

References:—U.B.R. (1897—01) II, 556, 559, F.; 2 L.B.R. 103, Diss.; 14 B. 152; 13 B. 369, R. Com.

Stamp Act.**(1) S. 2 (15)—Instrument of partition—Release—Stamp.**

In a joint Hindu family consisting of three brothers, one of them first agreed to take, in lieu of his share in the family property movable and immovable, a certain amount in cash and certain securities for money in the form of bonds securing debts due to the family; and executed a document in the form of a release, in favour of the eldest brother. On the next day, the other brother passed to the same eldest brother a document in the form of a release, whereby he and the eldest brother divided the remaining family property by the latter handing over to him securities for money:

Held that the first document was an instrument of partition, as defined by S. 2 (15), Stamp Act, 1899, for its effect was to divide the property of the three co-owning brothers between the executant on one side and the two brothers on the other.

Held that the second document also amounted to an instrument of partition, as by the same the two remaining co-owners divided their property in severalty. *In re Govind Pandurang Kamat*, 12 Bom. L.R. 936.

SCOTT, C.J., BATCHELOR and DAVAR, JJ.

(2) S. 2 (23), Sch. I, Art. 53—Receipt—Consideration—Contract—Payment by one officer of a firm to another for the purposes of the firm, if for consideration.

Certain pay orders in respect of money to be paid to creditors of a firm had been made out by the Accounts Department of the firm, and were sent to the cashier who paid the amount to assistants for payment to the creditors, and the assistants signed their names on the back of the pay orders in acknowledgment of receipt.

Held, that the acknowledgments were not liable to stamp duty as receipts for payment with consideration. There was in the circumstances no contract between the cashier and the assistants. *In the matter of Messrs. Burn & Co.*, 14 C.W.N. 833=6 Ind. Cas. 778=37 C. 634.

JENKINS, C.J., and CHATTERJEE, J.

(3) S. 5 and Sch. I, Art. 35—Lease concurred to by persons other than lessor, if multifarious document.

B, to whom A had agreed for a certain price to transfer the mining rights in a certain property for a period of 999 years, subject to the payment of certain rents and royalties, agreed

Stamp Act—(Continued).

to transfer those rights to C, subject to the same conditions as to rents and royalties, but for an increased price. To carry this last agreement into effect, a lease was executed, but concurrence of A amongst others was obtained to it:

Held, that the instrument was a single lease and liable to stamp duty as such. It was not a multifarious document within the meaning of S. 5 of the Stamp Act embodying two leases.

The concurrence, which it was thought proper to obtain of several persons other than the lessor, did not alter the character of the lease or the nature of the transaction. *Parasea Collieries, Ltd., In the matter of*, 14 C.W.N. 861=6 Ind. Cas. 762=37 C. 629.

JENKINS, C.J., DOSS and CHATTERJEE, JJ.

(4) S. 5, Arts. 40 (b), 57 (b)—Deed of mortgage executed by mortgagor, mortgagee and surety—Stamp duty payable—Test to ascertain proper duty.

Held, that an instrument of mortgage securing the re-payment of a loan of Rs. 2,000, under which both the mortgagor and surety jointly and severally undertake liability in respect of the loan, and under which it would be competent to the creditor to claim the money from either the mortgagor or the surety, is correctly stamped, if it bears a ten-rupee stamp as a mortgage-deed, within the meaning of Art. 40 (b) and S. 5 of the Act, and need not bear in addition a five-rupee stamp as also falling under Art. 57 (b) (a).

The test under the Stamp Act is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters (b). *In re Stamp duty liable on a certain deed executed by M. Ghulam Haidar and Abdul Latif in favour of the Punjab Banking Co., Ltd., Peshawar*, 15 P.R. 2910 (F.B.) =16 P.W.R. 1910=4 P.L.R. 196=5 Ind. Cas. 813.

REID, C.J., ROBERTSON and RATTIGAN, JJ.

References:—(a) 5 B. 188 (F.B.); Bombay P.J. (1881), 305, *Rel. on*; 10 B. 47, D. (b) 102 P.R. 1895, F.

(5) S. 35—Suit on an unstamped pro note—Admission of liability by defendant—Decree whether valid.

In a suit based on an unstamped promissory note and not on the original consideration which gave rise to it, no decree should be passed

Stamp Act—(Continued).

even where the defendant admits liability (a).
Kodali Mathaya v. Tangoppala Ramaya,
 7 Ind. Cas. 320.

KRISHNASWAMIYER, J.

References :—(a) 18 B. 369 ; 30 M. 386 ; 17 M.L.J. 308, F. ; 29 M. 111 ; 15 M.L.J. 484, D.

(6) *Ss. 35, 36, 61—Instrument not duly stamped, if admitted into evidence—Admission not to be questioned—Duty of appellate Court when admitted by first Court—Arrears of rent, transfer of—Interest, whether passes to transferee—Abwab—selasni and teherir.*

S. 61 of the Stamp Act is framed for fiscal purposes, that is to say, for the protection of the Government revenue, and it does not affect the provisions of S. 36, which distinctly provides that, when an instrument has been admitted in evidence, such admission shall not be called in question at any subsequent stage of the suit.

Therefore, where a document not duly stamped has been admitted into evidence by the first Court, the appellate Court should regard it as admissible in evidence, and at the same time declare that an extra duty ought to be paid and that that duty and the penalty should be leviable from the person who filed the document, and that that sum might be recovered by the Collector.

Where certain arrears of rent are transferred, the interest on them, being a legal incident, also passes to the transferee.

A landlord is not entitled to recover such sums as *selasni*, *wasal baki selasni* and *teherir* which are *abwabs*. **Syed Baair-ud-din Ahmed v. Kalika Prosad Singh**, 7 Ind. Cas. 582.

BRETT and VINCENT, JJ.

References :—15 C. 828 ; 17 C. 726, *relied on*.

(7) *S. 36—Admitted in evidence—Document objected to for want of stamp—Question regarding admissibility reduced to issue—Issue determined at the final decision of the suit—Document in the meanwhile allowed to be exhibited—Mistake of Court—Court to correct its own mistakes suo motu.*

In the course of a suit, a document was tendered in evidence ; but its admissibility was objected to. An issue was accordingly raised to try the question. The Court postponed its decision until the delivery of the judgment on the whole case, and after evidence recorded on

Stamp Act—(Continued).

all the issues, including the issue as to the admissibility of the document. In the meantime, the document was exhibited as part of the evidence. In delivering its final judgment, the Court held that the document was inadmissible in evidence. On appeal, the lower appellate Court held that, though the document was inadmissible for want of stamp, yet, as it was as a matter of fact let in and exhibited as a piece of evidence by the Court at the trial, its admissibility could not be objected to at any subsequent stage of the case.

Held, (1) that the document should be excluded from the evidence, (2) that the party was not bound to ask the Court to correct the mistake. The Court ought to have corrected it *suo motu*, because the mistake was that of the Court, and the party had nothing to do with it and he had done all he could to get the document excluded.

The expression "admitted in evidence" in S. 36 of the Stamp Act, 1899, means the act of letting the document in as part of the evidence ; but it must be letting in as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. In other words, the Court admitting it must have applied its mind consciously to the question whether the document is admissible or not. **Chunilal Tulsiram v. Mulabai**, 12 Bom. L.R. 466.

CHANDAVARKAR and HEATON, JJ.

(7-a) S. 36. See No. 6, *supra*.

(8) S. 52, Sch. I, Art. 45—Partition-suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Refund of value of Court-fee stamp. See **PARTITION**, No. 13, 7 Ind. Cas. 94.

(8-a) S. 61. See No. 6, *supra*.

(9) *Sch. I, Art. 5, exception (a)*—"Agreement for sale of goods," *what is*.

An instrument, which acknowledges the receipt of a certain sum of money, and further, in consideration of this payment, agrees to sell paddy at the harvest time at a certain rate, is not an agreement "for, or relating to the sale of goods exclusively," and is not therefore exempt under cl. (a) of the exemptions to Art. 5. So it should be stamped 8 as. under Art. 5 (b).

Per Hartnoll, J. :—"Even supposing this instrument is an agreement for the sale of goods,

Stamp Act—(Concluded).

it seems to be more than that and to be an acknowledgment of a debt." *In re Revenue Stamp case, No. 19 of 1909-10 of the Collector, Prome*, 5 L.B.R. 157 (F.B.).

FOX, C.J., HARTNOLL, ROBINSON and PARLETT, JJ.

Reference :—15 M. 152, R.

(10) Art. 35. See No. 3, *supra*.

(11) Art. 40 (b). See No. 4, *supra*.

(12) Art. 45. See No. 8, *supra*.

(13) Art. 53. See No. 2, *supra*.

(14) Art. 57 (b). See No. 4, *supra*.

Stamp Act (Mysore).

(1) *Sch. I, Arts. 1 and 14—Acknowledgment—Bond*.

From the signature of the debtors below the balance struck on a settlement of accounts, the most that can be implied is an acknowledgment and not a promise to pay. Hence the entry is in the nature of an acknowledgment liable to a stamp duty of one anna, and not a bond. *Ibrahim Sab v. Chennappa*, 15 M. C.C.R. 32.

NANJUNDAYYA and KRISHNA RAO, JJ.

Reference :—(a) (1883) 8 B. 194, F.

(2) Art. 14. See No. 1, *supra*.

Stamp Regulation (II of 1900, Mysore).

(1) *Ss. 35, 36 and 61—Admission by Court of insufficiently stamped instruments on payment of penalty—Power of Court of revision*.

When a Court has admitted an instrument on payment of duty and penalty under S. 35 of the Stamp Regulation, S. 36 precludes a Court of Revision from calling such admission into question (a). *Kampli Sanna Rachappa v. Malakere Sathiappa bin Malappa*, 15 M.C.C.R. 24.

KRISHNA RAO and SETLUR, JJ.

References :—(a) 12 C. 664; 18 B. 737; 5 M. 232, F.

Standing crops.

(1) Claim to—Right of successful claimant. See CLAIM, No. 1, 8 Ind. Cas. 77.

Statutes 24 and 25. Vlc., C. 104.

(1) S. 15. See ACT VIII OF 1895 (BENGAL TENANCY), No. 10, 14 C.W.N. 788.

Statutes 57 and 58 Vlc., Ca. 60 (Merchant Shipping).

(1) S. 24—*Vendee of a share in a ship—Absence of bill of sale in his favour—Right to be registered as owner*.

A person, who is only the beneficial owner of a ship and in whose favour there is no bill of sale, is not entitled to be registered as owner.

First defendant, who owned a one-fourth share in a ship, executed a nominal sale-deed in favour of his agent, the fourth defendant. Subsequently he sold the one-fourth share to plaintiff. Plaintiff sued, among other things, for a declaration that he was entitled to be registered as owner of one-fourth share in the ship.

Held, that plaintiff was not entitled to be registered as owner. *Raman Chetty v. Alagappa Chetty*, 8 M.L.T. 407.

SANKARAN NAIR and AYLING, JJ.

Stay of execution.

(1) Inherent power to order, at the time of passing a decree. See CIV. PRO. CODE (1908), No. 115, 7 M.L.T. 151.

(2) Powers of appellate Court *re*. See CIV. PRO. CODE (1908), No. 86, 82 F.R. 1910.

(3) Special leave to appeal to Privy Council—Power of High Court to stay execution. See APPEAL TO (PRIVY COUNCIL), No. 6, 7 Ind. Cas. 188.

Step-in-aid of execution.

(1) Application by decree-holder to reject an objection and to examine witnesses, whether a. See LIMITATION ACT (1877), No. 118, 5 Ind. Cas. 292.

(2) Deposit of diet money or process-fee is not a. See LIMITATION ACT (1908), No. 31, 7 Ind. Cas. 759.

Stoppage in transitu.

Unpaid vendor—Pledgee for value of bills of lading—Rights of. See CONTRACT ACT, No. 55, 12 Bom. L.R. 553.

Stranger.

—promoting litigation, if bound by judgment. See PROBATE, No. 3, 12 C.L.J. 91.

Subrogation.

(1) Extent of right of. See MORTGAGE (GENERAL), No. 8, 11 C.L.J. 226.

(2) Principle of, when applies—Presumption of intention to keep alive first mortgage—Rebuttal. See MORTGAGE (GENERAL), No. 17, 20 M.L.J. 380.

Subrogation—(Concluded).

(3) Principle of, on what based—Legal and equitable claim, if both may be urged together. See **MORTGAGE (GENERAL)**, No. 34, 14 C.W.N. 1089.

(4) Presumption of intention. See **MORTGAGE (GENERAL)**, No. 35, 14 C.W.N. 1093.

(5) Effect of *lis pendens*. See **MORTGAGE (GENERAL)**, No. 42, 7 Ind. Cas. 473.

Subscription.

(1) Suit against a trust for—Jurisdiction. See **ACT IX OF 1887 (PROVL. S.C. COURTS)**, No. 11, 20 M.L.J. 146.

Substituted service.

Defendant when deemed to be keeping out of the way. See **CIV. PRO. CODE**, 1882, No. 57, 7 A.L.J. 286.

Succession.

(1) *Succession—Persons governed by two systems of law—Succession to property how determined—Mahomedan law.*

Where persons are governed by two systems of law (e.g., Mahomedan law and Marumakkattayan law, as in this particular case), held that, in the absence of usage to the contrary, property inherited under the Mahomedan law will pass in further descent according to that law (a). **Mukkatparkum Kodarakaudy Mammad Haji and others v. Kathkayil-pakum Koshipurankarady**, 19 M.L.J. 736.

WHITE, C.J., and KRISHNASWAMI IYER, J.

References:—(a) 8 M. 238; 22 M. 494 and 27 M. 77. R.

(1-a) Persons governed by two systems of law—Succession to property how determined. See **INHERITANCE**, No. 1, 19 M.L.J. 736.

(2) Whether Transfer of Property Act deals with cases of. See **LEASE**, No. 10, 5 Ind. Cas. 500.

(3) Law governing—Special custom—Burden of proof. See **MAHOMEDAN LAW (SUCCESSION)**, No. 1, 50 P.R. 1910.

Succession Act.

See **ACT X OF 1865**.

Succession certificate.

(1) Joint certificate—Right of the holder of the. See **REGULATION VII OF 1901 (MYSORE)**, No. 1, 15 M.C.C.R. 283.

(2) See **ACT VII OF 1889 (SUCCESSION CERTIFICATE)**.

Succession Certificate Act.

See **ACT VII OF 1889**.

Succession Certificate Regulation (VII of 1901, Mysore).

(1) *S. 1, cl. (4)—Restriction to the grant of certificate.*

There is nothing in the regulation which forbids the grant of a certificate to a party, otherwise entitled to it, merely on the ground that, as a member of an undivided family with the deceased, he becomes entitled, by right of survivorship, to the debts sought to be collected. **Hulle Gowda v. Chinnakka**, 15 M.C.C.R. 50.

NANJUNDAYYA and SETLUR, JJ.

Succession Property Protection Act.

See **ACT XIX OF 1841**.

Successor.

(1) Right of, to re-open question decided by predecessor in Court. See **COURT**, No. 1, 204 P.L.R. 1910.

Sudras.

(1) Meaning of the term. See **HINDU LAW (MARRIAGE)**, No. 1, 7 M.L.T. 17.

(2) Illegitimate son, rights of. See **HINDU LAW (SUCCESSION)**, No. 6, 12 Bom. L.R. 204.

Suit.

(1) *Suit, restoration of—Decree set aside for fraud—Order of Court of concurrent jurisdiction, if effective to restore suit.*

Where a decree obtained in a Court of equal jurisdiction was set aside by another Court, which went on to add that the result of the decree being declared fraudulent would be that the original suit would be restored.

Held, that this order of a Court of equal jurisdiction could not operate as a direction to the first Court to restore the suit, and that, in refusing to restore the suit, the Court had committed no error. **Khetra Mohan Barik v. Mangobinda Pal**, 14 C.W.N. 558—6 Ind. Cas. 13.

BRETT and SHARFUDDIN, JJ.

(2) *Allegation of suit being instituted without knowledge and consent of plaintiff—Procedure to be adopted.*

In this case after the plaint had been duly admitted, an objection was raised that the suit was instituted without the knowledge and consent of the plaintiff. Held that the Court should raise a preliminary issue whether the

Suit—(Concluded).

plaint had been duly signed and presented, and should decide the same after recording the evidence of both the parties thereon. Where an order was passed rejecting the plaint without holding such formal enquiry, *held*, such an order was bad. **Mussamat Bibi Sadhu v. Sayed Ghulam Hyder Shah**, 4 S.L.R. 35=7 Ind. Cas. 600.

HAYWARD and CROUCH, JJ.

Suit of civil nature.

(1) Right to perform Ram Lila—Not connected with shrine or temple—Right of suit. See CIV. PRO. CODE (1908), No. 8, 7 A.L.J. 529.

(2) Suit for declaration of right to recite Stotrams. See CIV. PRO. CODE (1908), No. 9, 20 M.L.J. 530.

(3) Claim to officiate as priest at the cremation ceremony. See CIV. PRO. CODE (1908), No. 10, 12 C.L.J. 74.

(4) Proceeding for revocation of probate, if suit. See PROBATE, No. 3, 12 C.L.J. 91.

Suits Valuation Act.

See ACT VII OF 1887.

Summons.

(1) *Summons, non-service of—Decree, suit to set aside, on the ground of non-service of summons—Non-service of summons defence of, if can be raised—Res judicata.*

The principal of *res judicata* is a principle of rest and convenience and not of absolute justice.

A decree can be set aside either under S. 108, Civ. Pro. Code, 1882, on the ground of non-service of summons, or on review, or by a regular suit on the ground of fraud. Non-service of summons alone is not a ground for setting aside a decree by suit (*a*).

If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit. **Narasimha Das v. Bibi Rafkan**, 11 C.L.J. 250=14 C.W.N. 507=37 C. 197=5 Ind. Cas. 198.

HOLMWOD and CHATTERJEE, JJ.

References :—29 A. 212; 4 A.L.J. 51, *F*.

(2) Service of, on unascertained persons—S. 82, C.P.C., 1882. See PARTITION, No. 8, 11 C.L.J. 580.

(3) Affixing copy of, to defendant's house—When good service. See CIV. PRO. CODE (MYSORE), No. 5, 15 M.C.C.R. 95.

(4) Service of, on Companies. See CIV. PRO. CODE (1882), No. 191, 12 Bom. L.R. 730.

Summons—(Concluded).

(5) Power of Court to refuse to issue—Exclusion of evidence—Ground for remand. See CIV. PRO. CODE (1908), No. 70-a, 8 Ind. Cas. 418.

Surety.

(1)—agreeing to make good the sum by which sale-proceeds of the property fell short of the decretal amount—Extent of his liability. See EXECUTION OF DECREE, No. 3, 5 Ind. Cas. 139.

(2) Sureties, liability of, under Administration bond. See ADMINISTRATION BOND, No. 1, 7 M.L.T. 90.

(3) Attachment before judgment—Removal on K giving security—Suit dismissed by lower Court but decreed on appeal—Liability of, for amount of appellate decree. See CIV. PRO. CODE (1882), No. 196, 5 L.B.R. 156.

(4) Judgment-debtor failing to apply for insolvency—Non-appearance—Discharge of. See CIV. PRO. CODE (1892), No. 171, 61 P.W. R. 1910.

(5) Application for execution against—Limitation. See LIMITATION ACT (MYSORE), No. 9, 15 M.C.C.R. 72.

(6) Bond by—Insolvency petition by judgment-debtor dismissed—Liability of—Limitation—Public policy. See CIV. PRO. CODE (1882), No. 170-b, 7 Ind. Cas. 917.

(7) Position of. See VENDOR AND VENDEE, No. 7, 8 Ind. Cas. 674.

Survey.

Survey Records, Supplementary, value of. See EVIDENCE, No. 1, U.B.R. 1909, 4th Qr. Evidence, 19.

Survey Act (V. B. C. of 1875).

(1) *Ss. 41, 62—Order—Suit for confirmation of possession—Relief inconsistent with plaint.*

S. 62 of the Survey Act is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under this Act, for confirmation of possession on the allegation that he has been in continuous possession from or before the order, such an order having, under S. 41 of that Act, the effect of a Civil Court decree, which is binding on the parties as regards the question of possession.

When the plaintiff sues for confirmation of possession on declaration of title, alleging that he is in possession, and proves his title but fails to prove possession, the Court ought not

Survey Act (V.B.C. of 1875)—(Concluded).

to award him recovery of possession, unless on the facts alleged in the plaint the action amounts to one for restoration of possession. **Bhassouri Koer v. Ram Purtab Singh**, 14 C. W.N. 366 = 4 Ind. Cas. 547.

HARRINGTON and CHATTERJEE, JJ.

References :—11 C.L.R. 443 and 11 C.L.R. 451, *Dist.*

• Survey and Boundaries Act.

See ACT IV OF 1897 (MADRAS).

Tahzimat tenure.

Nature of. See LANDLORD AND TENANT, No. 28, 80 P.W.R. 1910.

Tambol register.

Evidentiary value of. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

Tank.

(1) Suit against Government for recovery of a.—Acts constituting adverse possession. See ADVERSE POSSESSION, No. 2, 5 Ind. Cas. 115.

(2) Suit for rent of, whether governed by Bengal Tenancy Act. See ACT VIII OF 1885 (BENGAL TENANCY), No. 46, 5 Ind. Cas. 158.

• Tastik.

Arrears of cash allowance—Suit to recover. See LIMITATION ACT (1877), No. 52, 12 Bom. L.R. 157.

Tax.

—imposed without jurisdiction—Legality—Right to recover excess—Limitation. See LIMITATION ACT (1877), No. 39, 7 A.L.J. 496.

Teji Mandi transactions.

Nature of—Wagering. See CONTRACT ACT, No. 22, 12 Bom. L.R. 590.

Telegraph.

(1) Mistake of Reuter in transmitting message—Effect. See SALE, No. 11, 8 M.L.T. 353.

Temple.

Bequest to complete and to instal an idol—Validity. See HINDU LAW (WILL), No. 3, 7 A.L.J. 296.

Tenancy Act.

(1) See ACT VIII OF 1885 (BENGAL).

(2) See ACT IX OF 1883 (C.P.).

(3) See ACT XVI OF 1887 (PUNJAB).

Tenants-in-common.

Adverse possession — Tenants-in-common—Burden of proof. See LIMITATION ACT (1877), No. 98, 7 M.L.T. 155.

Tender.

Effect of. See HINDU LAW (PARTITION), No. 7, 5 Ind. Cas. 348.

Tenure.

(1) Change of—Effect on law of succession. See ACT V OF 1862 (BHAGDARI), No. 1, 12 Bom. L.R. 578.

(2) Presumption as to. See ACT VIII OF 1885 (BENGAL TENANCY), No. 7, 6 Ind. Cas. 362.

Thak map.

(1) Value of, as evidence of possession and title—Specified land included in estate at thak survey—Presumption that it was included with in estate at permanent settlement. See ACT XI OF 1859 (REVENUE SALE LAW), No. 4-a, 7 Ind. Cas. 819.

(2) See also MAP.

Third party directions.

(1) *Third party directions—General principles—Practice—Procedure.*

The general principles on which a Court will issue third party directions are :—

(1) that there must be a clear case of contribution or indemnity from the third party ;

(2) that all the disputes arising out of a transaction, as between the plaintiff and the defendant, and between the defendant and a third party can be tried and settled in one action ; and

(3) that, in cases of contract and sub-contract, it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. **W. and A. Graham & Co. v. Chunilal Harilal & Co.**, 11 Bom. L.R. 1056 = 34 B. 423 = 4 Ind. Cas. 131.

MACLEOD, J.

Time.

Power of Court to enlarge time before and after decree. See CIV. PRO. CODE (1908), No. 80, 13 O.C. 29.

Title.

(1) Case to be decided on issues—Plaintiff's title assumed—Case not to be dismissed. See ISSUES, No. 1, 6 Ind. Cas. 446.

(2) Suit for declaration of title as absolute owner—Second suit as mortgagor not barred. See CIV. PRO. CODE (1882), No. 12, 6 Ind. Cas. 696.

Title—(Concluded).

(3) Throwing cloud on—Declaratory suit—Proper remedy. See SPECIFIC RELIEF ACT, No. 19, 14 C.W.N. 576.

Title-deeds.

(1) Possession of—Prior incumbrancer—Gross negligence. See TRANSFER OF PROPERTY ACT, No. 54-a, 7 Ind. Cas. 810.

Titles to Rent-free Estates Act.

See ACT XI OF 1852 (BOMBAY).

Tort.

(1) *Tort—Obstruction to view of curusady—No special damage—Right of suit to worshipper—Possible obstruction, no special damage.*

Plaintiffs, certain worshippers of St. Jacob's Church, sued for the removal of certain constructions made by the defendants, who represent the Church of the Holy Ghost, on a part of the public road in front of their church, on the ground that the new construction will obstruct the plaintiff's view of a *curusady* and their procession on the public roadway round the *curusady*.

Held, that no special damage was proved and that the plaintiffs had no right of action.

A possible obstruction to a procession would not be a special damage. **Kurusu Kotha v. Thommai Savarimuthu Fernand Suthaki**, 20 M.L.J. 367—6 Ind. Cas. 790—8 M.L.T. 131.

BENSON and KRISHNASWAMI AIYAR, JJ.

(2) *Tort—Liability of the personal representative of the tort-feasor.*

For a tort committed to the person such as battery or false imprisonment, no action can be obtained against the personal representatives of the tort-feasor. **Kare Siddia v. Bora**, 15 M.C.C.R. 45.

STANLEY ISMAI, C.J., and KRISHNA RAO, J.

(3) *Tort—Rule of speed limit in navigable channels—Contributing negligence—Bad light.*

Where a speed limit has been fixed by notification for steam vessels navigating a navigable channel, the speed limit rule must be observed under all conditions of the tide.

Before a vessel can be held in fault for a collision, negligence contributing to the accident, and not negligence merely, must be shown. Thus where a collision occurred and the vessel that was struck had not a proper and good light showing, and the collision would have been less

Tort—(Concluded).

likely if the vessel struck had a proper and good light showing, there is no contributory negligence, if the vessel in fault was not going at a rate within the speed limit and on a course which a cautious man would have taken, **Lutchman Chetty v. Irrawaddy Flotilla & Co., Ltd.**, 8 Ind. Cas. 611.

FOX, C.J., and PARLETT, J.

(4) Actions sounding in—S. 90, C.P.C. (1908). See CIV. PRO. CODE (1908), No. 6, 12 Bom L. R. 615.

(5) Wrongful collection of cess by Collector—Acting in excess of statutory authority—Liability in damages. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 2, 8 M.L.T. 201.

(6) Exercise of powers given by statute—Liability to be sued in tort. See ACT III OF 1901 (BOMBAY DISTRICT MUNICIPAL), No. 1, 4 S.L.R. 65.

(7) Joint tort-feasors—Liability of—Release of one—Effect. See MESNE PROFITS, No. 1, 11 C.L.J. 503.

(8) Procuring breach of promise to marry—Malice—Effect. See CONTRACT, No. 2, 7 M.L.T. 394.

Tout.

(1) *Tout—Evidence—Interference by the Chief Court—Ss. 3 and 36 of Act XVIII of 1879, as amended by Act XI of 1896 and S. 13 of the Punjab Courts Act XVIII of 1884.*

Held, that, a person cannot be declared a habitual tout, when evidence of his being so is vague and general, while there is the testimony of apparently respectable witnesses to the contrary. **Nizam D. v. The Crown**, 26 P.W.R. 1909 (Cr.).

FRIZELLE, J.

(2) *Tout—Evidence—Power of Chief Court to interfere—Ss. 3 and 36 of Act XVIII of 1879, as amended by Act XI of 1896 and S. 13 of the Punjab Courts Act, XVIII of 1884.*

Held, that the evidence of an ordinary witness to the effect that a Barrister pays a person commission on any case brought to him while the Barrister himself denies, it is not sufficient to declare that person a habitual tout. **Balsakhip Ram v. The Crown**, 27 P.W.R. 1909 (Cr.).

HARRIS, J.

Tout—(Concluded).

(3) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 8, 31 P.W.R. 1909 (Cr.).

(4) Procedure—Misjoinder or multifariousness. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 9, 11 C.L.J. 513.

Town.

• When a village becomes a. See VILLAGE, No. 1, 26 P.R. 1910.

Trade.

(1) *Will—Executor—Trade of testator carried on by the executor—Directions of the testator to carry on the trade—Debts incurred in carrying on the trade—Liability of the executor is personal—Testator's trade assets also liable.*

A testator by his will directed an executor of his to continue his business in cotton, cottonseed and cotton ginning, in order to perpetuate his name, so long as it could be carried on at a good profit; but if it appeared that the trade would suffer so as to destroy his (testator's) reputation, the executor was enjoined to stop it. The trust-trader, in conjunction with his co-executrix, carried on the business and employed therein the trade assets. The management resulted in heavy losses, to pay off which the executor obtained money by a mortgage executed by the co-executrix, to the defendant, of the ginning factory used in the business. The plaintiffs, the beneficiaries of the testator, who were also the executor's sons, sued the defendant for a declaration that the factory was not liable to be sold under the mortgage decree.

Held, dismissing the suit, that the mortgage was by one member of the firm with the consent and in formal co-operation of the undisclosed partner—the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business; and that therefore the mortgage was valid and binding on the executor or as principal.

Held, also, that a mortgage by a trader under a testamentary trust, of the testator as factory, was referable to his implied authority as a trustee, and not to his position as executor (b). An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors, and is entitled to use, as a trader, the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his executor who is not named as a trade trustee.

Trade—(Concluded).

The trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned (c). *Jethabhai Kevalbhai v. Chotalal Chunilal*, 12 Bom. L.R. 1 = 34 B. 209 = 5 Ind. Cas. 594.

SCOTT, C.J., and BATCHELOR, J.

References:—(a) 2 M.I.A. 487, E'. (b) 13 L.R. Ir. 52, F'. (c) 26 Ch. D. 248, F'.

Trade mark.

(1) *Right to restrain another from using a particular name.*

A dealer in, or a manufacturer of, a particular article, who adopts a name for that article, whether the name be a purely fancy name, or a descriptive name, cannot restrain another dealer from using the same name, simply on the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity, he must be in a position to show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article. *Mohomed Esuf v. Rajaratnam Pillai*, 7 M.L.T. 55 = 5 Ind. Case. 712.

ARNOLD WHITE, C.J., and KRISHNASWAMI AIYAR, J.

References:—24 C. 364; 35 C. 311; 15 M.L.J. 15 (46) and *Reddaway v. Banham*, 1896, A C. 199.

(2) *Meaning of—Registration in India—Effect—Proof—Vendor of goods—Right to bring an action for infringement of.*

A trade-mark means a mark used to denote that goods are the manufacture or merchandise of a particular individual.

Since there is no system of registration in India which gives a person a statutory title, it is necessary for a person, who brings an action for the infringement of a trade-mark, to establish that the mark, in respect of which he makes the claim, has acquired a reputation in connection with the goods that he sells (a).

An action for the infringement of a trade-mark is maintainable, even though the person

Trade mark—(Concluded).

who brings the suit is not the manufacturer or selector of the goods, but is merely a vendee of them.

Though no specific objection was taken on appeal to the form of the injunction ordered in the lower Court, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared or manufactured by him, a variation must be introduced into the terms of the injunction, so as to fit in with the facts as they actually are established. **Jawla Prasad v. Munna Lal Serowjee**, 37 C. 204 = 5 Ind. Cas. 1000.

JENKINS, C.J., and WOODROFFE, J.

Reference :—(a) (1887) 36 L.J. Ch. 504.

(3) *Trade-mark—No system of registration in India—English law to be applied—Assignment of trade-mark, how effected—Good-will also to be transferred.*

In India there is no system of registration, nor is there any provision for a statutory title to a trade-mark; so the rights of the parties must be determined in accordance with the principles of the English Common Law.

A trade-mark cannot be transferred in gross; that is, no trade-mark can be assigned except in connection with the good will of the business in which it has been used, or, in other words an assignment of good will must accompany or follow the transfer of a trade-mark (a).

Consequently where a person merely takes an assignment of the trade-mark without an assignment of the goodwill, he acquires no title to the trade mark. **British American Tobacco Co., Ltd. v. Maboob Bux**, 7 Ind. Cas. 279.

JENKINS, C.J., and WOODROFFE, J.

References :—(a) L.R. 30 Ch D. 454 at p. 479; 55 L.J. Ch. 125; 54 L.T. 112, *relied upon*.

Transfer of case.

(1) *Transfer of case—Difficult questions of law—Insufficient ground for transfer.*

The fact that the case will involve difficult questions of law is not alone a sufficient ground for the transfer of a case. **Ma Thaw v. McKenzie**, 8 Ind. Cas. 444.

PARLETT, J.

(2) *Transfer of case from one city to another—Balance of convenience—Sufficient cause.*

An application to transfer a case from one city to another should not be granted, where

Transfer of case—(Concluded).

there is no balance of convenience on the side of a trial in the other city, nor are there grounds to suppose that greater justice would be done by a trial there.

A plaintiff should not, without sufficient cause, be deprived of the right given him by law to select the Court in which he will sue (a). **Bahltram v. Chimunbux Bhowlingha**, 8 Ind. Cas. 449.

PARLETT, J.

References :—(a) 5 A. 60; 9 C. 980; 13 C.L.R. 182; 13 B. 178, *approved*.

(3) District Judge—Remand of appeal by High Court. Transfer of appeal to Sub-Judge—Legality. See JURISDICTION (GENERAL), No. 4, 6 Ind. Cas. 384.

(4)—of interlocutory application—Jurisdiction—Notice to opposite party. See CIV. PRO. CODE (1908), No. 24, 8 M.L.T. 374.

(5)—of decree for execution—Order of transfer signed by sheristadar as "by order" of Dt. Judge—Validity. See CIV. PRO. CODE (1882), No. 83, 5 Ind. Cas. 155.

(6) Transfer of suit—High Court—Subordinate Court—Concurrent jurisdiction. See CIV. PRO. CODE (1908), No. 22, 11 C.L.J. 218.

(7) Jurisdiction of District Judge and Assistant Judge to transfer case. See CIV. PRO. CODE (1908), No. 23, 12 Bom. L.R. 354.

(8) High Court's power—District Judge determining question of jurisdiction after High Court disposed of application for—Return of plaint for presentation to proper Court. See CIV. PRO. CODE (1882), No. 25, 5 Ind. Cas. 588.

Transfer of Property, Act.

(1) Effect of incorporation of sections of, as O. 34 of the C.P.C. of 1908. See MORTGAGE (GENERAL), Nos. 57 and 58, 37 C. 907.

(1-a) Ss. 2, 108 (h)—Tenant of homestead land—Right to cut and appropriate trees. See TREES, No. 1, 6 Ind. Cas. 796.

(2) Ss. 2 (c), 111 (g), 112—Applicability of Act to leases created prior to the Act. See LEASE, No. 19, 6 Ind. Cas. 447.

(3) Ss. 4, 105, 107—Lease—Agreement to lease—Registration Act (III of 1877), S. 17, cl. (d)—Evidence Act (I of 1872), S. 91—Parol agreement to lease out land for five years—Doctrine of part performance—Entry upon land by lessees—Ejectment.

Transfer of Property Act—(Continued).

The plaintiff sued to eject the defendant, alleging that the land was leased for one year. It was found that the agreement between the parties was that the defendant was to remain upon the land for five years on payment of a certain rent. The defendant entered upon the land upon that contract, laid out money and commenced certain works.

Held, that, there being a special definition of the word "lease" in the Transfer of Property Act, section 105, the word "lease" in S. 107 must be read as speaking of leases as defined in section 105, that it did not include an agreement to lease, and that, even in the absence of a registered lease, the contract is valid :

Held, further, that, as there was an agreement to lease and a part performance of that agreement by allowing the defendant to enter upon the land, it would be inequitable to allow the plaintiff to resile from his contract, and to turn the defendant out before the expiry of the term for which he had been taken in. **Nanda Lal Ghose v. Sarat Chandra Banerji**, 5 Ind. Cas. 562.

CHATTERJI, J.

References :—21 Ch. D. 9; 52 L.J. Ch. 2, 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 31 W.R. 820; 47 J.P. 821, F.; 2 C.L.J. 843; 1 C.W.N. 218; 9 C.W.N. 134, R. *

(4) S. 6, clause (a)—*Reversionary interest—Promissory notes, release of—Validity of.*

Chapter 2 of IV of 1882, refers to transfers of property whether moveable or immoveable. Hence, the release of reversionary right in certain promissory notes is invalid as being the transfer of the chance of an heir apparent succeeding to property, within the meaning of clause (a) of S. 6 of that Act. **Hargawan Magan v. Baijnath Dass**, 7 A.L.J. 11; 4 Ind. Cas. 144 = 32 A. 88.

STANLEY, C.J., and BANERJEE, J.

Reference :—21 A. 71, *Itelied on*.

(5) S. 6 (d)—*Transfer of right to future maintenance—Contract Act (IX of 1872), Ss. 16, 19-A—Undue influence—Loan to helpless widow—"Dominating the will of the borrower," meaning of.*

A right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally, within the meaning of paragraph (d) of S. 6 of the Transfer of Property Act.

Transfer of Property Act—(Continued).

Where the amount of maintenance payable is subsequently fixed by agreement or by decree, a widow's right to maintenance from her late husband's estate is not inalienable.

Where Rs. 1,500 was lent to a helpless widow, whose husband died ten years ago and who had no means for maintenance, to enable her to establish her right to maintenance, and the interest stipulated was 10 per cent. and the principal and interest were to be repaid in a year, and, in default of payment, interest on principal and interest at compound rate at 1 per cent. per month was to be paid with six month's rests :

Held, that the contract was induced by undue influence, and the circumstances of the case called for equitable relief at the hands of the Court (b). **Ranee Annapurani Nachiar v. M. AR. AR. Swaminathan Chetty**, 6 Ind. Cas. 439.

WHITE, C.J., and MUNRO, J.

References :—(a) 16 M. 429 (494); 5 W.R. 111; 5 B. 99 (104); 7 W.R. 311; 23 W.R. 427. R. and Expt. (b) 28 A. 570 (583); 4 C.L.J. 1; 1 M.L.T. 205; 3 A.L.J. 495; 9 O.C. 188; 8 Bom. L.R. 491; 10 C.W.N. 819; 16 M.L.J. 292; 34 C. 150; 4 A.L.J. 109; 11 C.W.N. 249; 5 C.L.J. 106; 17 M.L.J. 43; 9 Bom. L.R. 304; 2 M. L.T. 75; 15 A. 352; 20 I.A. 127; 31 A. 386; 10 C.L.J. 76; 6 A.L.J. 707; 13 C.W.N. 1069; 11 Bom. L.R. 804; 6 M.L.T. 71; 19 M.L.J. 438; 3 Ind. Cas. 395, R.

(6) S. 6 (e)—*Right to sue for damages for breach of contract, not assignable.*

A right to sue for damages for breach of contract is a mere right to sue with in the meaning of S. 6 (e) of the T. P. Act, and so could not be transferred. **Gopala Iyer v. Ramasani Sastrigal**, 7 M.L.T. 228 = 6 Ind. Cas. 290.

SIR ARNOLD WHITE, C.J., and KRISHNASWAMY IYER, J.

Reference :—36 C. 345, F.

(7) Ss. 10, 12—*Whether repealed by implication by Ss. 10 and 11, Bengal Tenancy Act. See LEASE, No. 15, 6 Ind. Cas. 685.*

(7-a) S. 12. See No. 7, *supra*.

(8) S. 39—*Hindu widow—Right of residence or maintenance—Alienation of family property—Necessity. See HINDU LAW (MAINTENANCE), No. 4, 12 Bom. L.R. 1075.*

(9) S. 40—*Contribution between purchasers. See MORTGAGE (CONTRIBUTION), No. 1, 33 M. 211.*

Transfer of Property Act—(Continued).

- (10) *S. 41—Indian Evidence Act (I of 1872), S. 115—Estoppel—Transfer of immoveable property.*

S. 41 of the Transfer of Property Act, 1882, is the statutory qualification and restriction of the general law of estoppel contained in S. 115 of the Indian Evidence Act, 1872, which is a rule of proof.

S. 41 of the Transfer of Property Act, 1882, imposes upon the purchasers of immoveable property the duty of exercising reasonable care and diligence. **Hoorbai v. Alshabal**, 12 Bom. L.R. 457 = 6 Ind. Cas. 898.

BEAMAN, J.

- (11) *S. 41—Estoppel—Fictitious sale by husband in favour of wives—Mortgage-deed by wives attested by husband—Private sale by wives to mortgagee—Subsequent sale in execution of decree against husband—Respective rights of the two purchasers—Evidence Act (I of 1872), S. 115.*

One G executed a sale-deed of his property in favour of his wives. The ladies executed a mortgage-deed in respect of the property, which was attested by G and his son. Subsequently the property was sold by the mortgagors to the mortgagee L. After the sale M attached and sold the property in execution of a simple money decree against the heirs of G, and purchased it himself and obtained possession. The plaintiffs, the heirs of the mortgagee purchaser, brought this suit for possession. M defended the suit on the ground that the sale by G in favour of his wives was fictitious and L therefore acquired no rights under it from the wives.

Held that it was not open to the person, who was the purchaser of the rights of G, to raise the plea against the validity of the sale made by G in favour of his wives, and that the provisions of S. 41, Transfer of Property Act, were applicable. **Mutsaddi Lal v. Daleep Singh**, 7 A.L.J. 967 = 7 Ind. Cas. 442.

STANLEY, C.J., and GRIFFIN, J.

- (12) *S. 41—Buddhist law—Presumption of ownership of house built during coverture on land belonging to wife alone—Joint property—Power of one of parties to marriage to deal with joint property—T.P. Act, S. 41—Bona fide mortgagee without notice for consideration—Acquiescence.*

A piece of Government land was in the possession of the wife many years before her

Transfer of Property Act—(Continued).

marriage, and after her marriage she obtained a lease of it from Government. A house was then built on the land and she mortgaged it to a Chetty without the consent of her husband but for the benefit of her son. The mortgage contained a power of sale. It was proved that her husband came to know of the mortgage and took no steps to set it aside until after the Chetty refused to allow his wife further time to pay off the mortgage-money. He then filed this suit.

Held, that, in the absence of any evidence to the contrary, the house must be presumed to be the joint property of husband and wife, and that the mortgage of house was under the circumstances not a *bona fide* mortgage "without notice for consideration: that the husband must be held to have acquiesced in the mortgage; but that, from his consent to the mortgage, no presumption could be made that he consented to the power of sale. **U Po Lon v. Soolliman Haji**, 8 Ind. Cas. 606.

ROBINSON, J.

Reference:—1 L.B.R. 11, F.

- (12-a) *S. 41—'Reasonable care,' etc., meaning of. See CIV. PRO. CODE (1882), No. 164-a, 12 Bom. L.R. 1044.*

- (13) *Ss. 41, 43—Mortgagor entitled only to a third share—Mortgage of half-share—Mortgagee having knowledge—Mortgagor subsequently becoming entitled to a half—Erroneous representation—Ostensible owner—Applicability of S. 43—Requisites of S. 41—Difference between Ss. 41 and 43.*

S. 41 requires a person, who has obtained a transfer from the ostensible owner, to have done so in good faith and after due enquiry, in order to become entitled to the interest purported to be transferred.

Though, under S. 43, mere belief in, and acting upon, the representation, may be sufficient to pass the subsequently acquired interest, mere belief would be insufficient under S. 41.

The principle of S. 43 is the acting by the transferee on the erroneous representation of the transferor (a).

The well-known maxim of law to which effect is given in S. 41 is "interest feeds the estoppel." **Pandiri Bangalam v. Karumoory Subbaraju**, 8 M.L.T. 285.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—(a) 34 B. 175 (182); 7 C.L.J. 381 (383), *Rel.*; 18 M.L.J. 247, *R.*

Transfer of Property Act—(Continued).

(14) S. 43—Acquisition of larger interest by the mortgagor after the date of the mortgage—Rights of mortgagee. See MORTGAGE (GENERAL), No. 7, 12 Bom. L. R. 143.

(15) S. 43—Transfer by mother during minority of son—Right of reversioner. See HINDU LAW (ALIENATION), No. 7, 6 Ind. Cas. 37.

(15-a) S. 43. See No. 13, *supra*.

(16) S. 48. See BENAMI TRANSACTIONS, No. 1-a, 7 Ind. Cas. 218.

(17) Ss. 51, 108 (h)—Tenant's right to improvements.

Per Chief Justice:—In cases to which the Transfer of Property Act applies, the rights of the tenant are defined by S. 108 (h) of that enactment, and the extent of the right is the same in cases not governed by the Act. S. 51 of the Act does not apply in terms as between landlord and tenant. Both under the Hindu and the Mahomedan Law as well as under the common law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation in eviction (b).

Mere knowledge on the part of the plaintiff that improvements are made on his land is not enough to estop him in a suit for possession. If there is no express contract, unless the lessor is estopped from suing for possession, the lessee cannot claim compensation (c).

Per Abdur Rahim, J.—The doctrine of equitable estoppel has not been or should not be extended, as between a landlord and his tenant, to a case where all that can be alleged against the former is that he did not interfere and merely remained passive, with the knowledge that the tenant was making improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant at will or of a tenant from year to year (c).

The tenant should know under what terms he has been let into possession, and the law lays no duty upon the landlord to remind his tenant of his title under which he holds the land.

If a tenant, knowing the extent of his interest in the land in his possession, chooses to expend money upon a title which he must know would soon come to an end, that is his own folly, and he cannot ask the owner of the land to recoup him for such expenditure (d).

Transfer of Property Act—(Continued).

Raja of Venkatagiri v. Mukku Narasayya, 8 M.L.T. 258.

WHITE, C.J., and ABDUR RAHIM, J.

References:—(a) 27 C. 570, N. (b) 27 M. 211 (221), R. (c) 21 A. 496; 17 B. 736; 29 C. 871 (884); 29 B. 580, R.; 6 M.H.G.R. 245, *doubtful*. (d) 21 A. 496; L.R. 1 H.L. 171 (1886), R.

(18) S. 52—*Lis pendens*—Suit "actively prosecuted" in wrong Court, returned to proper Court and decreed by latter on compromise—Civ. Pro. Code (Act XIV of 1882), S. 15—Suit to be instituted in Munsif's Court filed in Subordinate Judge's—Decree against minors not duly represented, void or voidable—Strangers if may challenge

A decree obtained against persons who, though minors, were not represented by guardians *ad litem*, stands good against the whole world as a final order of the Court, until set aside at the instance of those persons and at their instance only. It cannot be challenged or questioned by third parties.

The rule of *lis pendens* will operate in favour of a plaintiff, who at the time of the transfer was erroneously prosecuting his suit in a Court, which from defect of jurisdiction was unable to entertain it, and in consequence returned it for presentation to the proper Court, which Court ultimately decreed the suit on the basis of a lawful compromise.

S. 15, Civ. Pro. Code (1882), referred to procedure only and did not affect the jurisdiction of Courts of higher grade. **Tangor Majhi v. Jaladhari Deari**, 14 C. W. N. 322=5 Ind. Cas. 691.

CHITTY and VINCENT, JJ.

(19) S. 52—Suits for sale and redemption are subject to the rule of *Lis pendens*—*Transferee pendente lite cannot question the correctness of the decree*.

Held, that a right to immoveable property is directly and specifically in question both in a suit for sale by a mortgagee and in a suit for redemption by a mortgagor, and S. 52 of Act IV of 1882 applies to both classes of cases.

Held, further, that an alienation of property, which is the subject of a suit to which S. 52 of Act IV of 1882 applies, cannot question the decree passed therein by showing that it was for any reason wrong. **Saiyad Zahid Ali v. Musammatt Sadar Begam**, 18 O.C. 50=5 Ind. Cas. 800.

CHAMIER and EYANS, J.CS.

References:—10 O.C. 314; 10 O.C. 356; 12 O.C. 133, R.

Transfer of Property Act—(Continued).(20) *S. 52—Decree passed upon a compromise.*

Held, that, if the other conditions of the section are satisfied, S. 52 of the Transfer of Property Act applies to a case in which a decree is passed upon a compromise **Raghubar Dayal v. Ghasite**, 13 O.C. 98 = 6 Ind. Cas. 750.

CHAMBER and EVANS, O.J.C.

References:—6 O.C. 294, *Dis.*; 12 M. 439, *not F.*; 18 C. 188, *D.*; 8 B.L.R. 474; 8 C. 79; 7 W.R. 133; 21 W.R. 319; 34 I.A. 102; 29 A. 339, *R.*; 29 M. 426, *F.*

(21) *S. 52—Lis pendens—Contentious suit—Compromise decree—Sale pending suit—Purchaser bound by the decree.*

An honest compromise, incorporated into a decree under the provisions of the Code of Civil Procedure, is just as effectual for purposes of S. 52 of the Transfer of Property Act as a decree passed by the Court.

S transferred a portion of the property which formed the subject-matter of a partition suit to which she was a party. After the transfer, S died. Her reversioners were already on the record as parties. Subsequently the suit terminated in a compromise decree: *Held*, that the purchasers from S were bound by the compromise decree. **Musammatt Jhuna v. Munshi Tara Chand**, 6 Ind. Cas. 168.

RICHARDS and TUDBALL, JJ.

(22) *S. 52—'Contentious,' meaning and scope of—Suit to enforce mortgage of immoveable property—Consent or compromise decree—Contentious suit—Lis pendens—Applicability after decree nisi and before order absolute—Lease of waste land, subject of suit—Absence of Court's sanction—Incident of prudent management—Validity.*

The word "contentious" in S. 52, Transfer of Property Act, is used in distinction to such non-contentious proceedings as unopposed applications for probate.

A suit to enforce a mortgage lien on immoveable property is, in this sense, clearly, a contentious suit, and does not cease to be so because the decree actually passed in it is the result of a compromise, or is consented to by the defendant (a).

The doctrine of *lis pendens* is applicable also to conveyances made between the decree *nisi* passed in a mortgage suit and the institution of proceedings for bringing the property to sale. The protection given to the plaintiff under

Transfer of Property Act—(Continued).

S. 52, Transfer of Property Act, extends up to the final satisfaction of the conditional decree, since it might be otherwise rendered nugatory by the judgment-debtor's dealing with the mortgaged property during the six months' grace necessarily allowed him by the conditional decree, during which time the decree-holder cannot apply for a decree absolute (b).

Although a fresh lease to avoid loss of rent of a holding that had been abandoned by a tenant might possibly be regarded as an "ordinary and reasonable incident of interim beneficial enjoyment," a lease, without the sanction of the Court, of waste land with the option of either cultivating or keeping it under grass, is not such an incident nor necessary, but an act materially curtailing the lessor's rights in the village which the mortgagee was entitled to bring to sale intact (c). **Dhiraaj Singh v. Dinanath**, 6 N.L.R. 140.

SKINNER, A.J.C.

References:—(a) 29 M. 426 (F.B.), *F.*; 12 M. 439, *N.F.*; 18 C. 188, *Expl.*; 27 C. 77, *R.* (b) 29 M. 426 (F.B.), *Rel.*; 20 A. 349, *Concurred in*; 22 B. 939, *R.* (c) 15 C.P.L.R. 6, *D.*; 7 M. 96, *R.*

(23) *S. 53—Subsequent creditors, whether within the meaning of the section—Resumption in cl. (2) of the section, whether applies to the case of subsequent creditors.*

S. 53, cl. (1) of the Transfer of Property Act does not restrict the benefit of its provisions to the existing creditors alone.

Subsequent creditors are also within the meaning of the section.

The presumption in c. (2) of S. 53 of the Transfer of Property Act applies alike to the case of subsequent creditors as to that of the existing creditors. **Thomas Pillai v. Muthurama Cherrayar**, 4 Ind. Cas. 301 = 7 M. L.T. 28.

BENSON, C.J., and SANKARAN NAIR, J.

References:—5 Bom. L.R. 255; 29 B. 146; 26 B. 577, *R.*; 26 E.R. 758; 69 E.R. 1035, *Expl.*

(24) *S. 53—Fraudulent transfer—Fraud of transferee an essential element—Inadequate consideration—Presumption of fraud—Good faith and valuable consideration—Fraud—Pleading.*

The mere fact that the transferor intended to defraud his creditor is not sufficient to bring a transfer within the purview of S. 53 of the Act.

Transfer of Property Act—(Continued).

It must be also proved that the transferee was not a transferee in good faith and for valuable consideration (a).

A transfer for consideration is not void under S. 53, even if it gives preference to one of the creditors of the transferor (b).

When any fraud is imputed, the use of mere general word of fraud or collusion is ineffective (c).

In the absence of any allegation as to fraud in the pleadings, it cannot be presumed from the mere fact of inadequacy of consideration. **Husain Bukhsh v. Hafiz Musahib Khan**, 5 Ind. Cas. 179.

KARAMAT HUSAIN, J.

References:—(i) 24 C. 825; 1 C.W.N. 665; 25 B. 202, R. (b) 8 A. 178; A.W.N. (1901), 67; A.W.N. (1901), 64. (c) 15 I. A. 119; 15 C. 533; 18 B. 144, R.

(25) S. 53—Consideration not a necessary test of *bona fides*—Test of fraudulent transfers. See REGISTRATION ACT (1877), No. 22, 7 Ind. Cas. 614.

(36) Ss. 53, 100—*Fraudulent transfer of property to defeat creditors—Conversion of land into cash to defeat creditors—Vendee helping vendor to defeat vendor's creditors—'Good faith'—Burden of proof—Part of consideration applied in discharge of mortgage—Right of vendor to a charge on the property sold for the said consideration.*

If a vendee of property assists his vendor to convert land into cash, to enable the latter to keep it out of the reach of his creditors, the sale is voidable, under S. 53 of the Transfer of Property Act, at the option of the creditors.

Where, however, a part of the consideration for such sale was paid in discharge of a subsisting mortgage on the property sold, the vendee will be allowed a charge on the property to the amount of such consideration, and the sale will not be voidable *ab initio* (a).

It lies on the transferee to prove good faith on his part and consideration (b). **Palamalai Mudaliyar v. The South Indian Export Co., Ltd.**, 5 Ind. Cas. 38 = 7 M.L.T. 167 = 20 M.L.J. 211.

WALLIS and MILLER, JJ.

References:—(a) 30 M. 6; 16 M.L.J. 427; 1 M.L.T. 351, *Expl.* and D. (b) 5 Bom. L.R. 142, *Rel. on.*

Transfer of Property Act—(Continued).

(27) S. 54—*Sale—Unregistered sale-deed for less than Rs. 100 followed by delivery of possession—Subsequent sale-deed registered—Title—Priority.*

A sale by unregistered deed of immoveable property, less than Rs. 100 in value, passed a good title to the vendee when it is followed by delivery of possession; and has priority over a registered sale of later date. **Veda Muppan v. Kathan Padayachi**, 5 Ind. Cas. 57 = 7 M.L.T. 372.

BENSON, O.C.J., and SANKARAN NAIR, J.

(28) S. 54—*Sale—Necessity for registration or delivery of possession for land worthless than Rs. 100—Compromise.*

The terms of a compromise affecting land worth less than Rs. 100 were reduced to writing, but the document was not registered nor was possession given:

Held, that the transaction was not a "sale," and delivery of possession required by S. 54 of the Transfer of Property Act, 1882, was not essential to its validity.

The nature of a compromise is that it is an acknowledgment of the existing rights of the parties. Delivery of possession is not therefore necessary to give effect to it. **Krishna Tanhaji v. Aba Shetti Patil**, 11 Bom. L.R. 1336 = 34 B. 139 = 4 Ind. Cas. 833.

CHANDAVARKAR and HEATON, JJ.

Reference:—1 I.A. 157, F.

(29) S. 54—*Sale of land—Registration of deed of sale—Delivery of deed—Completion of purchase—Non-payment of consideration—Recital of receipt in sale-deed—Proof of non-payment—Estoppel.*

More registration of a deed of sale of land, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one, and does not pass title, if it was intended by the parties that the title should pass only upon the consideration money being paid (a).

Notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid or that the consideration was different from that stated in the sale-deed (b). **Sree Nath Holdar v. Sree Kanta Holdar**, 6 Ind. Cas. 477.

DOSS, J.

References:—(a) 2 C.W.N. 207; 27 C. 7; 4 C.L.J. 334, *relied on.* (b) 4 C.W.N. 485; 11 C. 486; 10 C.L.J. 27; 2 Ind. Cas. 953, F.

Transfer of Property Act—(Continued).

- (30) *S. 54—Delivery of tangible immovable property—Property already in vendee's possession—Necessity for registered document.*

Where the vendee is already in possession at the date of his purchase, and there can be no delivery of possession to him, the requirements of S. 54 of the Transfer of Property Act are not satisfied by an unregistered instrument, even if the value of the immovable property is less than one hundred rupees; that is, where there is not a delivery, involving a change of possession, a registered instrument is necessary. **Mrinalini Debi v. Mohima Chandra Moltra**, 6 Ind. Cas. 763.

CARNDUFF and RICHARDSON, JJ.

*References:—*34 C. 207; 5 C.L.J. 390, *F.*

- (31) *S. 54—Unregistered sale-deed—Registered mortgage bond for consideration money, validity of. See CONTRACT ACT, No. 14, 5 Ind. Cas. 581.*

- (32) *S. 55—Interpretation—Sale and execution of proper conveyance—Purchase money unpaid—Rights of buyer and seller.*

It is not permissible to extract a single clause of S. 55 and use it without relation to the clauses which have preceded it. Each clause seems to assume that the conditions imposed by those preceding it have been satisfied.

Although the legal ownership of immovable property may have passed to a buyer by virtue of a properly executed deed of conveyance, if the purchase money or any part thereof remains unpaid, such buyer will not be entitled to a decree for possession of the property sold, except on condition of first paying the purchase money in full; but the remedy of an unpaid vendor who has parted with possession of the property sold, in a case to which the Transfer of Property Act, 1882, applies, is to enforce the charge allowed to him by S. 55 (4) (b) of that enactment. **Balkrishna v. Shripatsingh**, 6 N.L.R. 98.

STANYON, A.J.C.

*References:—*4 C.P.L.R. 92; 5 N.L.R. 70; 16 M.L.J. 524, *F.*; 2 B. 547; 22 B. 176; 23 B. 525; 11 A. 214; 3 A. 77; 30 A. 125; 8 A. 641; 2 A. 711; 27 M. 28; 10 W.R. 114, *R.*; 30 M. 524, *Diss.*

- (32-a) *S. 55—Purchase-money not paid—Vendee entitled to possession—Vendor's lien for unpaid purchase-money.*

According to the provisions of the Transfer of Property Act, a vendee is entitled to possession

Transfer of Property Act—(Continued).

even though the purchase-money is not paid, and the vendor is entitled to have a statutory charge on the property for unpaid purchase-money (*a*).

It is not open to Courts of this country to introduce and enforce equities modifying the provisions of the statute law (*b*). **Velayutha Chetty v. Govindasami Naicken**, 8 Ind. Cas. 364.

WHITE, C.J., and WALLIS, J.

References:—(*a*) 30 A. 125; A.W.N. (1908), 38; 5 A.L.J. 96; 11 A. 244, *doubted*. (*b*) 30 I.A. 238; 13 M.L.J. 399; 5 Bom. L.R. 838; 8 C.W.N. 41; 31 C. 57, *R.*

- (32-b) *S. 55 (1) (f)—Mortgagee selling under power of sale—Possession how given—Obstructive conduct of tenants does not affect possession.*

A mortgagee of land with an inhabited house thereon sold the property in virtue of his power of sale. The purchaser, after paying a certain sum as earnest money, refused to pay the balance of the purchase money and claimed back what he had paid, because, the tenants of the house refused to recognise either party as their landlord and to pay rent. Under the circumstances the purchaser contended that the vendor could not give him effective possession of the property.

Held, that the vendor could give effective possession of the property. **Suliman Ahmed Sedat v. Palaneappa Chetty**, 8 Ind. Cas. 605.

FOX, C.J., and PARLETT, J.

- (32-c) *S. 55 (1). cl. (g)—Contract Act (IX of 1872), S. 69—Payment of Government revenue by party interested in saving property—Private sale of property—Liability of vendor—Contribution.*

Where plaintiff, who was interested in saving property from sale for non-payment of Government revenue, paid the revenue and the property was in the meantime sold by the owner, the liability of the vendor for payment of Government revenue having accrued due before the sale: *held* that the person paying the revenue was entitled to be re-imbursed by the vendor. **Dantaluri Ragavaraju v. Kanjaluri Ramasawmy**, 8 Ind. Cas. 435.

ABDUR RAHIM, J.

- (33) *S. 55 (2)—Sale-deed—Warranty of title—Interest sold whether a subsisting interest.*

Transfer of Property Act—(Continued).

A prior mortgagee brought a suit for sale of the mortgaged property without making puisne mortgagees parties to the suit. He had the property sold and purchased it himself. He then brought a second suit against the puisne mortgagees who were three and joint. The suit was compromised, the latter agreeing to pay a certain amount, and the compromise was embodied in a decree. One of them, S, paid his one-third share of the money and recovered possession of a third share of the property. Another, N paid the other two-thirds and took possession of the rest of the property. S sold this two-thirds share to P. The third puisne mortgagee, B, who was a brother of N, brought a suit against P and recovered half of the two-thirds share. In a suit for recovery of half the sale price by P against N, *held* that, while the reference to the decree and the compromise in the sale-deed operated to save the vendor from a charge of fraud, it was quite insufficient to relieve the vendor from the obligation imposed upon him by S. 55, cl. 2. of the Transfer of Property Act. **Muhammad Ibrahim v. Nakched Ram**, 7 A.L.J. 752 = 6 Ind. Cas. 890.

STANLEY, C.J., and GRIFFIN, J

(23-a) S. 55 (2)—Extent of vendor's liability. See VENDOR AND PURCHASER, No. 6, 8 Ind. Cas. 91.

(34) S. 55, cl. 1 (b)—Vendor and purchaser—Vendor's lien for unpaid purchase money—Agreement that purchase money should be paid by vendee to third parties—Whether vendor can enforce the statutory charge.

Where the agreement between a vendor and a purchaser of property is that the vendee should pay the purchase money or part thereof to a third person to whom the vendor is indebted, there is no statutory lien on the property which the vendor can enforce in default of payment by the vendee, but only a personal covenant, the breach of which must be compensated in damages. **Abdulla Beary v. Mamhali Beary**, 5 Ind. Cas. 87 = 7 M.L.T. 376.

WHITE, C.J., and KRISHNASWAMI IYER, J.

References:—30 I.A. 238 (244); 31 C. 57; L. R. 11 Eq. 164; 7 Eq. 409; 4 Ch. D. 562, 2.; 29 M. 305, *Excl. and D.*

(35) S. 55 (4) (b)—Unpaid purchase money—Vendor's lien—Money left with vendee for payment to decree-holder not inconsistent

Transfer of Property Act—(Continued).

with the continuance of charge—Limitation—Sale—Vendor and purchaser.

A sold his property to B in 1896, and left a portion of the purchase money with the vendee for payment to C who held a decree against A. B did not pay the money to C. A, therefore, sued to recover the money from B in 1908: *held* that the suit was not barred by limitation. S. 55 of the Transfer of Property Act, 1882, creates a charge in favour of the vendor for the unpaid purchase money. The fact that the money was left with the vendee for the payment to C was in no way inconsistent with the continuance of the lien. **Har Chand v. Kishori Singh**, 7 Ind. Cas. 639.

KARAMAT HUSAIN, J.

References:—A.W.N. (1908), 71; 3 M.L.T. 374; 5 A.L.J. 243; 30 A. 172; 31 C. 57; 13 M. L.J. 389; 5 Bom. L.R. 838; 8 C.W.N. 41; 30 I.A. 238 (P.C.), R.

(36) S. 55, sub-sec. 6, cl. (b)—Scope—Payment of money by purchaser—Claim to have sale completed—Refund—Charge—Applicability of clause.

The charge given under S. 55, sub-sec. 6, cl. (b) of the Act, being for money paid, presupposes that the purchaser has become entitled to get back the money.

The clause applies to the case of a sale having fallen through and the purchaser consequently having acquired a right to get back the money, and does not apply to the case of a plaintiff who, having paid the money in performance of his contract, claims to have the sale completed. **K Abdul Khadir Muhammad v. P. Mammad**, 8 M.L.T. 361.

ABDUR RAHIM and KRISHNASWAMI IYER, JJ.

(36-a) S. 55 (6) (b)—Sale wholly invalid—Vendee's charge—Whether exists.

In a case where the sale is wholly invalid, S. 55, cl. 6 (b), does not operate so as to give the vendee a charge upon the property. **Muthu Gounden v. Chellappa Gounden**, 8 M.L.T. 464.

MILLER and KRISHNASWAMI AIYAR, JJ.

References:—29 M. 336, *Appr.*; 28 B. 466 (470), *Dist.*

(37) Ss. 56 (6) (b), 123—Sale—Gift—Transfer of property—Consideration in shape of services rendered or to be rendered—Grant of assessment—Registration Act (III of 1877), S. 17.

Transfer of Property Act—(Continued).

The plaintiff sued to recover arrears of assessment. The defendant claimed exemption from assessment under two documents which released him from the payment, and which were passed by a predecessor-in-title of the plaintiff by way of reward for services, which the defendant had rendered or was expected to render him. The documents were neither stamped nor registered. The lower appellate Court treated the transaction as one of sale and, applying S. 56 (6) (b) of the Transfer of Property Act, 1882, ordered the plaintiff to pay what the Court calculated to be the equivalent of purchase-money to the defendant before he recovered the assessment :

Held, that the transaction must be regarded as one of gift, not sale ; what was given in gift was regarded in Hindu Law as *nibhanda*, which is immoveable property ; and there could be no gift of immoveable property except by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses.

(2) That, there having been no such instrument in support of the defendant's title, he could not set up the right in answer to plaintiff's claim. **Madhavarao Moreshwar v. Kasibai Dattubhai**, 12 Bom. L.R. 9=5 Ind. Cas. 599=34 B. 287.

CHANDAVARKAR and HEATON, JJ.

(38) S. 58—Mortgage—Attestation—Co executant if may attest, execution by others—Evidence Act (I of 1872), Ss. 68, 69, 70.

A mortgage bond executed by several persons was sought to be proved by the evidence of one of the executants who was also the scribe of the document.

Held, that a party executing a document, required by law to be attested, cannot be an attesting witness thereof, and his evidence, even if he was present at and witnessed the execution of it by others, cannot be accepted as that of an attesting witness in regard to such execution (a).

Quere :—Whether admission of execution by a party is not receivable in proof of execution of such document by himself. **Peary Mohan Maiti v. Sreenath Chandra Maiti**, 14 C.W.N. 1046.

DOSS, J.

References :—(a) 7 C.W.N. 385 (1903), D.; 2 Robertson 315 at p. 317 (1860) ; L.R. 8 Q.B.D. 111 (1882) ; 1 Ad. and Ell. 3 at p. 23 (1834) ; 9 M. and W. 404 (1842) ; and L.R. 7 Q.B.D. 516 (1881), *relied on*.

Transfer of Property Act—(Continued).

(39) Ss. 58 (d), 67—Mortgage-deeds, construction of—Usufructuary mortgage sale of property.

A usufructuary mortgage contained a provision that, after the expiry of a certain term (fixed in the deed), the mortgagee should have power to institute a suit and realise the money by public or private sale of the property mentioned in the document and of other moveable and immoveable property belonging to the mortgagors :

Held, that the mortgage was not purely a usufructuary mortgage as defined in S. 58 (d) of the Transfer of Property Act, 1892, and that, by virtue of the provisions contained in the deed, the mortgagee could obtain a decree for sale of the mortgaged property. **Salamat-ullah v. Partab Singh**, 6 Ind. Cas. 795.

STANLEY, C.J., and GRIFFIN, J.

(39-a) S. 59—Essentials of attestation—Position of scribe. See ATTESTATION, No. 4-a, 6 N.L.R. 152.

(40) S. 60—Agra Tenancy Act (II of 1905), Ss. 11, 18, 20—Fixed-rate tenant—Mortgage—Covenant that the mortgagee will remain always in possession of property after redemption—Clog on redemption

S. 18 of the Agra Tenancy Act, 1901, relates to the right of occupancy referred to in S. 11 of the Act, and does not apply to the case of a tenant at fixed rates whose interests are under S. 20 heritable and transferable.

A stipulation in the mortgage-deed, by which, on payment of the principal, interest and costs, the mortgagor is not to recover possession, but is bound to allow the mortgagee to continue in possession apparently in perpetuity upon payment of a fixed rent, prevents the mortgagor from getting the property unfettered, and is thus a clog on equity of redemption. **Sheo Singh v. Birbahadur Singh**, 6 Ind. Cas. 707.

BANERJI, J.

References :—(1903) A.C. 253 ; 88 L.T. 633 ; 51 W.R. 636 ; 72 L.J.K.B. 471 ; 9 B. 524, F. ; 22 A. 238, D.

(40-a) S. 60—Right of private purchaser to redeem his own share. See MORTGAGE (GENERAL), No. 50, 8 M.L.T. 409.

(41) S. 64 (a)—Mortgage of joint property—Mortgagor becoming entitled to some other property at partition—Effect. See MORTGAGE (GENERAL), No. 29, 20 M.L.J. 393.

(42) Ss. 65, 66 (b)—Usufructuary mortgage—Right to sue for mortgage-money—Mortgagee deprived of security in consequence of "wrongful default" of mortgagor.

Transfer of Property Act—(Continued).

A breach of any of the obligations imposed on the mortgagor by S. 65 of the Act amounts to a "wrongful default" within the meaning of cl. (b) of S. 68, and entitles the mortgagee to sue for the recovery of his money (a).

Therefore, where the mortgagor fails to disclose the existence of a prior encumbrance, clause (b) of section 68 applies. **Bhola Nath v. Jana v. Hara Mohan Jana**, 7 Ind. Cas 251.

CARNDUFF and RICHARDSON, JJ.

Reference:—(a) 25 W.R., relied upon.

(43) S. 66—Destruction of mortgaged property—Demand for additional security—Reasonable time—Limitation.

Where the mortgaged property was wholly submerged, and the mortgagee, after demanding additional security to which the mortgagor paid no heed, waited for more than six years to bring his suit for the recovery of the mortgage money, held that the delay, under the circumstances, was not reasonable, and the suit was time-barred.

Semle: A period of six months would be a liberal allowance, in a case like the present, to enable the mortgagors to comply with the requests of the plaintiff. **Bhawani Singh v. Jang Bahadur Singh**, 7 A.L.J. 391=6 Ind. Cas. 569.

GRIFFIN and TUDHALL, JJ.

(14) S. 67—Usufructuary mortgage—The mortgage money payable after a given number of years—Order for sale.

On the 26th of October, 1893, the defendant executed in favour of plaintiff a usufructuary mortgage, which provided that the money borrowed was repayable in two years from its date. In 1907, the plaintiff sued to recover the mortgage debt by sale of the mortgaged property. The lower Courts held that, as the mortgage was usufructuary, no order for sale could be passed:

Held, that the mortgage was not a purely usufructuary mortgage, but was one in which the mortgage money had become payable by the mortgagor, and, therefore, in the absence of a contract to the contrary, the mortgagee had the right, under S. 67 of the Transfer of Property Act, 1882, to an order that the property be sold (a). **Datrambhat Rambhat v. Krishnabhat Govindbhat**, 12 Bom. L.R. 491=34 B. 462=7 Ind. Cas. 446.

SCOTT, C.J., and BATCHELOR, J.

References:—7 Bom. 425; 10 Bom. L.R. 615, *Expl.*

Transfer of Property Act—(Continued).

(44-a) S. 67. See No. 39, *supra*.

(45) Ss. 67, 99. Attachment of mortgaged property in execution of money-decree by mortgagee—Right to sue for sale in satisfaction of this claim and of any other claim under the mortgage. See MORTGAGE (GENERAL), No. 15, C N.L.R. 20.

(46) S. 68. See MORTGAGE (GENERAL), No. 46, 137 P.W.R. 1910.

(47) S. 68 (a)—Covenant to compensate mortgagee—Dispossession of mortgagee—Liability of mortgagor. See MORTGAGE (GENERAL), No. 33, 6 Ind. Cas. 838.

(47-a) S. 68 (b). See No. 42, *supra*.

(48) S. 63, cls. (b) and (c)—Mortgage with possession—Default of mortgagor—Possession lost by mortgagee—Risk to title of mortgagee—Right to sue mortgagor for mortgage money.

U, the original owner of a property, executed a *panayone* and *purankadam* in favour of M's father. In 1891, M purchased the property from U subject to prior encumbrances. One A got a money decree against U and also obtained a declaration that the sale in M's favour was invalid, and that he was entitled to execute his decree against U, subject to prior encumbrances only.

In 1896 A purchased the property in private sale and instituted in 1898 a suit for redeeming the *panayone* and *purankadam*. The suit was dismissed but was decreed on appeal by the first appellate Court. Pending the first appeal, M and the other heirs of M's father executed in 1899 a usufructuary mortgage in favour of the plaintiffs in the present suit. M filed a second appeal to the High Court. A executed the decree of the first appellate Court and, pending second appeal purchased the property in execution and continued in possession.

Held, that, under the circumstances, so far as regards the suit for redemption, plaintiff's mortgagors did all that could be done to resist A's getting possession and that there was no default on their part within cl. (b) of S. 68, nor did they fail to secure possession to the mortgagees under cl. (c) of that section.

The fact that A took possession under the redemption decree of the first appellate Court and that there was a temporary suspension of the mortgagors' possession does not bring the case within cl. (c) of S. 68.

Transfer of Property Act—(Continued).

Held, also, that the mortgagors were under an obligation to discharge the decree for which the property was held liable in the declaration suit brought by A, and that, as the property was sold in discharge of that decree, the mortgagors had clearly committed default within S. 68, cl. (c), and that their heirs were liable to the extent of the assets of the mortgagors in their hands. **K. Y. Kunhiraman Menon v. M.T. Avuthala Kutti**, 8 M.L.T. 223=7 Ind. Cas. 173.

BENSON and KRISHNASWAMI AIYAR, JJ.

- (49) S. 73—*Putni created and registered after mortgage of revenue-paying estate—Act XI of 1859, Ss. 40, 41—Decree on mortgage against proprietor and putnidar—Sale of estate for arrears of revenue—Transfer of lien to sale-proceeds if relieves putni interest from liability to sale.*

The proprietor of a revenue-paying estate executed mortgages in favour of A and subsequently granted a *putni* to B who had it registered under S. 40 of Act IX of 1859. The mortgagee, A, obtained a decree on his mortgages in a suit in which the *putnidar* B was made a party. After the decree the estate was sold for arrears of revenue subject to the encumbrance of the *putni*. The mortgagee withdrew the surplus sale proceeds in part satisfaction of his decree, and for the unsatisfied balance applied for sale of the *putni* interest.

Held, that S. 73 of the Transfer of Property Act, by providing that the mortgage-lien is to be transferred to the surplus sale-proceeds, did not relieve the *putni* from liability to sale in satisfaction of the mortgage-decree.

A mortgagee is not bound, upon receipt of notice of an application for registration of an incumbrance under S. 41 of Act XI of 1859, to oppose such application.

Quere: Whether such opposition by a mortgagee would be a sufficient ground for the rejection of the application by the revenue officer. **Sullabala Dasi v. Dinabandhu Nandi**, 14 C.W.N. 186=5 Ind. Cas. 70.

BRETT and SHARFUDDIN, JJ.

References:—6 C. 142; 20 C. 241; 27 C. 181, *cons.*

- (50) Ss. 74, 85. See MORTGAGE (GENERAL), No. 23, 11 C.L.J. 551.

- (51) S. 76. See CO-SHARERS, No. 8, 7 Ind. Cas. 772.

Transfer of Property Act—(Continued).

- (52) S. 76 (h)—*Liability of mortgagee in possession.*

Under S. 76 (h) of the Act, where a mortgagee in possession cultivates the mortgaged land or part of it, he may be charged the net profits of his cultivation or a fair occupation rent as under the circumstances of the case may seem just. **Dadnu v. Somnath**, 6 N.L.J. 109.

SKINNER, A.J.C.

References:—7 W.R. 244; 6 C. 377; 12 B.H.C. 88, D.

- (53) Ss. 76, 83. See MORTGAGE (REDEMPTION), No. 11, 5 Ind. Cas. 529.

- (54) S. 77—*Usufructuary mortgagee—Liability to account—Act XXVIII of 1865, S. 4—Rent to be appropriated in lieu of interest only.*

In the absence of an express stipulation therefor, a usufructuary mortgagee is not liable to render account to the representatives of the mortgagor in an action for redemption.

The fact that the rents of the property are to be appropriated in lieu of a portion of the interest only cannot alter the usufructuary character of the mortgage. **Shafi-un-nissa v. Fazalrab**, 7 A.L.J. 787=7 Ind. Cas. 293.

KNOX and KARAMAT HUSAIN, JJ.

- (54-a) S. 78—*Registration—Possession of title-deeds—Gross negligence.*

The same importance does not attach to the possession of the title-deeds in the *Mofussil* as in the city of Madras, and facility in inspecting the registry provided by the Registration Law should be taken into account in determining whether there was gross negligence in the prior incumbrancer. **P. L. S. A. R. S. Chettiar v. N. Periasami Thevan**, 7 Ind. Cas. 810.

BENSON and KRISHNASWAMI AIYAR, JJ.

References:—31 M. 7; 3 M.L.T. 87; 17 M.L.J. 499, R.

- (55) S. 83—*Deposit paid to mortgagee—Balance promised—Whether a full discharge.*

Some money was deposited under S. 83, Transfer of Property Act, for payment to a mortgagee. On objections being raised by the mortgagee as to the insufficiency of the amount, the mortgagor agreed to pay the balance which was found due to him. At the request of the pledger for the mortgagors, the Court paid the money deposited to the mortgagees and endorsed payment on its back and returned the deed

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to the mortgagees. Held that the mortgagees did not take the money in full discharge of the mortgage as provided by S. 83, Transfer of Property Act. **Hardial v. Pirthi Singh**, 7 A. L.J. 65.

STANLEY, C.J., and BANNERJI, J.

(55-a) S. 83. See No. 53, *supra*.

(55-b) Ss. 83, 84—Order directing distribution of sale proceeds between several mortgagees—Appeal—Interest to run till date of confirmation. See MORTGAGE (GENERAL), No. 52, 8 Ind. Cas. 4.

(56) S. 84—Tender by mortgagor—Refusal by mortgagee—Subsequent inability to pay by mortgagor—But no demand by mortgagee—Interest, whether will run—"Tender," meaning of.

The mortgagor tendered the mortgage amount, but the mortgagee refused to accept the same. Subsequently the mortgagor became unable to pay, but the mortgagee did not make any demand.

Held, that, under S. 84 of the Transfer of Property Act, interest ceases from the date of tender—The word "tender" does not in itself imply that the tenderer must always be ready to pay the money—The mortgagee, not having made any subsequent demand, was not entitled to interest from the date of the tender. **Yelayuda Naick v. Hyder Husain Khan**, 6 M L. T. 262=3 Ind. Cas. 729=19 M.L.J. 648=33 M. 100.

BENSON and SANKARAN NAIR, JJ.

(56-a) S. 84. See No. 55-a, *supra*.

(57) S. 85—Suit upon mortgage—Joinder of parties as defendants—Hindu Law—Father represents his sons in a suit on mortgage against him.

The rule enacted by S. 85 of the Transfer of Property Act is that all persons, having an interest in the property comprised in a mortgage, must be joined as parties to any suit, under Chapter IV of the Act, relating to such mortgage, provided that the plaintiff has notice of such interest; but this rule does not interfere with the rule of Hindu Law, that it is open to a father or the manager in a Hindu family to represent subject to certain conditions, his sons or other members, in a suit brought upon a mortgage against him. **Ramakrishna Narayan Sindhe v. Vinayak Narayan Saswadkar**, 12 Bom. L.R. 219=5 Ind. Cas. 967.

CHANDAVARKAR and KNIGHT, JJ.

Transfer of Property Act—(Continued).

(58) S. 85—Mortgage—Sale upon a mortgage—Mortgage executed by managers of a joint Hindu family—Mortgage executed to liquidate ancestral debt and marriage expenses of a co-parcener—Suit upon the mortgage against the manager alone—The adult co-parcener no party to mortgage or suit—His interest passes under the sale—Party to a suit—Practice.

The managers of a joint Hindu family passed a deed of mortgage for an ancestral debt and for cash advanced for the marriage of a co-parcener (defendant No. 2). In a suit brought on the mortgage against the managers, a decree for sale of the mortgaged property was passed, and at the Court sale the property was sold. The defendant No. 2, who was an adult co-parcener, was not a party either to the mortgage-deed or to the suit and execution proceedings. He claimed that his share in the family property did not pass under the mortgage or under the sale:

Held, (1) that by reason merely of the provisions of S. 85 of the Transfer of Property Act, 1882, it could not be held that no interest passed upon a sale under a mortgage-deed except that of persons made parties to the suit (a).

(2) That, even apart from S. 85 of the Transfer of Property Act, 1882, the sale under the mortgage in question was binding upon all the co-parceners (b). **Chimna Sadashiv v. Sada Barka**, 12 Bom. L.R. 811.

BASIL SCOTT, C.J., and BATCHELOR, J.

References:—(a) (1898) 21 Mad. 222; (1902) 25 All. 234, F. (b) (1887) 11 I.A. 187, F.

(59) S. 85—Mortgage of family property by managing member—Decree for sale—Suit by son and other members to recover the family property. See HINDU LAW (JOINT FAMILY), No. 8, 7 A.L.J. 945.

(59-a) S. 85. See No. 50, *supra*.

(60) S. 86—Application for order absolute of decree nisi—Application for execution—Intervention of objections subsequently proved to be groundless—Continuation or revival of previous application—Limitation Act, (XV of 1877), Sch. II, Art. 178—Limitation Act (IX of 1908), Art. 181, whether governs application for order absolute under O. XXXIV, r. 3 of Civil Procedure Code (Act V of 1908).

Under the law, as it stood before the Civil Procedure Code of 1908 and the Limitation Act

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of 1908 came into operation, there was no rule of limitation applicable to an application for order absolute, of a decree *nisi* made under S. 86 of the Transfer of Property Act (a).

An application for execution of a decree may be treated as in continuation or for revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction (b).

Art. 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, but it does not follow that that article, or the corresponding article of the Limitation Act of 1908, applies to all applications made in the course of a suit.

Art. 191 of the Limitation Act of 1908 does not govern an application for order absolute under O. XXXIV, r. 3 of the Code of 1908.

A decree *nisi* in a mortgage suit was made on March 30, 1904, for foreclosure, and there was also a decree made for costs against the mortgagee in favour of the daughters of the mortgagor who were made parties to the suit. An appeal from the decree was withdrawn on March 5, 1907. On September 9, 1908, an application was made for order absolute for foreclosure by M, the decree-holder. On September 19, 1908, A objected that the decree *nisi* had been purchased by her at execution sale for costs of the daughters of the mortgagor on August 11, 1908, which was confirmed on November 4, 1908, and she alone was competent to execute the decree *nisi*. M then applied on December 23, 1908, for reversal of the sale. A, in the meanwhile, applied for execution of the decree, and the Court on December 19, 1908, dismissed the application of M for decree absolute. On July 7, 1909, the sale was set aside, and the application of A for order absolute was dismissed. On the next day, that is, on July 8, 1909, M applied for order absolute, but no order was passed on that application. A appealed from the order setting aside the sale, and the appeal was dismissed on February 2, 1910. On February 10, M again applied that her application of July 8 might be taken into consideration and order absolute may be made. The judgment-debtor objected that it was barred by limitation :

Held, that the applications of July 8, 1909, and February 10, 1910, should be treated in

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substance as applications for revival or continuation of the original application for order absolute made on September 9, 1908, and that, even if either of these two applications be treated as an independent application, it is not barred by limitation, as Art. 181 of the Limitation Act of 1908 does not govern applications in pending suits by which the Court is invited to make the final decree. **Madhab Moni Das v. Pamela Lambart**, 6 Ind. Cas. 537 = 12 C.L.J. 323.

MOOKERJEE and CARNDUFF, JJ.

References:—(a) 22 C. 924; 6 C.L.J. 119; 34 C. 672; 11 C.W.N. 674, *F.* (b) 1 C.L.J. 381; 32 I.A. 102; 27 A. 334; 15 M.L.J. 258; 9 C.W.N. 601; 2 A.L.J. 397; 7 Bom. L.R. 433; 23 C. 437; 24 B. 345; 18 A. 482, *R.*

(60-a) S. 86—Rate of interest allowable up to date of payment. See MORTGAGE (GENERAL), No. 51, 8 M.L.T. 387.

(61) S. 67—Time fixed for payment—Mortgagor's right to redeem after expiration of time but before order absolute.

A mortgagor can redeem the mortgaged property at any time before the decree for foreclosure is made absolute (a). **Pardas Singh v. Dwarka Singh**, 7 Ind. Cas. 50 = 7 A.L.J. 953.

STANLEY, C.J., and GRIFFIN, J.

References:—(a) 16 C. 246; 21 C. 818 at p. 824; 27 C. 705; 23 M. 133; 20 A. 446 and 25 A. 231, *R.*; 19 A. 180, *not F.*

(62) Ss. 87 and 89, Application under—Application for execution or in execution of a decree—Civil Procedure Code, S. 258, applicability of.

Held, that an application under Ss. 87 or 89 of the Transfer of Property Act is an application for an execution or in execution of a decree, and, consequently S. 258 of the Civil Procedure Code applies to proceedings held under the application. **Mussammatt Sheorani v. Chandarpal**, 13 O.C. 13.

CHAMIER, J.

(63) S. 68—Mortgage—Decree for sale—Father representing sons—Registration—Notice.

The father in a joint Hindu family consisting of himself and his son executed a mortgage of some family property. At a partition between the father and son, the latter acquired a share

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in the mortgaged property. The deed of partition was registered. Subsequently, the mortgagee sued the father alone on the mortgage and in execution of the decree which he obtained, the mortgaged property was sold. The son then sued for a declaration that his share in the property was not affected by the decree or the sale thereunder.

Held, (1) that the right, title and interest of the son in the property passed by the sale in execution of the decree in which he was sufficiently represented by his father (a).

(2) That the registration of the deed of partition did not operate as notice to the mortgagee of the son's right in the property.

Registration is notice to all subsequent purchasers or incumbrancers of the same property. The doctrine, however, cannot be extended to others besides subsequent purchasers or incumbrancers.

A person acquiring a title to or interest in immoveable property should, before acquiring, investigate the title and inquire whether it is in any way burdened, or else he acquires the title or interest subject to the existing burdens on the property. That makes it incumbent upon him to search in the registry. No duty, however, is laid by law on a person, who has acquired a title or interest in property, to search for subsequent titles or interests. **Tatyarao Yenktarao Vase v. Puttappa Kotrappa**, 12 Bom. L.R. 940.

CHANDAVARKAR, J.

Reference :—12 Bom. L.R. 219, R.

(64) S. 88—Applicability of S. 257-A, C.P.C. (1882). See **LIMITATION ACT (1877)**, No. 117, 7 A.L.J. 251. ••

(65) S. 89—Not in conflict with S. 291, C.P.C. (1882). See **CIV. PRO. CODE (1882)** No. 143, 6 Ind. Cas. 813.

(65-a) S. 89. See No. 64, *supra*.

(66) Ss. 89, 101—S. 291, C.P.C. (1882), not in conflict with S. 89, Tr. P. Act. See **CIV. PRO. CODE (1882)**, No. 142, 14 C.W.N. 1019.

(67) S. 90—*Execution of decree—Decree against assets in hands of mortgagor's sons—Mitakshara Law—Property coming by survivorship, if assets.* •

A mortgage was executed by a Hindu father governed by the *Mitakshara* law. In a mortgage suit against his sons, the mortgagee applied for a decree under S. 90 of the Transfer of

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Property Act, and a decree was made against "the assets of the mortgagor which might be in the hands of his sons."

Held, that property, which is not the self-acquired property of the sons, but has come to them by survivorship, is liable to satisfy the debt, and that the decree may be executed against such property. **Ramlal Singh v. Maharajah Papwati Bejoy Pati Gajapati**, 5 Ind. Cas. 146 = 11 C.L.J. 362.

HARINGTON and CHATTERJEE, JJ.

References :—34 C. 642; 11 C.W.N. 593; 5 C.L.J. 491; 2 M.L.T. 207 (F.B.), *relied upon*.

(68) S. 90—*Mortgage—Suit for sale of mortgaged property—Personal remedy against mortgagor or his other property in the event of the mortgaged property not realising sufficient amount—Civil Procedure Code (Act XIV of 1882), Ss. 43, 50—Allegations to be set out in the plaint.*

The plaintiff sued on the 18th April, 1899, to recover Rs. 1,999 on a mortgage dated the 18th April, 1877, by sale of the mortgaged property, and balance if any from the remaining un-hypothecated property of the defendant. The decree passed was against the mortgaged property alone. The amount realised by the sale of the mortgaged property having been insufficient to satisfy the decree, the plaintiff applied under S. 90 of the Transfer of Property Act for a further decree against the other property of the mortgagor. The first Court found that the claim for personal decree was time-barred. Before the lower appellate Court it was contended that the mortgagors had paid Rs. 200 as interest which avoided the bar of limitation, and that the plaintiff should have been allowed to adduce proof. The Court negatived the contentions on the ground that they were not mentioned in the original plaint. On second appeal:

Held, (1) that the mortgage in suit being of the year 1877, and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show in the plaint the ground on which exemption from the law of limitation was claimed.

(2) That the plaintiff could not be allowed at a very late stage of the suit, to bring forward, for the first time, allegations which it was necessary to prove in order to show that he was entitled to a further decree against the

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defendant personally. **Gulam Hussain Tyaballi v. Mahamadally Ibrahimji**, 12 Bom. L. R. 531.

SCOTT, C.J., and BATCHELOR, J.

(459) S. 90—"Defendant," meaning of—
Defendants benefited by mortgage—Personal liability.

S. 90 of the Transfer of Property Act contemplates a supplementary decree against the mortgagor alone, or his representatives, if he is dead. The word "defendant" in the section means the mortgagor defendant.

S purchased a certain property in her own name and, not being able to pay the consideration money in cash, executed a mortgage of the purchased property in favour of the vendors, whose assignee brought this suit against S and the defendants on the ground of their having been benefited by the mortgage, as the property was purchased for the joint family of which they were members and in which they lived under the guardianship of S. A joint decree was passed against all the defendants; the property was sold but the proceeds were insufficient to satisfy the decree. In the meantime S died and the decree-holder applied for a decree against the defendants under S. 90 of the Transfer of Property Act: *held* that no decree could be made against the defendants under the section as they were not the mortgagors in the sense of being executants of the mortgage-deed and it was not shown that they got any assets from S so as to attract upon themselves the liability of S; that the meaning of the mortgage-deed which was passed against them on the ground of benefit meant only that the mortgaged property was liable to sale, and that the personal liability must be made out on the terms of the mortgage bond. **Ramoo Singh v. Miterjit Mahton**, 7 Ind. Cas. 784.

CHATTERJEE and RICHARDSON, JJ.

References:—23 A. 439; A.W.N. (1901), 131; 26 A. 507; A.W.N. (1901), 73; 1 A.L.J. 250; 13 C.W.N. 138; 1 Ind. Cas. 442; 9 C.L.J. 35; 34 C. 642; 11 C.W.N. 593; 5 C.L.J. 491; 2 M.L.T. 207 (F.B.), R.

(70) S. 90—Mortgage decree—Proceeds of the sale of mortgaged property—Appropriation—Costs—Principal and interest.

There is no rule that the proceeds of the mortgaged property sold under a decree for sale shall be applied in the first place towards the principal and interest, and shall be applied

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towards the payment of costs only after the satisfaction of the principal and interest. **Jaswant Rai v. Sadig Ali**, 8 Ind. Cas. 32.

CHAMIER, J.

References:—23 A. 439, F.; 20 A. 523, D.

(71) Ss. 92, 93—Usufructuary mortgage—Extension of time for payment after decree—Good cause—Foreclosure.

Where a decree is passed for the redemption of lands held in usufructuary mortgage and a date fixed for redemption, and the mortgagors apply for extension of time for payment on the grounds of poverty and the difficulty of raising money during the pendency of an appeal by the mortgagees, they are entitled to an extension of time if they show good cause.

In deciding whether good cause for extension of time has been shown, all the circumstances of the case must be looked at. Thus, where the mortgagor tendered the mortgage-money to the mortgagee prior to suit, which was instituted in consequence of the refusal to accept it on the part of the mortgagee who claimed to have bought it outright, and an appeal had been filed by the mortgagee against the decree for redemption, and in asking for extension of time the mortgagor alleged poverty and difficulty of raising money pending the appeal, it was *held* that a good cause for extension of time had been made out. **Maung Pye v. Ma Thau**, 8 Ind. Cas. 592.

PARLETT, J.

(71-a) S. 93—Mortgage decree—Time fixed for payment of prior mortgage—Payment not made within time, effect of—Court's power to extend time. See MORTGAGE (GENERAL), No. 38, 7 Ind. Cas. 36.

(71-b) S. 93. See No. 71, *supra*.

(71-c) S. 99—Equity of redemption purchased by mortgagee—Sale voidable, not void—Rights of mortgagee and mortgagor. See MORTGAGE (REDEMPTION), No. 7, 14 C.W. N. 579.

(71-d) S. 99. See No. 45, *supra*.

(71-e) S. 100. See No. 26, *supra*.

(72) S. 101—Mortgage—Purchaser of the equity of redemption paying off prior incumbrance—Equities between him and puisne incumbrancers.

S. 101 of the Transfer of Property Act provides that, where the owner of a charge or other incumbrance on immoveable property becomes

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absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. It protects a purchaser against the claims of puisne incumbrancers, where, holding a prior mortgage, he has purchased the mortgaged property. Where, therefore, a purchaser of hypothecated property pays off a prior incumbrance on the same with the money left with him, that money being part of the sale consideration of the property, he can hold up that mortgage as a shield against the claims of puisne incumbrancers. **Baldeo Parshad v. Uman Shankar**, 6 A.L.J. 987 = 32 A. 1.

STANLEY, C.J., and BURKITT, J.

(73) S. 104. Rules made by the High Court—Execution—Mortgage decree—Effect of—S. 248, C.P.C. (1882). See CIV. PRO. CODE (1882), No. 116, 5 Ind. Cas. 101.

(73-a) S. 104. See No. 66, *supra*.

(74) S. 105, *Lease—Consideration consisting of past advance—“Price paid” whether may be an outstanding debt—S. 11, Central Provinces Tenancy Act, 1898—Whether notice necessary in case of simultaneous mortgage and lease to one and the same person—Construction of S. 11 (2), C.P. Tenancy Act.*

Held, a document may amount to a lease of immoveable property, though the consideration partly consists of an advance made long before the date of execution; for there is nothing in the definition of “lease” given in S. 105 inconsistent with the view that the price paid may be an outstanding debt (a)

S. 41 (2), Tenancy Act, being restrictive of a natural right, must be strictly continued.

Held also, that, where an absolute occupancy tenant transfers his holding by simultaneous mortgage and lease to one and the same person, he need not give notice to his landlord his intention to do so, since neither transaction, when taken alone, comes within the operation of S. 41 (2) of the Tenancy Act. **Beni Prasad v. Mulchand**, 6 N.L.R. 65 = 6 Ind. Cas. 817.

DRAKE-BROCKMAN, J.C.

References :—(a) 25 A. 115 (P.C.), F; 11 B. 462; 7 M. 203; 12 C.P.L.R. 96; 16 C.P.L.R. 49; 26 B. 252; and 22 A. 149, R. (b) 15 C.P.L.R. 135 and 4 N.L.R. 45, R.

(74-a) S. 105—*Patta tendered to, and refused by, tenant, whether a lease—Registration.*

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Where a patta is tendered to, but is not accepted by, a tenant, it is not a lease for the purpose of the Registration Act. **Bangat Singh v. Bolama Reddi**, 8 M.L.T. 371.

MILLER and KRISHNASWAMY AIYAR, JJ.

Reference :—3 M. 358, R. •

(74-b) S. 105. See No. 8, *supra*. •

(75) Ss. 105, 107—Lease from month to month—Oral lease—Registration. See HINDU LAW (JOINT FAMILY), No. 5, 7 M.L.T. 116.

(76) Ss. 105, 107—Lease unsigned by lessor, whether valid See LEASE, No. 14, 20 M.L.J. 298.

(77) S. 106—Landlord and tenant—Lease—Stipulation for surrender on demand—Notice to quit.

A condition in a deed of lease, whereby the lessee agrees to surrender the property demised to the lessor on demand, is “a contract to the contrary” within the meaning of S. 106 of the Transfer of Property Act, and no notice to quit is necessary. **P. K. Kulu v. Ammad Kully**, 8 Ind. Cas. 362.

MUNRO and SANKARAN NAIR, JJ.

(77-a) S. 106. See LEASE, No. 8, 5 Ind. Cas. 336.

(78) Ss. 106, 108 (a), 111 (g). See CHARI-RAMNA HOLDINGS, No. 1, 14 C.W.N. 372.

(79) Ss. 106, 111—Suit in ejectment—Tenancy determined by efflux of time—Tenancy on sufferance—Assent of landlord necessary to convert it into a tenancy from year to year—Ejectment—Notice to quit.

Where a tenancy has determined by efflux of time and the tenant or his heirs hold over, the tenancy is only on sufferance unless it is converted into a tenancy from year to year by the landlord's assent. After the efflux of time, the tenant or his heirs may be ejected without any notice to quit being given (a). **Nandikolla Gopalan v. Manyam Mahalakshmi**, 7 Ind. Cas. 8 = 8 M.L.T. 230.

ARNOLD WHITE, C.J., and ABDUR RAHIM, J.

References :—(a) 31 M. 163; 3 M.L.T. 256; 18 M.L.J. 26, F.

(80) S. 107—Lease in writing registered—Signature of lessor—Whether necessary to validate lease—Signature by lessee only—Whether lessee can repudiate liability.

The registered instrument referred to in S. 107, Transfer of Property Act, need not necessarily be signed by the lessor.

Transfer of Property Act—(Continued).

If such instrument is signed by the lessee only, he is not precluded from denying his liability thereunder (a).

If a registered instrument signed by the lessee and accepted by the lessor is not a lease, the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder. (*Per White, C.J., and Ayling, J.*).

If no lease is created by the instrument because the lessor's signature is wanting and it is signed only by the lessee, the question of the lessee's liability depends upon the existence of consideration for his undertaking to pay. If the lease is the consideration, it fails because no valid instrument has been executed by the owner of the property. If the lessee had obtained possession of the property, he would be liable as for use and occupation, and his covenant to pay would be evidence of the measure of his liability. If no possession had been obtained, the signatory to the instrument is not liable merely because he has covenanted to pay. **Syed Ajam Sahib v. Madura Sree Meenatchi Sundareswarar Devastanam**, 9 M.L.T. 437 (F.B.) = 8 Ind. Cas. 668.

WHITE, C.J., KRISHNASWAMI AIYAR and AYLING, JJ.

References :—(a) 30 M. 322 = 2 M.L.T. 270 = 17 M.L.J. 395 and 32 M. 532 = 6 M.L.T. 175 = 4 Ind. Cas. 1039, *overruled*; 26 A. 368; A.W.N. (1904), 46; 27 A. 136 = A.W.N. (1904), 189 1 A.L.J. 516; 27 A. 190 = A.W.N. (1904), 212 and 14 C.W.N. 73 = 10 C.L.J. 555 = 2 Ind. Cas. 994, *Diss.*

(80-a) S. 107—Lease—Agreement to lease—Specific performance. See LEASE, No. 12, 11 C.L.J. 543.

(80-b) S. 107. See LEASE, No. 7, 5 Ind. Cas. 350.

(80 c) S. 107. See Nos. 3, 75 and 76. *supra*.

(81) Ss. 107, 117—"Lease" for agricultural purposes—Reclamation lease granted for removal of jungle—Necessity for registration—Tenure for agricultural purposes—Whether interest heritable.

A reclamation lease granted expressly for the purpose that the jungle and wild trees might be removed and the land brought under cultivation, is a lease for agricultural purposes within the meaning of S. 117 of the Transfer of Property Act. It is immaterial whether the grantee did the work himself, by his servants

Transfer of Property Act—(Continued).

and hired labourers, or by under-tenants whom he settled on the land.

Consequently, such a tenancy can be created without a registered instrument notwithstanding the provisions of S. 107.

As the grantee becomes a tenure-holder for agricultural purposes, the interest is heritable and does not lapse upon his death. **Jagdish Chandra v. Lal Mohan**, 7 Ind. Cas. 864.

MOOKERJEE and SHARF-UD-DIN, JJ.

(82) S. 108—Lessor and lessee—Duty of lessor to put lessee in possession on request—Agricultural lease—Land in possession of third person—Duty of lessor to remove the third person.

S. 108 imposes an obligation on the lessor to put the lessee in possession, on a request being made to him to that effect, and the principle of law is applicable to leases of agricultural land as well (a). But if the land is already in possession of a third person to the knowledge both of the lessor and the lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee (b). **Narayanasami Naidu Garu v. Veeramilli Ramakrishnayya**, 7 M.L.T. 119 = 5 Ind. Cas. 479.

ABDUR RAHIM, J.

References :—25 M. 587; 9 W.R. 583, P.

(83) S. 108—Landlord and tenant—Lease for a period—Subletting by the lessee—Destruction of premises by fire—The premises remaining in the sub-lessee's occupation—Vacant possession not delivered to the landlord—Sub-lessee's liability to pay rent till vacant possession delivered to the landlord.

The plaintiffs rented a godown for a period of one year from the 1st April 1908 at a monthly rental of Rs. 1,100; and re-let it on the same terms to defendant from the 1st May, 1908. The latter used it for storage of sugar bags. A fire broke out in the premises on the 5th December 1908, when a portion of the building and sugar were destroyed. The plaintiffs wrote to the landlord on the 10th December, 1908, advising payment of rent for November and saying that the lease terminated as the godown has been burnt down. The landlord replied that the plaintiffs would continue liable to pay the rent until the godown was cleared and its vacant possession was given to

Transfer of Property Act—(Continued).

him. The godown remained in the possession of the defendant's insurers, who used it as a storage of salvage, which was not cleared till the 16th February, 1909, and who were consequently not able to give its vacant possession till then. On further correspondence between the plaintiffs and the landlord, the latter insisted upon his right to levy rent till the 16th Feb. 1909. The plaintiffs thereupon sued the defendant to recover the rent for the first five days of December 1908 and rent for use and occupation of the godown from the 6th December 1908 to the 15th February 1909 at the rate of Rs. 1,100 per month.

Held, (1) that the plaintiffs could not exercise their option to terminate their lease until they put the landlord in possession of the godown; since, if the avoidance of the lease under S. 108(e) of the Transfer of Property Act, 1882, was effectual without surrender of vacant possession, the plaintiffs, by failing to give vacant possession, were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before; and if the avoidance was ineffectual, the lease continued until put an end to by mutual consent.

(2) That the defendant continued liable to pay rent to the plaintiffs as long as it was in his occupation on account of his salvage; inasmuch as the abandonment to the insurers by the defendant was effected for his benefit, and in the absence of evidence that the insurers kept the sugar in the godown in spite of protests of the defendant, the latter must as between him and the plaintiffs, be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over.

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(3) That the respective tenancies of the plaintiffs and the defendant terminated upon the landlord entering into possession on the 16th February 1909 by the consent of all parties interested.

(4) That, therefore, the defendant was liable to pay to the plaintiffs the amount claimed. **Sidick Haji Hoosein v. Bruel & Co**, 12 Bom. L.R. 1055.

SCOTT, C.J., and ROBERTSON, J.

(83-a) S. 108 (b). See Nos. 1-a and 17, *supra*.

(84) S. 108, cl. (e)—*Lease, expiry of, on the premise Cased being destroyed by fire.*

A tenant has no right to retain possession of the premises till such time as it suits him, and

Transfer of Property Act—(Continued).

then make the destruction of premises by fire or other causes the ground for putting an end to the lease so far as the remainder of the term is concerned. Both under the provisions of the Transfer of Property Act and under the common law governing the relations between landlord and tenant, on the determination of a lease, it is the duty of the tenant to put his landlord in vacant possession of the premises let to him. So far as this obligation imposed by law on the tenant is concerned, it does not matter whether the lease came to a termination by efflux of time or by operation of law on the happening of events contemplated in cl. (e) of S. 108 of the Transfer of Property Act.

The true construction to be placed on cl. (e) of S. 108 of the Act is, that, on the demised premises being destroyed or rendered substantially and permanently unfit for the purposes for which they were let, the lessee would have an option by notice to terminate the lease, and that, on such notice being given, the lease should be deemed to have come to an end. On the occurrence of the fire and the destruction of premises let to a tenant, the contract of letting becomes voidable at the option of the tenant, and on that option being exercised it becomes void. The lease does not become void *ab initio*. **Breul & Co. v. Haji Sidick Haji Ibrahim**, 12 Bom. L.R. 474.

DAVAR, J.

(85) S. 108 (e)—*Lesser and lessee—Subject of lease damaged by earthquake—Liability of tenant for rent—Permanently and substantially unfit for occupation.*

The lessee of a house can avoid the lease, if the house be rendered substantially and permanently unfit for the purpose for which it was let by reason of the earthquake.

A house, which was let out to the defendant, was damaged by earthquake. The Engineer, who examined the house, certified that the house was not in imminent danger but that it required immediate repairs in some portions. *Held*, that the building had not been rendered by the earthquake substantially and permanently unfit for occupation. **J. O'Brien Donaghuey v. George Weatherdon**, 7 Ind. Cas. 201.

STANLEY, C.J., and KNOX, J.

(86) S. 108 (f)—*Tenant's right to deduct expenses of repairs—Set-off. See LANDLORD AND TENANT, No. 21, 6 Ind. Cas. 131.*

Transfer of Property Act—(Continued).

- (87) *S. 108 (j)—Lease—Liability of assignee for rent after transfer by him of his purchased interest—Privy of estate, ground of liability.*

The liability of an assignee of lease-hold interest to the lessor, being founded wholly upon privity of estate, ceases upon transfer of such interest by the assignee to another. **R.D. Mehta v. Gadadhar Rai**, 14 C.W.N. 831 = 12 C.L.J. 256 = 37 C. 683 = 7 Ind. Cas. 198.

BRETT and SHARFUDDIN, JJ.

- (88) *S. 108 (j)—Scope of the Act—Whether it deals with cases of succession. See LEASE, No. 10, 5 Ind. Cas. 500.*

(88-a) *S. 108 (j). See No. 78, supra.*

- (89) *S. 111—Suit against tenant withdrawn with liberty to bring fresh suit—Effect. See LANDLORD AND TENANT, No. 19, 6 Ind. Cas. 264.*

(89-a) *S. 111. See No. 79, supra.*

- (90) *S. 111 (g) - Lease—Breach of condition—Re-entry and determination of lease—Mode of—Suit for arrears of rent—Limitation—Right to recover compensation for use and occupation—Cancellation of lease—Restoration thereafter—Whether operates as surrender, implied or express—Forfeiture—Waiver of—Arrangement to share lease between lessee and stranger—Whether requires to be embodied in registered document—Endorsement by landlord approving tenant's assignment—Whether amounts to an interest in immoveable property—Registration Act, S. 17—Suit for rent—Limitation Act, 1877, Sch. II, Arts. 110, 115, 116.*

This suit was instituted on 29th June 1903 for the recovery of arrears of rent due for faslis 1305 to 1311. In 1891 the first defendant had obtained a lease of certain villages from the Zemindar of Kalahasti for a period of nine years. In October 1897, the lease was cancelled, and the same was notified by means of takids and beat of tom tom in the villages, and in December 1897, the cancelled leases were restored. The second defendant was let into possession by an arrangement made, in February 1898 between his father and the first defendant and sanctioned by the plaintiff.

Held per Munro, J.—That the leases were properly determined. Under S. 111 (g), Transfer of Property Act, 1882, a lease of immoveable property determines by forfeiture, if there is a

Transfer of Property Act—(Continued).

breach of condition which entitles the lessor to re-enter and if the lessor does some act showing his intention to determine the lease.

Per Munro, J.—According to the common law of the land which specially prevails in zemindaries and similar estates, the delivery of possession is by the issue of orders or notices to the karnams and the other village officers whose duty it is to collect rents from persons in occupation of the land, and also, though not invariably by a general proclamation addressed to the ryots and others occupying the land giving information of the transfer of possession in question and requiring them to attorn and pay rent to the person giving notice (a).

Held also (per Munro, J.), that, in this case, the plaintiff was entitled, even in the absence of a prayer for such relief in the plaint, to recover compensation for use and occupation, as the defendants were again let into possession, and that the rent fixed in the leases afforded a fair basis for the amount to be decreed (b), and that the limitation was three years under Art. 115, Limitation Act, 1877.

Held, per Abdur Rahim, J.—(1) that the arrangement by the first defendant, lessee, to give a half share of the lease to the second defendant's father, a stranger, did not amount to a surrender impliedly or by operation of law, of a moiety of the lease (c);

(2) that the contract between the first defendant and the second defendant's father was one of partnership, and was not a transaction which must be embodied in a registered instrument.

Held that an endorsement, by which the landlord waived his objection to the assignment of a portion of his interest by the tenant in favour of a stranger, cannot be said to create an interest in immoveable property, and need not be registered under the terms of S. 17, Registration Act (d).

If the tenant never acquiesced in the landlord's act determining the tenancy, and the landlord afterwards changes his mind at the request of the tenant himself, one cannot see why he should not be able to waive the forfeiture, so long as the question is one exclusively between him and the tenant (e).

Art. 110 is applicable to suits for rent generally, but Art. 116 specially provides for a suit which is based on a contract in writing registered, including a lease (f). **M. Chenglah v. Umadai Rajah Raja Damara Kumara**

Transfer of Property Act—(Continued).

Thimma Nayanim Bahadur, 7 M.L.T. 419
=6 Ind. Cas. 766.

MUNRO and ABDUR RAHIM, JJ.

References :—(a) 25 M. 592, R. (b) 31 A. 276, P.; 27 C. 239; 22 C. 752; 13 B.L.R. 243, D. (c) 2 C.L.J. Ex. 122; 3 B. & C. 478; (1861) 2 F.F. P. 435; (1893) 2 Ch. 75, R. & D. (d) 25 M. 7; 27 M. 348, R. (e) (1903) K. B. 304, R. (f) 26 A. 138, not F.; 3 M. 77; 15 C. 221, F.

(90-a) S. 111 (g). See Nos. 2 and 78, *supra*.

(91) Ss. 111, 116—*Lease—Non-payment of rent—Forfeiture—Covenant for re-entry—Meaning of "express condition."*

What is meant by an express condition is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument giving to them their ordinary meaning, so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them. If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances, that is sufficiently express within the meaning of the law.

Where the lease contains an express provision for re-entry on breach of the conditions of the lease, and the condition as to payment of rent is broken, the non-payment operates as a forfeiture of the lease.

If, instead of exercising his right of forfeiture, the landlord allowed the tenant to continue in possession of the premises and treated him as tenant, he must be held to have waived the forfeiture already incurred. **Mussa Kutli v. Rangachariar**, 8 M.L.T. 238.

MUNRO and ABDUR RAHIM, JJ.

(91-a) S. 112. See No. 2, *supra*.

(92) S. 114—*Relief against forfeiture in cases not governed by.*

S. 114, though it does not in terms apply, may be taken as a correct statement of the law even in cases of forfeiture not governed by it. **Parapurath Kalliani Amma v. A. Chinnan alias Mammad Rowthen**, 8 M.L.T. 250.

BENSON and KRISHNASWAMI AIYER, JJ.

Reference :—15 M.L.J. 210, R.

(93) S. 116—Position of tenant holding over—Applicability of the Act. See ACT IX OF 1898 (C.P. TENANCY), No. 5, 6 N.L.R. 95.

(93-i) S. 116. See No. 91, *supra*.

Transfer of Property Act—(Concluded).

(93-ii) S. 117. See No. 31, *supra*.

(93-iii) S. 123. See No. 37, *supra*.

(93-a) Ss. 123, 129—Necessity for written and registered document. See **MAHOMEDAN LAW (GIFT)**, No 5, Ind. Cas. 34.

(93-a-i) S. 129. See No 93-a, *supra*.

(93-b) Ss. 130, 137—Promissory note—Allocation in partition—Want of endorsement—Right of person to whose share it falls to sue. See **PROMISSORY NOTE**, No. 98, Ind. Cas. 33.

(94) S. 134—Actionable claim, transfer of—Right to recover subscriptions, assignment of—Right of holder of a charge.

The holder of a charge on a debt due to his debtor by way of security for his own loan is a transferee of an actionable claim, and entitled to recover the debt from the transferor's debtor (a).

Where an assignment of the right to recover the subscriptions received by A from B has been made by the latter in favour of C, and a suit was brought by C against A to recover the debt due and B was also made a party thereto, held that, though the plaintiff as chargee may not be entitled to the whole debt assigned by way of security, still, as the original creditor is a part. to the suit, there can be no objection to his recovering. **Ramaswamy Pillai v. Mothoo Chetty and others**, 7 M.L.T. 125 =5 Ind. Cas. 834.

MILLER and KRISHNASWAMI AIYAR, JJ.

References :—20 M. 35, R.; 14 C.W.N. 165 and 33 B. 610, P.; (1898) 1 Q.B. 765 (769), R.

(95) S. 135. See **MORTGAGE (USUFRUCTUARY)**, No 7, 8 M.L.T. 420.

(96) S. 137. See No. 93-b, *supra*.

Transfer of Property Act (Mysore).

(1) S. 85—"Interest in the property comprised in mortgage", explained.

* The expression "an interest in the property comprised in a mortgage" as used in S. 85 of the Act, means an interest either in the mortgage security or in the right of redemption (a). **Mysore Prasanna Nanjundeswaraswami Mercantile Bank v. Anantha Jois**, 15 M.C.C. R. 27.

STANLEY ISMAY, C.J. and SETLUR, J.

Reference :—(a) 33 C. 425, F.

Trees.

(1) *Trees, right to cut and appropriate—Fruit trees grown by tenant of holding*

Trees—(Concluded).

when tenancy was created before Transfer of Property Act—Bengal Tenancy Act (VIII of 1885), S. 23—Transfer of Property Act (IV of 1882), Ss. 2, 108, cl. (b).

A tenant of homestead land has the right to cut and appropriate fruit trees grown by him or his predecessor's interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act came into operation. **Moffz Sheikh v. Rasik Lal Ghosh**, 6 Ind. Cas. 796=14 C.W.N. 952=12 C.L.J. 246.

MOOKERJEE and CARNDUFF, JJ.

(2) Right to cut and appropriate—Landlord and tenant—Putni. See CUSTOMARY RIGHT, No. 1, 11 C.L.J. 209.

(3)—planted by occupancy tenant in village land—Right to sell—Consent of Zamindar—Custom. See LANDLORD AND TENANT, No. 12, 5 Ind. Cas. 256.

(4) Suit for damages for cutting—Defendant alleging non-existence of—Jurisdiction. See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 15, 5 Ind. Cas. 372.

(5)—planted by tenant—Right of landlord. See LANDLORD AND TENANT, No. 52, 8 Ind. Cas. 151.

Trespasser.

(1) Auction sale—Property sold in possession of—Formal possession—Adverse possession—Taking of the possession of two trespassers. See LIMITATION ACT (1877), No. 87, 5 Ind. Cas. 273.

(2) Independent trespassers—Adverse possession—Limitation. See LIMITATION ACT (1877), No. 88, 7 A.L.J. 1184.

Trust.

(1)—Created in 1787—Consent decree in 1869 settling the management of the trust—Effect—Rights of descendant of founder.

Plaintiff's ancestor created a trust for charitable purposes in 1787 and appointed the then Pandara Sannadhi and his successors in office as trustee. In 1869, the then Pandara Sannadhi brought a suit against the plaintiff's grandfather for a declaration of the Pandaram's right to manage the trust, and a compromise decree was passed declaring that the Pandarams had the right to manage the trust and that the trustee might nominate a deputy from the male descendants of the founder's family. Plaintiff, as the lineal male descendant of the

Trust—(Continued).

family, brought this suit for removing certain abuses of the trust and for settling a scheme for the management of the trust. Held that the consent decree in the suit of 1869 did not have the effect of altering the terms of the trust as created in 1787 (a); and that, although that decree gives the present plaintiff no right in law to be appointed a deputy, the arrangement came to in 1869 might well be taken into consideration in settling the terms of the scheme. **Krishnaswami Mudaliar v. Nataraja Thambiran**, 8 M.L.T. 205=7 Ind. Cas. 151.

ARNOLD WHITE, C.J. and ABDUR RAHIM, J.

Reference :—(a) 30 M. 255 (258), R.

(2) Administration of—Vote or act of majority of trustees how far binding on minority—Right of suit by one trustee."

In the administration of all trusts of a private nature, the vote or act of the majority of the trustees cannot, in the absence of an express or implied power, bind a dissenting minority (a).

The very principle of recognising the validity of the acts of the majority involves the necessity of the majority being arrived at after mutual discussion among all the members.

Without deciding that in every case of a transaction entered into by the majority of trustees of a public and charitable trust, there should have been a meeting of all to validate it, it may safely be held that all the trustees should have had an opportunity of stating their opinion (b).

There is no objection to one trustee suing for redemption without consulting the others or making them co-plaintiffs (c). **Kunhan v. Moorthi**, 8 M.L.T. 208.

BENSON and L. RISHNASWAMI IYER, JJ.

References :—(a) 11 Ch. D. 121, R. (b) 48 E. R. 1119; 6 M. 270, R. (c) 14 M. 489; 23 M. 82; 24 M. 296; 26 M. 461; 26 M. 649; 29 M. 302; 24 A. 226; 26 C. 409; 5 C.L.J. 527, Cons.

(3) Right of suit—Suit for removal of officer of a temple—Suit by some of the trustees—Other trustees not consulted—Maintainability of suit.

In a suit by two of the trustees of a temple, (thirty-one in number), for removal of two of the officers thereof, the other trustees were made co-defendants as they were not consulted about the matter :

Trust—(Continued).

Held that the action of the minority of the trustees of a temple, without consulting the other trustees, was illegal, and the suit was liable to be dismissed. **Sundaram Iyer v. Venkateswara Iyer**, 7 Ind. Cas. 391.

BENSON and KRISHNASWAMI AIYAR, JJ.

Reference :—23 M. 117, referred to.

(3-a) Adverse possession—Prescription—Village tank—Common property—Trustees.

The plaintiff's claimed to be hereditary trustees in respect of a village pond or tank (common property of the villagers) and prayed for a declaration that, as such trustees, they were entitled to look after the conservancy of the tank and for an injunction restraining defendants from molesting them in their enjoyment of it. The following Acts were relied on by plaintiffs in support of their claim, *viz.*, that they and their ancestors had been maintaining and conserving the tank at their cost, that they built at their cost a flight of steps, and sluices, and had been cleaning them repairing and strengthening the *bunds*, enjoying the fruits of the trees on the banks, and that the occupants of the houses on the *bunds* constructed them with the leave of plaintiffs' ancestors.

Held, that whatever might be the nature of the evidence required to establish a proprietary right, the above acts were not sufficient to sustain the plaintiffs' right as trustees, and the presumption of a lost grant could not be made in favour of the plaintiffs. **Maruthan Chetty v. Kallimuthan**, 8 M.L.T. 368.

WHITE, C.J. and AYLING, J.

References :—6 M. 229 & 12 M. 241 (248); 16 I.A. 48, *Expl. and Appl.*; 20 M.L.J. 74; 7 M.L.T. 139; 5 Ind. Cas. 118, *D.*

(3-b) Creation of trust—Abandonment of office by trustees—Acquiescence—Adverse possession—Action in ejectment—Notice—Invalidity of notice—Objection taken for the first time in second appeal.

Where persons, who originally acted as trustees of a temple, were found to have abandoned the office in 1858, and since then the plaintiffs were found to have been exercising the powers and performing the duties of the trustees.

Held, that the presumption was that plaintiffs acquired title to the office of trustees either with the acquiescence of their predecessors or by adverse possession.

Where, in an action in ejectment, the notice of surrender was prematurely given, and objection as to want of proper notice was taken for the first time in second appeal.

Trust—(Continued).

Held, that the objection should be deemed to have been waived and could not be sustained. **Musili Naidu v. Nataraja Chettiar**, 8 M.L.T. 435=8 Ind. Cas. 132.

ABDUR RAHIM and AYLING, JJ.

(3-c) Charitable Trusts—Suit for removal of trustee of mosque and injunction—Right to injunction—Whether carries with it right to possession of lands attached to the mosque.

A right to pray for removal of the trustee of a mosque from his office and for an injunction restraining him from performing the duties thereof, does not necessarily carry with it the right to possession of the lands attached to the mosque (*a*). **Podia v. Abdul Raiman**, 8 Ind. Cas. 525.

BENSON and KRISHNASWAMI AIYAR, JJ.

Reference :—(a) 23 M. 99, *R.*

(1) Suit for subscription against a—Jurisdiction. See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 11, 20 M.L.J. 146.

(5) Decree, form of—Suit by worshippers to declare alienation invalid—Trustees may be given possession, without a separate suit. See RELIGIOUS ENDOWMENTS, No. 2, 20 M.L.J. 151.

(6) Insolvency—Appointment of members of a banking firm as trustees of a fund to be invested in their own bank—Failure of the Bank—Whether the trustees are entitled to recover the whole amount from the assets. See INSOLVENT, No. 4, 7 M.L.T. 266.

(7) Suit by dismissed trustee for mere declaration and injunction—No prayer for possession—Maintainability. See DECLARATORY SUIT, No. 4, 7 M.L.T. 311.

(8) Effect of trustee dealing with trust property for his benefit—Who to be appointed trustee. See RES JUDICATA, No. 7, 11 C.L.J. 461.

(9) Dispute about succession to trusteeship cannot be referred to arbitration—Award—Application to file award—Jurisdiction of Court. See MAHOMEDAN LAW (WAKF), No. 5, 6 Ind. Cas. 219.

(10) Amounts recovered by trustees to be paid over to a *katlai*—Suit for recovery of arrears for eleven years and odd—Limitation. See LIMITATION ACT (1877), No. 12, 20 M.L.J. 374.

(11) Joint trust—One trustee allowing right to become barred—Suit by the other trustee

Trust —(Concluded).

within 3 years after majority whether barred. See **COMPROMISE**, No. 4, 20 M.L.J. 421.

(12) Trust deed not stamped—Admissibility in evidence. See **EXECUTION SALE**, No. 3, 12 Bom. L.R. 72P.

(13) Private trust—Relinquishment of office. See **RELIGIOUS OFFICE**, No. 1, 20 M.L.J. 654.

(14) Trustee and *cestui que trust*—Unconscionable bargain—Duty of Court. See **PLEADINGS**, No. 4, 12 Bom. L.R. 795.

(15) Suit relating to charitable or religious trusts—Suit when not within S. 539, C.P.C. See **CIV. PRO. CODE (MYSORE)**, No. 26, 15 M.C.C.R. 212.

(16) Suit for removal of trustee—Jurisdiction. See **ACT VII OF 1887 (SUITS VALUATION)**, No. 5, 20 M.L.J. 726.

(17) Suit to recover property as trustee—Subsequent suit by heirs after plaintiff's death. See **RES JUDICATA**, No. 21, 7 Ind. Cas. 184.

(18) Trust indicated in will—No specific trust for residue—Suit to follow residue in trustee's hands—Limitation. See **LIMITATION ACT (1908)**, No. 3, 12 Bom. L.R. 947.

(19) Suit for removal of trustee—Trustee as plaintiff—Others interested—Permission under S. 30, C.P.C., 1882—Necessity. See **CIV. PRO. CODE (1882)**, No. 32, 8 M.L.T. 357.

(20) Dedication by trustees as highway. See **HIGHWAY**, No. 1, 8 Ind. Cas. 175.

Trustee.

(1) *Cotrustees—Death of a trustee—Representative taking possession of trust property and acting jointly with the surviving trustee—Right of a trustee passing under a settlement to others—Right to join possession.*

M and P were trustees. On the death of M, his sister, N took possession of the trust property, and was acting jointly with P till his death as trustees. When P's interest passed away to X and Y under a settlement deed, *held*, X and Y were entitled to be joint trustees with N and were only entitled to the joint possession of trust property. **Arakkal Muttukalel Ummathi Ummah v. Erambathil Kunhamad**, 8 M.L.T. 200=7 Ind. Cas. 801.

SANKARAN NAIR and KRISHNASWAMY IYER, JJ.

Trustee—(Concluded).

(2) Head of a mutt, position of—Trustee or a life-tenant. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 7 M.L.T. 1 (F.B.).

(3) Mortgagee, position of—Whether a—Power to grant leases or make other dispositions of mortgaged property in his own favour—Grant of the property to undivided son—Presumption—Trusts Act, S. 90. See **MORTGAGE (REDEMPTION)**, No. 4, 7 M.L.T. 148.

(3) Trusteeship—Acquisition by will and adverse possession. See **WILL**, No. 4, 7 M.L.T. 189.

(4) Banker whether a trustee for customer. See **BANKER AND CUSTOMER**, No. 2, 7 M.L.T. 214.

(5) Lunatic as—Removal of. See **LUNACY**, No. 1, 8 M.L.T. 243.

(6) Order against, under S. 43, Act VIII of 1890—Jurisdiction. See **ACT VIII OF 1890 (GUARDIANS AND WARDS)**, No. 15, 6 Ind. Cas. 963.

Trustees' and Mortgagees' Powers Act.

See **ACT XXVIII OF 1866**.

Trusts Act.

See **ACT II OF 1882**.

Uncertified payment.

(1) *Payment to decree-holder—Not certified—Subsequent payment to attaching creditor—Damages to judgment-debtor—Suit for—Cause of action.*

When a judgment-debtor pays out of Court the decree amount, there is an obligation on the part of the decree-holder to report satisfaction to the Court. The consideration for the payment is certifying payment as the judgment is to discharge the decree debt, and the decree-holder is therefore bound to take the necessary steps to give a proper discharge; otherwise the decree still remains capable of execution by the decree-holder or any other attaching decree-holder. The payment therefore must be treated as having been made without consideration, and the judgment-debtor is entitled to get back the money so paid.

In a suit for damages, the cause of action arises only when the damage is sustained and the amount recoverable is the amount paid the second time. **A. Shanmugappa v. A. Marappa**, 7 M.L.T. 351.

SANKARAN NAIR, J.

Unchastity.

—not proved—Suspicion if should be expressed in judgment. See **MAHOMEDAN LAW (GENERAL)**, No. 1, 14 C.W.N. 865.

Unconscionable bargains.

(1) Duty of Court. See **PLEADINGS**, No. 4, 12 Bom. L.R. 795.

(2) What is. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 23, 109 P.W.R. 1910.

(3) —. See **CONTRACT ACT**, No. 6, 7 A.L.J. 591.

Underground rights.

(1) *Miseral rights—Grant of tenure by zamindar—Underground rights if pass to tenure-holder, when tenure permanent—Presumption in favour of zamindar.*

The Zamindar must be presumed to be the owner of the underground rights appertaining to a tenure granted by him, in the absence of evidence that he parted with them.

Quere.—Whether, in this case, the evidence justified the conclusion that the grant conferred permanent, heritable and transferable rights on the tenure-holders.

Quere.—Whether the grant of a permanent, heritable and transferable tenure necessarily carries with it the underground rights. **Kumar Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti**, 14 C.W.N. 716 (P.C.) = 11 C.L.J. 653 = 7 A.L.J. 633 = 8 M.L.T. 51 = 12 Bom. L.R. 495 = 6 Ind. Cas. 785 = 20 M.L.J. 569.

LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON and MR. AMER A.L.J.

Under-proprietary rights

(1) “Under-proprietary right,” facts necessary to establish—*Sub-settlement (Oudh Act XXVI of 1866)*, s. 10—*Provisions in the rule not exhaustive—Acknowledgment of under-proprietary right sufficient to establish it.*

The provisions of Sub-Settlement (Oudh Act XXVI of 1866) are not necessarily exhaustive, and an under-proprietary right can also be established by evidence of some specific grant or by an acknowledgment by the superior proprietor (a). **Sheo Ghulam Singh v. Hausila Singh**, 8 Ind. Cas. 407.

EVAN, A.J.C.

References:—(a) 8 O.C. 145; 9 O.C. 167; 4 O.C. 31; 4 I.A. 198, R.

(2) *Sir and nankar rights—Claim for under-proprietary rights not made at regular*

Under-proprietary rights—(Concluded).

settlement—Sub-settlement Act (XXVI of 1866)—Estoppel—Landlord accepting mortgage of non-transferable holding, effect of.

Where a person at the time of regular settlement of the Province of Oudh claimed certain land as *sir* and also certain *nankar* right and was decreed by the Settlement Courts only heritable and non-transferable rights, subject to the payment of a fixed amount of rent: *Held*, that he could not subsequently claim under-proprietary rights with respect to the same land (a).

Where a landlord accepts from a tenant mortgage of his non-transferable holding or brings a suit for arrears of rent styling him in the plaint as an under-proprietor, there can be no estoppel in law, unless the person pleading it can show that by such action of the landlord he has been made to alter his position to his detriment. **Maiku Lal v. Mohammad Mah.**, 8 Ind. Cas. 691.

EVANS, A.J.C.

Reference:—(a) 21 M. 153, R.

(3)—Tenant when may acquire, by prescription. See **LANDLORD AND TENANT**, No. 54, 8 Ind. Cas. 710.

Undue influence.

(1) *Custom—Alienation—Mortgage and sale of ancestral land by a male proprietor—Suit for its possession on his death by his descendants—Necessity—Equity—Alienee, a Zaildar and Lambardar—Undue influence—unconscionable transaction—Interference by Courts justifiable—Sale rejected in toto.*

Held, that, where the alienee is an influential person, like a Zaildar or Lambardar in the locality, where the alienated property is situate, and the alienor is a simple-minded Zamindar, and the terms of the contract are, on the very face of them, so harsh and onerous that no person even of ordinary intellect would have accepted them, the presumption is, that the alienor was completely under the thumb of the alienee and was obliged to agree to any conditions imposed at the time of making the bargain, and that the whole transaction is unconscionable and unenforceable by law. In such a case the Courts should interfere and rearrange the terms according to the principle of justice, equity, and good conscience.

1. On the above principles, in the present case, a charge on landed property, apparently

Undue influence—(Concluded).

for Rs. 1,174, was reduced to Rs. 284 exclusive of interest on the reduced amount, and a sale-deed of the same property for Rs. 7,880 was entirely ignored.

2. The plaintiff's suit brought against the defendants as trespassers holding under an invalid mortgage was treated as one for redemption. **Mian Amar Singh v. Tulsi Ram**, 123 P.W.R. 1909.

ROBERTSON, C.J. and SCOTT-SMITH, J.

(2) Presumption of, when arises high rate of interest—Effect. See CONTRACT ACT, No. 10, 7 A.L.J. 658.

(3) Contract by woman—Effect of. See CONTRACT, No. 6, 77 P.W.R. 1910.

(4) Capacity to make a will—Burden of proof as to—Nature of evidence as to—. Particulars of—. Evidence in rebuttal. See WILL, No. 15, 7 Ind. Cas. 301.

Usage.

— See CUSTOM (GENERAL), No. 1, 6 Ind. Cas. 291.

Use and occupation.

(1) *Damages—Use and occupation—Demise—Permission of plaintiff.*

An action for damages for use and occupation does not necessarily suppose any demise. It is enough that the defendant used and occupied the premises by the permission of the plaintiff (a).

But where it is not established that the plaintiff agreed to accept the possession of the premises by the defendant as possession held on his own behalf, no suit for damages for use and occupation lies against the defendant. **Kanai Lal Biswas v. Nitai Chand Saha**; **Nitai Chand Saha v. Badlo Jinno**, 7 Ind. Cas. 492.

MOOKERJEE and CARNDUFF, JJ.

Reference :—(a) 1 Campbell 466, *relied on*.

Usury Laws Repeal Act.

See ACT XXVIII OF 1855.

Vaccination Register.

Value of, entries in. See GUARDIAN AND MINOR, No. 7, 86 P.W.R. 1910.

Valuation of suit.

(1) *Separate reliefs claimed in the alternative—Valuation for purpose of jurisdiction—Object of section 17, Court Fees Act.*

The general rule that the value for Court-fee governs the value for jurisdiction does not

Valuation of suit—(Continued).

apply to cases, in which separate reliefs, no one of which exceeds the value of the property in suit, are claimed in the alternative in respect of that property.

The object of S. 17 of the Court Fees Act is to prevent loss to the revenue, and the Suits Valuation Act contains no rule corresponding to S. 17.

So, where houses, the subject-matter of a suit, are of a value which does not confer the right of further appeal, that right does not accrue merely by reason of separate claims, not exceeding that value, being sought in one suit. **Nur Kahi v. Umar Baksh and Paia Mal**, 41 P.R. 1910=65 P.W.R. 1910=6 Ind. Cas. 715.

REID, C.J. and RATTIGAN, J.

References :—5 C. 489, F.; 96 P.R. 1895; 29 A. 155; and 30 M. 61, R.

(2) *Adoption, suit to set aside—Valuation of relief by plaintiff—Forum of Court—Jurisdiction—Restitution of conjugal rights, suit for—Jurisdiction of Munsif.*

It is competent to the plaintiff to value the relief claimed in his suit to set aside an adoption, and that valuation is to be taken to determine the *forum* of the Court to decide the suit.

The decision in the case of (a) as to the jurisdiction of a Munsif to entertain a suit for restitution of conjugal rights, is an *obiter dictum* (b). **Prohlad Chandra Das v. Dwarka Nath Ghosh**, 6 Ind. Cas. 636=14 C.W.N. 929.

BRETT and RICHARDSON, JJ.

References :—(a) 31 C. 849; 8 C.W.N. 705. (b) 34 C. 352; 5 C.L.J. 470; 11 C.W.N. 458, *Appr.*

(3) Effect of not objecting to, before the lower Court. See LAND SUIT, No. 1, 78 P.W.R. 1910.

(4) Right of party to prove value of subject matter contrary to valuation in plaint or memo of appeal—Mesne profits, pending suit if to be added. See APPEAL (TO PRIVY COUNCIL), No. 4, 14 C.W.N. 872.

(5) What to be taken as value of suit. See MESNE PROFITS, No. 2, 7 Ind. Cas. 778.

(6) Preliminary finding of Court as to valuation for purposes of Court-fee and jurisdiction—Interlocutory Order—Revision. See INTERLOCUTORY ORDER, No. 1, 43 P.W.R. 1910.

Valuation of suit—(Concluded).

(7) **Usufructuary mortgage—Redemption—Value of suit.** See MORTGAGE (REDEMPTION), No. 20-c, U.B.R. (1910), 2nd Qr. 10.

Vatan property.

- (1) **Vatan property—Alienation by the holder enures for his life-time—Suit by alienor's heirs to set aside alienation—Limitation Act (IX of 1908). S. 21.**

V and D, joint *vatan* dars of certain *vatan* lands, alienated them to defendants 1–3 in 1872. D died shortly after and V died on the 26th April, 1893. Within twelve years of this date V's sons sued to recover possession of the lands from the defendants: D's sons were joined as party defendants (defendants 4, 5). The plaintiffs alleged that, at a partition between V and D, the whole of the *vatan* lands had fallen to the share of V. The first Court found the partition not proved and awarded plaintiff's claim to the extent of half the lands. On appeal, the defendants Nos. 4 and 5 claimed that, on the findings of the first Court, they should be awarded possession of the other half of the *vatan* lands. This was allowed on appeal:

Held, (1) that time for the purposes of this suit ran from the death of V, the survivor of the two *vatan* dars,

(2) that defendants Nos. 1, 5 are entitled to a moiety in the *vatan* lands in right of their father,

(3) that, in putting forward their claim, they were not barred by any provisions of the Limitation Act, 1908.

The fact that *vatan* land is attached to the office deprives it of some of the incidents which would attach to it, if it were ordinary land in the possession of a Hindu family.

A *vatan*dar is entitled to alienate the *vatan* land for the term of his natural life, and his children, although not separate in interest from him, have no right to object to such alienation until after his death. **Narasinha Krishnaji v. Yaman Venkatesh Deshpande**, 11 Bom. L. R. 1102=34 B. 91.

SCOTT, C.J. and BATCHELOR, J.

(2) **Patilki Vatan—Suit by reversioners—Limitation.** See HINDU LAW (SUCCESSION), No. 6, 12 Bom. L.R. 201.

Vendor and Purchaser.

- (1) **Vendor and purchaser—Sale of equity of redemption—Prior sale—Mutation of names—Notice—Acquiescence.**

Vendor and purchaser—(Continued).

Held, that, finding a fact *prima facie* against the record is a material irregularity within the meaning of section 70 (a) of Act XVIII of 1884.

Held, also, that a subsequent vendee acquires no title by purchasing a property from the vendor, who has already parted with all the interests therein. **Imam Din v. Shah Din**, 40 P.W.R. 1910=6 Ind. Cas. 642.

SIR ARTHUR REID, C.J.

- (2) **Contract for sale of land—Deposit of by vendee—Stipulation for forfeiture of deposit, on failure to pay balance of purchase-money and to complete sale by certain date—Time, essence of contract—Failure to complete sale—Rescission of contract by vendor—Right of vendee to return of deposit—"Penalty," meaning of the word—Distinction between "penalty" and "damages"—Indian Contract Act, Ss. 55, 61, 73 and 74.**

A agreed to purchase certain lands from B for Rs. 41,000, and a sum of Rs. 4,000 was paid 'as advanced' to B on the date of the contract. It was also agreed that A should pay the balance of the purchase money, and complete the sale by a certain date, and that A should forfeit the above said amount of advance if he should fail to pay the money and complete the sale by the stipulated time. On A's failure to complete within the stipulated time, B rescinded the contract under S. 55 of the Contract Act, and A brought a suit for specific performance or for the return of the deposit. The lower Court, finding that time was of the essence of the contract, and that B exercised his option of avoiding the contract under S. 55 on A's failure to complete, refused to give A specific performance, but ordered B to return the deposit paid by A at the time of executing the contract of sale. It was contended that, since it was expressly stipulated that the amount was to be forfeited by A in the event of his delaying to complete the contract by a certain date, A was not, on his failure to complete, entitled to the return of deposit.

Held, *Per Sankaran Nair, J.* (Wallis, J. dissenting and Sankaran Nair, J.'s opinion prevailing):—

Under the Indian Contract Act the vendor can recover only the damages sustained by breach of contract, and if he rescinds the contract, he must restore the deposit, and that, as, in this case, no damage has been sustained, A is entitled to the return of the deposit (a).

Vendor and purchaser—(Continued).

Where a person, at whose option, under S. 55, a contract is voidable, rescinds it, while he gets compensation under Ss. 73 and 74 for the breach, he has to restore any benefit, so far as may be, to the other party (S. 64), the object being to replace the parties in the position which they occupied before the contract was made. The deposit was *prima facie*, therefore, to be restored under S. 64. This is consistent with the rule of English law that, where there is no abandonment or repudiation of the contract by the purchaser, and the vendor puts an end to the contract, he cannot claim to retain the deposit (b).

S. 64 applies to all contracts that are voidable and not merely to those voidable under Ss. 19 and 19-A. Where it is clear from the language of the stipulation and the intention of the parties that the amount of deposit was the agreed amount of damage, then the party committing the breach of the agreement is not entitled to recover his deposit. But when it is clear that the stipulation is only a penalty, the stipulation cannot be enforced (c).

Ss. 73 and 74 are intended to get rid of the distinctions between penalties and liquidated damages, and S. 74, as amended by Act VI of 1899, shows with sufficient clearness that a deposit, as such only, is not forfeited by any breach of contract. The "penalty" in this section means any provision intended to compel the performance of a contract, and hence includes a deposit.

PER WALLIS, J.

Ss. 73 and 74 deal with the right to recover compensation for breach of contract, and do not deal with the right of the defaulting party to recover back a deposit he has paid, or with the right of the other party to retain it.

The distinctions drawn by Courts of Equity between stipulations for liquidated damages, and stipulations for penalties, having no bearing in this case.

Courts of Equity do not regard a stipulation for the forfeiture of a deposit as a stipulation for a penalty from which Equity will relieve (d).

A deposit regarded as security or guarantee for the performance of a contract must be regarded as outside of and collateral to the main contract, although consisting of money. But the provisions of S. 64, requiring the party avoiding the contract to restore any benefit he has received thereunder, as far as may be, do not extend to a deposit regarded as a guarantee.

Vendor and purchaser—(Continued).

So there is no authority for the proposition that, where time is of the essence of the contract and the vendor owing to non-payment is entitled to treat the contract as rescinded and does so, he is bound to return the deposit (e). **Natasa Iyer v. Appavu Padayachi**, 6 M.L.T. 234 = 20 M.L.J. 230 = 3 Ind. Cas. 941.

WALLIS and SANKARAN NAIR, J.

References:—(a) 10 A. 27; 16 M. 474; 29 M. 118, R.; 19 A. 849; 23 B. 56, D. (b) 27 Ch. D. 89 (101); 2 Hare 110, 141; (1904) W.N. 168; 10 Ch. 512; Sugden's vendors and purchasers, 14th Ed. p. 22; Fry on specific performance, 3rd Ed., S. 1487. (c) 6 Bing. 141; 21 Ch. D. 213; (1859) 4 H. & N. 506; 8 Ch. 1022; (1839) 9 A.D. and E. 508; (1868) L.R. 3 C.P. 161; (1872) L.R. 8 C.P. 71. (d) 2 Ch. 603 (612) 4 M. & W. 734; (1904) W.N. 168, D. 19 A. 849 and 23 B. 56, R.

(3) *Vendor and purchaser—Rights inter se—Vendor agreeing to pay back the purchase money if there be any prior hypothecation or vendee to be dispossessed—Prior usufructuary mortgagee does not come within the agreement—Vendor not liable—Sale—Agreement—Construction.*

The vendors to a sale entered into an agreement with the vendee that, if by reason of a prior hypothecation or by reason of any kind of interference on the part of the vendors, any portion of the property sold went out of the possession of the vendee, the vendors would return the purchase money in whole or in part with interest. Prior to the sale, however, the vendors had executed a registered usufructuary mortgage, by virtue of which the property passed out of the hands of the vendee: *Held*, that the usufructuary mortgage did not fall within the purview of the agreement. The vendors were not liable to the vendee in damages, especially when a portion of the purchase money was still in the pocket of the vendee. The vendee must be presumed to have had notice of the registered mortgage.

All that the vendors undertook to do was to put the vendee in such possession as they had, namely, proprietary possession. This was subject to the possession of any prior mortgagee who was already in possession. **Musammatt Mumtaz-un-nisa v. Bhagirath**, 6 Ind. Cas. 114.

BANERJI and TUDBALL, JJ.

(4) *Vendor and purchaser—Sale of immovable property—Marketable title to the*

Vendor and purchaser—(Continued).

satisfaction of purchasers, solicitors to be made out—What should vendor prove when purchaser refuses to perform the contract.

Where a vendor of immoveable property desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser's solicitors, he must establish either (a) that the solicitors did approve of the title, or (b) that there was such a title tendered as made it unreasonable not to approve of it. **Treacher & Co., Ltd. v. Mahomedali Adamji Peerbhoy**, 12 Bom. L.R. 597.

DAVAR, J.

(5) *Vendor and purchaser—Deposit—Plaintiff failing to perform his part of contract—Claim to refund of deposit—Maintainability of—Deposit a guarantee—Specific performance.*

A deposit, although to be taken as part-payment if the contract is completed, is also a guarantee for the performance of the contract, and when the plaintiff fails to perform his part of the contract, he has no right to the return of the deposit.

The plaintiff paid a sum of Rs. 1,300, as part of earnest money promised. He then failed to take delivery of the goods but sued for return of the deposit. *Held* that he was not entitled to claim the earnest money paid (a). **Roshan Lal v. The Delhi Cloth and General Mills Company, Ltd., Delhi**, 7 A.L.J. 1019.

STANLEY, C.J. and BANERJI, J.

References :—(a) 11 Q. B. D. 142; L. R. 27 C.D. 89; L.R. 10 Ch. 512, referred to.

(6) *Vendor and purchaser—Mortgage for balance of consideration—Inability of vendor to put purchaser in possession of entire property—Reduction of consideration for mortgage pro tanto—Claim to portion of property sold, by third party—Power of purchaser to compromise with claimant—Whether vendor bound by compromise—Clause in conveyance that, if damage was sustained for any other cause, vendor would not be responsible, whether sufficient to relieve vendor's liability under S. 55, sub-sec. 2, Transfer of Property Act—Purchaser's claim for expense of litigation with successful claimant.*

Where a purchaser takes a conveyance and, being unable to pay the whole of the consideration in cash, executes a mortgage security for

Vendor and purchaser—(Continued).

the unpaid balance, and it subsequently transpires that the purchaser is entitled to a deduction from the price settled because the vendor is unable to transfer what he had agreed to sell, the consideration for the mortgage will also be reduced *pro tanto*.

A purchaser may well compromise or refer to arbitration any adverse claim made upon him, which would be covered by the vendor's covenant of title, without giving notice to the vendor of the claim on the proceedings, and he will be entitled to recover under the covenants the amount paid or awarded to be paid by him as compensation and costs to the claimant (a).

The only qualification to the rule is that, if the vendor has no notice of the claim and of the intention to compromise it, he would be at liberty to prove in defence that the claim was unfounded either wholly or partially or that he could have made better terms than the purchaser, or that the purchaser made an improvident bargain, and in these respects he would have to bear the burden of proof. His position is worse if, with notice of the claim, he declines or fails to remove or contest it himself. He cannot then even allege any such ground of defence (b).

Therefore, where the vendor was a party to the suit and quietly acquiesced in the adverse decision by the original Court, he cannot successfully turn round and contend that the compromise, which took place between the claimant and the purchaser in his presence in the appellate Court and without any protest on his part, was improvident.

In a conveyance, the vendor declared that he had not made any gift, etc., of the property, and that, if on account of any such incumbrance any damage was sustained by the purchaser, the vendor would indemnify him. This was followed by a clause that, if damage was sustained from any other cause, the vendor would not be responsible therefor.

Held, that this clause was not comprehensive enough to negative the liability of the vendor, which he may incur, by reason of the breach of the covenant implied, under S. 55, sub-sec. 2 of the Transfer of Property Act, to the effect that the seller must be deemed to have contracted with the buyer that the interest he professed to transfer subsisted and that he had power to transfer the same.

When reliance is placed upon an express contract to exclude the operation of the statute,

Vendor and purchaser—(Continued).

the contract to be binding must be expressed in plain and unambiguous language; if the vendor uses expressions reasonably capable of misconstruction or if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself (c).

Where an action is brought against the purchaser by a person with superior title, and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid and his costs, from the vendor.

But this principle is inapplicable to the case where the litigation expenses he incurred were caused in a large measure by the exaggerated claim of the person with superior title, for which his vendor was in no way responsible, and he voluntarily gave up costs which in the event of ultimate success he might have been awarded, and he had realized a substantial amount as profits from the portion of the property which he obtained from his vendor though he finally lost it. In such a case, there will be no failure of justice if the Court refuses to allow him any damages in the shape of litigation expenses against the vendor. **Digambar Das v. Nishibala Debi**, 8 Ind. Cas. 91.

MOOKERJEE and TEUNON, JJ.

References:—(a) (1906) 1 Ch. 316; 71 L.J. Ch. 241; 92 L.T. 104; 53 W.R. 297, R. (b) 3 B and Ad. 407, R. (c) *Seaton v. Mapp*, 2 Collyer, 556 (562), Rel.

(7) **Vendor and purchaser—Sale—Consideration—Sale complete without payment of full consideration—Arrangement that vendee should pay part consideration to a third person—Third person surety for payment of vendor's debt to their creditor—Vendee's suit for possession—Lien—Lien of surety not in possession—Agent, surety is not.**

The vendors of certain property received a part of consideration themselves and agreed that the vendee should pay the balance to a third person who was a surety for the vendors for the payment of a debt to their creditor. This arrangement was recited in the sale-deed with the consent of the vendors, the vendee and the surety. The vendee not being given possession of the property, sued the vendors for possession. The defence was non-receipt of full consideration and a lien to the extent of consideration not received.

Held, (1) that the sale was complete and binding, and that the vendors could not resist the claim.

Vendor and purchaser—(Concluded).

(2) that the surety, and not the vendors, were entitled to claim the unpaid balance;

(3) that the surety was not an agent of the vendors but was more than an agent;

(4) that the vendors had no lien;

(5) that the surety also had no lien as he was not in possession of the property;

(6) that, even if the surety had a lien, he should have asserted it himself, and that the vendors could not assert it on his behalf or take over his lien and act as if it were their own lien.

Maula Dad v. Ghulam, 8 Ind. Cas. 674.

CHEVIS and SHAH DIN, JJ.

(8) **Vendor leaving consideration for sale with vendee for payment to former's mortgagee—Position of purchaser. See MORTGAGE (GENERAL)**, No. 30, 7 A.L.J. 911.

(9) **See SALE.**

(10) **Vendor's lien for unpaid purchase-money—Agreement that purchase-money should be paid by vendee to third parties—Whether vendor can enforce the statutory charge. See TRANSFER OF PROPERTY ACT**, No. 34, 5 Ind. Cas. 87.

(11) **Vendee not to see to application of money by vendor. See CUSTOMS (PUNJAB—ALIENATION)**, No. 12, 67 P.W.R. 1910.

Village.

(1) *When becomes a town—Muzah Rori.*

A village, e.g., Rori, which is not a Municipality, but only comprises about 500 houses, with 11,500 acres of agricultural land, for a population of about 3,300 is not a town, though 40 or 50 of the houses in the village are *pukka*, and 10 or 12 of the inhabitants pay income-tax. **Radha v. Anokh Singh**, 25 P. R. 1910 = 32 P.W.R. 1900 = 5 Ind. Cas. 909.

REID, C.J.

Village Chowkidari Act.

See ACT VI OF 1870 (BENGAL).

Village community.

(1) **Land in possession of—Delivery to defendant by Government and assignment as *natham*—Right of the. See POSSESSION**, No. 3, 6 Ind. Cas. 419.

Village offices.

(1) **Village offices—Carpenter. See ACT III OF 1895 (MADRAS HEREDITARY VILLAGE OFFICES)**, No. 1, 7 M.L.T. 193.

(2) **Jurisdiction—Civil Court—Karnam, office of—Suit for recovery of. See JURISDICTION (OF CIVIL COURTS)**, No. 1, 20 M.L.J. 281.

Voluntary offerings.

Refusal of right to—Damages. See CIV. PRO. CODE (1908), No. 9, 20 M.L.J. 530.

Voluntary payment.

(1) Lease-deed—Entire extent not put in possession of lessee.—Proportionate reduction of rent for lands not given—Payment of whole rent under protest, whether a voluntary payment. See LANDHOLD AND TENANT, No. 3, 7 M.L. T. 52.

(2) Payment of revenue—Right to recover. See CONTRACT ACT, No. 43, 7 M.L.T. 200.

(3) What amounts to—Right of contribution. See CONTRIBUTION, No. 4, 7 A.L.J. 409.

Wages.

(1) *Payment of differences*—S. 57, Contract Act, scope of.

There is no authority for the proposition that, because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying S. 57 of the Contract Act. **Joshi Narbadashankar v. Mathuradas**, 34 B. 519.

SCOTT, C.J., and BATCHELOR, J.

References—7 Bom. L.R. 805, D.

(2) *Indian Contract Act (IX of 1872), S. 30—Wagering contracts—Forward contracts in linseed—Payment of differences.*

To determine whether a given transaction is a wagering contract or not, one of the commonest and most relied upon grounds of inference as to the true character of a transaction and the real intention of the parties has always been a comparison between the magnitude of the transaction and the capacity of the person who seeks to have it declared a wager.

The plaintiff, who had large dealings in the buying and selling of linseed, entered into forward contracts with the defendant for the purchase of 7,000 cwts. of linseed to be delivered on the 10th May 1910. The defendant was carrying on considerable business in seeds, had frequently given and taken delivery, and was a member of partnership which had godowns. Out of the total 7,000 cwts., 2,000 cwts. were settled by re-sale somewhere in March 1910. There having been a default in fulfilling the contract on the due date, the plaintiff sued to recover damages arising from the breach of the

Wager—(Concluded).

contract. The defendant pleaded non-liability on the ground that the transaction was merely a gamble in differences, and that he understood it to be no more than a wagering contract, and he relied on the re-sale of March 1910 as furnishing an index to its character. It appeared that the plaintiff's intention was to do bona fide business and that he made reasonable enquiries about the defendant's position and solvency before he entered into the contract in question:—

Held, (1) that the contract was enforceable at law and the defendant was liable in damages;

(2) that the defendant could not be absolved from payment, merely because that it was never his intention to pay more than differences;

(3) that the re-sale afforded no clue to the character of the contract, for it was no uncommon feature of perfectly genuine business to deal with forward contracts by settling some of them by cross sales and purchases according as the fluctuation of the market hit one or the other party to them. **Meghji Vallabhadas v. Jadhavji Morarji**, 12 Bom. L. R. 1062.

BEAMAN, J.

References:—17 M. 480; 28 I.A. 239; 3 Bom. L. R. 476; 17 M. 480, R.

(3) *Principal and agent—Liability of agent.* See CONTRACT ACT, No. 23, 7 A.L.J. 1146.

(4) *Law governing wagering contracts.* See CONTRACT ACT, No. 22, 12 Bom. L.R. 590.

Wagers Act.

See ACT III OF 1865 (BOMBAY).

Waiver.

(1)—or abandonment of right, what constitutes—Negligence in the enforcement of the claim, effect of—Distinction between laches and acquiescence. See ACT II OF 1882 (TRUSTS), No. 3, 3 N.L.R. 12.

(2)—by a party of an advantage conferred by Law for his benefit. See ACT XXXII OF 1839 (INTEREST), No. 1, 5 Ind. Cas. 285.

(3) *What amounts to waiver is a mixed question of law and fact—May be raised in second appeal.* See INSTALMENT DECREE, No. 1, 6 Ind. Cas. 138.

Wajib-ul-arz.

(1) *Pre-emption—Wajib-ul-arz—Custom or contract—Construction.*

Wajib-ul-arz—(Continued).

The *wajib-ul-arz* of a village, prepared before it was partitioned into several *mahals*, gave a right of pre-emption, first, to a near sharer (*hissadar karit*), and secondly to another sharer in the village (*dusre hissadar deh*). No new *wajib-ul-arz* was prepared at the partition. The plaintiff pre-emptor was a co-sharer in one of the *mahals* into which the village was divided, but had no share in the *mahal* in which the property purchased was situate. The vendee was a stranger to the village.

Held, per Stanley C.J.—that the plaintiff could assert his right of pre-emption, notwithstanding the partition, and that the words *hissadar deh*, as used in this *wajib-ul-arz*, meant a sharer in the village (a).

Held, per Banerji, J.—that the plaintiff pre-emptor could not pre-empt after the partition of the village, as, although he was a sharer in the village, he was not a co-sharer of the vendor, and that the words *hissadar deh* as used in the *wajib-ul-arz* meant a co-sharer of the undivided village for which the *wajib-ul-arz* had been prepared (b). **Dori v. Jiwan Ram**, 7 A.L.J. 133 = 6 Ind. Cas. 17.

STANLEY, C.J. and BANERJI, J.

References:—(a) 22 All. 1, D. (b) 22 All. 1, F.

(2) *Pre-emption — Wajib-ul-arz — Construction—Contract or custom.*

Where a *wajib-ul-arz* said: '*Ainda jari rakhna rawaj shufa ka humko manzur hai*:' *Held*, that it was a record of the existence of a custom of pre-emption which the co-sharers wished to continue. **Hazari Lal v. Durga Parshad**, 5 Ind. Cas. 114 = 7 A.L.J. 173 = 32 A. 187.

STANLEY, C.J. and KNOX, J.

References:—A.W.N. (1908), 120; 5 A.L.J. 470, D.

(3) *Pre-emption — Wajib-ul-arz — Construction—Contract or custom.*

The words used in a *wajib-ul-arz* were *koi muqadma huq shafa ka dair nahin hua aiyando jari rakhna shafa ka ham ko manzu hai*. *Held* that the words were a record of contract and not of custom. **Kanchan Singh v. Mani Ram**, 7 A.L.J. 213 = 5 Ind. Cas. 212 = 32 A. 201.

STANLEY, C.J. and PIGGOTT, J.

(4) *Pre-emption—Wajib-ul-arz—Construction of—Custom or contract.*

The words in the *wajib-ul-arz* were '*Is awaste ikrar ham malikan wa lambardaran ka*

Wajib-ul-arz—(Continued).

yeh hai ke ta miad boundobast wa ayinda to takmil bondobast samipaiband rah kar amal daramad karenge.' *Held* that the record was a record of contract and not of custom. **Asa Ram v. Kanhaiya**, 7 A.L.J. 365 = 16 Ind. Cas. 129.

STANLEY, C.J., and BANERJI, J.

(5) *Pre-emption—Wajib-ul-arz—Variation—Custom or contract.*

Where there is a variation in the pre-emption clauses of the two successive *wajib-ul-arzes*, the documents evidence a contract of pre-emption, and not a custom. **Mussammat Baldei Tewrani v. Wazir Khan**, 5 Ind. Cas. 424.

TUDBALL and PIGGOTT, JJ.

(6) *Pre-emption—Wajib-ul-arz—Construction—Custom or contract—Difference in terms of two wajib-ul-arzes.*

The *wajib-ul-arz* of a village prepared in 1833, when only two persons owned the village, provided that, if any one of the co-sharers wished to transfer his share in the village, it would be necessary for him to inform his co-sharers and to transfer it to them, but, if the transfer was made without the knowledge of the co-sharers, it was to be void, *held*, that the record was a record of contract which did not last after the settlement.

In a later *wajib-ul-arz* prepared in 1860, the preamble was very similar to that of the earlier *wajib-ul-arz*, but the right of pre-emption was given, first, to nearer co-sharers, then to co-sharers in the *thok* and then to co-sharers in other *thoks*. *Held* that the later *wajib-ul-arz* also recorded a contract, as the conditions contained in it, as to pre-emption differed in material particulars from those in the earlier *wajib-ul-arz*. **Sri Bhagwat Singh v. Ram Jatan**, 7 A. L. J. 406 = 6 Ind. Cas. 587.

STANLEY, C.J. and BANERJI, J.

Reference:—31 A. 539, Expl.

(7) *Landlord and tenant—Grove planted by tenants on the understanding that they will be at liberty to sell it—Custom not proved—Effect of.*

The *wajib-ul-arz* of a village prepared in 1862 recorded that in future a tenant shall plant a *bagh* with the consent of the zamindars, but as regards sale he shall have the power. On the sale of a grove by a tenant who had planted it, to the defendants, the zamindars sued for recovery of possession, on the ground that the *wajib-ul-arz* did not record a custom authorising the tenants to sell. *Held* that,

Wajib-ul-arz—(Continued).

when permission to plant a grove had been granted on the express condition that the tenants would be at liberty to sell, it was immaterial whether the record was one of a custom or a contract. **Ishar Dar Tiwari v. Ramharak Tiwari**, 7 A.L.J. 587 = 6 Ind. Cas. 872.

STANLEY, C.J. and BANERJI, J.

- (8) *Pre-emption—Wajib-ul-arz—Variation—Custom or contract—Ikrarnama—Entry not clear—Presumption as to custom.*

Where an entry in a *wajib-ul-arz* indicates neither custom nor contract, the presumption is that it records a custom (a).

The mere use of the word "*Ikrarnama*" does not point to the conclusion that the parties intended that all the entries in the *wajib-ul-arz* should be mere evidence of a contract.

A slight variation in the terms of the pre-emptive clauses of the two successive *wajib-ul-arzes* does not render the entries in the documents evidence of a contract (b). **Bandhu Ahir v. Bisheshar Rai**, 6 Ind. Cas. 704.

• GRIFFIN, J.

References:—(a) A.W.N. (1897), 3, R. (i) 6 Ind. Cas. 151; 7 A.L.J. 519, F.

- (9) *Pre-emption—Wajib-ul-arz—Construction—Karabat karib haqiut men, meaning of—Blood relation.*

The *wajib-ul-arz* of a village contained the following provisions:—"Lihaza jo koi sharik hissa a na bazarye bai ya rehn ya thi ka ya istighrafi intekal karna chahe, to awal shurkai zaili patti mustahak lene intekal milikiat ke honge, jo woh na len, to digar shurkai patti majaz lene intekal ke honge, aur bahalat inkar hissadarani patti mazkur, aur hissadarani duso patti ke jo karabat karib haqiut men rukhte hon, mustahaq lene hukuk ke honge."

Held that the words "Karabat karib hakiut men" referred to relationship in blood and not to nearness in space. **Baldeo Pershad v. Bhagwant Singh**, 7 Ind. Cas. 768.

KARAMAT HUSAIN, J.

- (10) *Pre-emption—Wajib-ul-arz—Presumption—Custom or contract.*

A record in the *wajib-ul-arz* must be deemed to be the record of a custom, unless the document itself indicates or it is otherwise proved that the clause relating to pre-emption is the embodiment of a new contract (a). **Nathu v. Dilawar Ali**, 8 Ind. Cas. 526.

• BANERJI, J.

References:—A.W.N. (1897), 3; 7 A.L.J. 902; 7 Ind. Cas. 181, F.

Wajib-ul-arz—(Concluded).

- (11) *Wajib-ul-arz—Construction of document—Wajib-ul-arz forbidding sale of trees, applicability of, to sales in execution—Sale in execution of decrees.*

Where a *wajib-ul-arz* provided that tenants who had planted groves had a right to cut standing trees for their household use but could not sell any tree except with the permission of the owner of the land, held, that the terms of the *wajib-ul-arz* forbidding sale applied as much to sales in execution of decrees as to a private sale. **Harpal Singh v. Jagwant Singh**, 13 O.C. 366.

LINDSAY, J.C.

- (12) *Pre-emption—Wajib-ul-arz—Partition—Old wajib-ul-arz copied—Hissadarani deh, meaning of.*

The pre-emptive clause of a *wajib-ul-arz* gave right of pre-emption, first, to co-sharers, who were relatives, secondly to *hissadarani ek jaddi*, and thirdly to *hissadarani deh*. The village was partitioned into several *mahals*. After partition the same pre-emptive clause was retained in each of the *mahals*: Held, that the words *hissadarani deh* meant co-sharers in the village, and not in the *mahal*. **Kallu v. Ajudhya Pershad**, 8 Ind. Cas. 527.

KNOX, C.J., and KARAMAT HUSAIN, J.

(13) Value of entries in, as evidence of custom. See HINDU LAW (SUCCESSION), No. 10, 14 C.W.N. 770.

(14) Suit based on—Whether incidents of Mahomedan Law could be imported into the. See PRE-EMPTION, No. 24, 7 A.L.J. 660.

(15) Variation of language—Interpretation of document. See PRE-EMPTION, No. 31, 7 A.L.J. 1010.

(16) Groves planted by tenant—Right to cut and sell timber. See LANDLORD AND TENANT, No. 32, 7 Ind. Cas. 212.

• (17) See PRE-EMPTION.

(18) Admission of liability entered in—Acknowledgment. See LIMITATION ACT (1877), No. 19, 5 Ind. Cas. 77.

(19) Provision as to *chaukidari* cess in—Legality. See REGULATION, VII OF 1822, No. 1, 8 Ind. Cas. 689.

Warranty.

(1) Agreement to sell "the entire stock at Shalimar Depot or 700—800, say seven to eight hundred tons of coal."—Words of description and not of estimation. See CONTRACT, No. 4, 37 C. 334.

Warranty—(Concluded).

(2)—in case of fire insurance—Breach of—Effect—Distinction between, and mere representation. See INSURANCE, No. 2 6 N.L.R. 89.

(3)—of title—Breach of—Rights of buyer—Measure of damages. See SALE, No. 6, 8 M.L.T. 216.

(4) What amounts to breach of. See CONTRACT, No. 9, 8 M.L.T. 181.

Washerman.

(1)—not returning articles made over to him—Right to set off value of articles against his wages. See CIV. PRO. CODE (1908), No. 106, 77 P.R. 1910.

Waste land.

(1) *Waste land, unassessed—Right of pasture against Government—Prescriptive title—Darkustdars whether entitled to possession.*

Where the plaintiffs were granted certain unassessed lands in Darkhast, and the defendant obstructed the plaintiffs and set up an immemorial right of pasture and denied the right of Government to grant the lands on Darkhast.

Held that a right of pasture does not exclude the owner's right to the possession and enjoyment of the property over which such right may exist (a).

Quare.—Whether, in the case of Government waste, where the owner has no use for the property and is not present on the spot to resist any acts of trifling enjoyment on the part of another (b), the mere pasturing of cattle by the adjoining ryot would amount to an enjoyment as of right so as to create a prescriptive title (c). **Yenkatappa Naidu v. Vallur Veeriah**, 7 M.L.T. 380.

WHITE, C.J., and KRISHNASWAMI IYER, J.

References :—(a) 19 A. 172, R. (b) 4 Ap. Cas. 770, R. (c) 31 C. 405, R.

(2) Right to—Adverse possession—Onus of proof. See CROWN, No. 1, 7 M.L.T. 128.

(3) Waste and jungle land—Disputed boundary—Onus of proof. See BOUNDARIES, No. 3, 7 Ind. Cas. 165.

Water.

(1) *Water, right of—Government, duty of, to maintain irrigation works in repair—Deficiency of water supply owing to non-repair—Loss to ryot in consequence—Whether suit lies against Government therefor—Position of Zemindar and Government.*

Water—(Continued).

The Government is not under an obligation, with regard to each individual ryot, to repair irrigation works whenever they require repair.

A ryot is entitled to prevent Government from doing any act resulting in a material diminution of the usual supply of water for irrigation to his land, but no action will lie for mere failure to repair, when repair is required to enable the ryot to receive the usual supply.

Obiter.—It may well be that the Government, when handing over large tracts of the country to Zamindars at the permanent Settlement, laid upon them an obligation to preserve and repair the irrigation works handed over to them; consequently there may lie on the Zamindar an obligation more burdensome than any that is upon Government, and what is discretionary upon Government has been made by the Government obligatory in the case of the Zamindar. The Zamindar's position is like that of a person or corporation on whom statutory powers are conferred and statutory duties are imposed (a).

It has never been held that a person, bound by reason of his tenure to keep away in repair, is liable to an action by individuals injured by his failure to do so (b), while, as regards persons and corporations on whom statutory powers have been conferred and statutory duties imposed, the rule derivable seems to be that in the absence of a law liability as regards individuals, no such liability arises in cases of non-feasance merely because the statute imposes a duty; the statute must impose the liability as well expressly or by clear implication (c). The extent of the public duty which lies on the Zamindar is to be ascertained on the analogy of public duties cast upon persons or corporations by reason of tenure or by statute.

The rights and obligations of Government in the matter of irrigation works in this country have to be ascertained from unrecorded custom and practice (d), and there is no custom or practice, recorded or unrecorded, in this Presidency, under which a ryot receives compensation from the State or a Zamindar, measured by the value of the crop lost, owing to defects in the irrigation works which command his land.

Much inconvenience would be caused, if every person injured by non-feasance on the part of a body or a person entrusted with a public duty, were entitled to come into Court with a demand for compensation for his own particular grievance.

Water—(Continued).

Nar can the Government be held liable on the basis of a contract, as the Government is not bound by a contract with the plaintiff to maintain a supply of water for the irrigation of his land (e). **The Secretary of State for India in Council v. Muthuveerama Reddi**, 7 M.L.T. 397 = 6 Ind. Cas. 731.

WHITE, C.J., and MILLER, J.

References :—(a) L.R. 1 I.A. 364, *Expl.* (b) 7 H. and N. 772; (1898), 2 Q.B. 88, *R.* (c) (1895) 1 Q.B. 64; (1895) A.C. 433, *R.* (d) 28 M. 72, *F.* and *Expl.* (e) 24 M. 36, *N.E.*; 16 M. 333; 7 M. H.C.R. 60; 28 M. 72, *R.*

- (1-a) "Full water rate", meaning of the term
 "Full" what it means.

The term "Full water rate" in rule 2 means full water rate in respect of wet cultivation, and not full water rate in respect of the crop actually raised, wet or dry as the case may be. "Full" means something different from "whole." **The Secretary of State for India in Council v. Mr. K. Subba Row**, 8 M.L.T. 53 = 7 Ind. Cas. 266.

WHITE, C.J., and MILLER, J.

- (2) **Water—Surface water, right to appropriate**
 Water-course previously supplied—Ob-
 struction—Right to natural flow.

A landowner has a right to appropriate surface water, which flows over his land in no definite channel, although the water is thereby prevented from reaching a water-course which it previously supplied. **Raja Inderjit Pertap Bahadur Shah v. Mohunt Krishna Dyal Gir**, 6 Ind. Cas. 273 = 14 C.W.N. 825.

CASPERSZ and CHATTERJEE, JJ.

- (3) **Water in Government channels—Right to distribute water.**

Government has a right to distribute water in Government channels, without prejudice to the rights of ryotwari holders which they have acquired for the necessary cultivation of their lands. **Kristna Row v. Kuppler**, 8 M.L.T. 268.

BENSON and KRISHNASWAMI IYER, JJ.

- (4) **Custom—Customary right to use a tank for bathing, washing and taking water, whether involves a general right of access.**

The existence of a customary right to use a tank, for the purpose of bathing and washing and taking water therefrom, does not necessarily involve a general right of access to the tank. The customary right may be limited to

Water—(Concluded).

access by a particular side. **Muhammad Hussin Rowther v. Muhammad Mubbakar Rowther**, 2 Ind. Cas. 427 = 20 M.L.J. 699.

WHITE, C.J., and MILLER, J.

- (5) **Water flowing in undefined water-course**
 Right of adjacent owners *inter se*. See **NATURAL RIGHTS**, No. 1, 7 M.L.T. 164.

- (6) **Right to flow of—Erecting a dam—Continuing wrong injunction.** See **LIMITATION ACT** (1877), No. 37, 3 Sind. L.R. 228.

- (7) **Easement for watering mulberry land—Right to irrigate other crops.** See **EASEMENT**, No. 6, 7 Ind. Cas. 813.

- (8) **Levy of—Statutory powers—Delegation—Validity.** See **MADRAS ACT, VII OF 1865 (WATER CESS)**, No. 3, 8 M.L.T. 171.

- (9) **Right to let the water run off from land on a higher level into that on a lower level—Injunction.** See **NATURAL RIGHTS**, No. 2, 8 Ind. Cas. 456.

- (10) **Tests for determining implied engagement exempting water cess.** See **ACT VII of 1865 (WATER CESS)**, No. 1-a, 8 Ind. Cas. 357.

Way.

- (1) **Public path, when dedication of, to be presumed—Right of one sect to take their idol in procession.**

The plaintiffs, *Vellalars*, sued for a declaration that the defendants, *Kaikkalars* (weavers) were not entitled to carry their idol in procession along a certain path. It was found that the path was used by all members of the public, including the *Kaikkalars*, who desired to use it, without any objection or interruption of any kind. There was no evidence as to the origin of the user or that the dedication by the *Vellalars* as found was subject to any conditions.

Held, that the *Kaikkalars* had the same right to conduct religious processions as the *Vellalars*, as the street was a public path (a). Continued user of a way by the public, raises a presumption that the way belongs to the public, that it has been dedicated by the owner for the public use for which it has been used.

It does not lie upon the public to show by what particular owner the road has been dedicated (b). **Mannada Mudali v. Nallya Goundan**, 6 M.L.T. 285 = 19 M.L.J. 467.

BENSON and SANKARAN NAIR, JJ.

References :—(a) 26 M. 376; 30 M. 185 (P.C.), *F*; 26 M. 555, *D.* (b) 2 Ch. 1908, p. 596, 1 Ch. 1909, p. 12.

Way—(Concluded).

(2) Easement of necessity—Right of way—Other means of access. See EASEMENT, No. 4, 7 M.L.T. 288.

(3) Claim of private right by plaintiff over land—Claim of public right by defendants—Cause of action—Parties. See SPECIFIC RELIEF ACT, No. 20, 6 Ind. Cas. 46.

(4) See PUBLIC WAY.

(5) Public user—dedication—Presumption—See HIGHWAY, No. 1, 8 Ind. Cas. 175.

(5-a) What confers right of way on the public. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 3, 8 Ind. Cas. 682.

Wharf.

(3) See FERRY, No. 1, 14 C.W.N. 410.

Will.

(1) Will—Document dealing with the property not belonging to testator—Mohunt of idol—Provision for succession of Mohuntship—Power of Superintendents to dismiss successor—Right of Superintendents to apply for probate—Succession Act (X of 1865), S. 3.

A document purporting to be a will dealt with property, which belonged to the idol of a *math* and in which the executant of the document, the *mohunt* of the idol, had himself no right at all. The document also purported to provide for the succession to the *mohuntship* after his death and named A as his successor, and there was a proviso that certain other persons, called superintendents, would be competent to dismiss him for misconduct and appoint a fit person in his place:

Held, that the document is not a will as it does not contain the legal declaration of the intention of the testator with respect to his property, but purports merely to indicate the person who on his death should be elected to undertake the duties of the *mohunt*; and that the power given to the Superintendents is not such a power of appointment as to give any title to for obtaining probate. **Ghanashyam Mohanti v. Jagabaddhu Jena**, 5 Ind. Cas. 149.

BRETT and SHARFUDDIN, JJ.

(2) Will—"Malik like myself" meaning of—Power of disposition conferred on donee—Extent of interest—"After death of wife property to come to son if he is reformed in character," effect of provision—Construction.

Although the use of the word "*malik*" in a will does not conclusively show that the donee was intended to take an absolute interest in the

Will—(Continued).

property, yet, if the expression "*malik*," like myself" is used, or if a power to sell or make a gift is conferred on the donee, the effect of the provision is to create an absolute interest (a).

A testator provided in his will to this effect:—"After my death my wife will be *malik* like myself, having right to give away, sell, etc., and, after the death of my wife, all that property will come under the control of my son if he is reformed, otherwise, if the son's character is not reformed up to the death of my wife, that property will come after my wife's death on behalf of the grandsons—"

Held, that the effect of the will was to vest the property absolutely in the testator's wife.

Held, further, that the obvious intention of the testator was to keep the property out of the hands of the son so long as he did not reform himself, and that the testator provided that, if any portion of the estate was left intact at the time of his widow's death, it was not to find its way into the hands of his son, except in the event of a complete reformation of his habits in the meanwhile. **Amerendra Nath Bose v. Shuradhany Das**, 5 Ind. Cas. 73 = 14 C.W.N. 458.

MOOKERJEE and TEUNON, JJ.

References:—§ C.L.J. 20; 30 A. 84; 10 C. 342, R; 27 C. 44; 27 C. 649; 4 C.W.N. 337; 28 C. 499; 23 C. 670; 23 I.A. 37, *Rel. on*.

(3) Will—Revocation—Hindu Law—Father's power over self-acquired property—Will not forthcoming—Secondary evidence—Presumption—Incompetency of defendant to make a new case in appeal.

Held, that:—

(1) In case of self-acquired property, a Hindu father is at full liberty to disinherit by will any of his sons.

(2) Where a will is not searched for immediately after, and it is not shown that it did not exist at the time of the testator's death, the mere fact of its not forthcoming afterwards and of the testator's acting in some explainable instances against it, does not raise the presumption that it has been destroyed by the testator with intention of revoking it (a).

(3) Where a defendant in the first Court only pleaded that the testator's conduct subsequent to the execution of the will showed that he had no intention to abide by its provisions and that the testator's conduct and that of the plaintiff

Will—(Continued).

operated to cancel the will, he cannot be allowed to set up in appeal a new case to the effect that the testator had destroyed the will with the intention of revoking it. **Hanwanta v. Padman**, 160 P.W.R. 1909.

JOHNSTONE and SCOTT-SMITH, JJ.

References :—29 A. 82; 31 C. 885, *R.*; M.I. 229, *D.*

- (4) *Will—Bequest of hereditary trusteeship, —Acquisition by adverse possession—Nature of estate acquired.*

Where a person took under a will, he must be considered to have prescribed for the estate which the will purports to confer upon him, as for instance in the present suit, that of a hereditary trustee, and that, if his title was perfected by adverse possession, he must be considered to have held a hereditary trusteeship with all the incidents attaching thereto (*a*). **Satyanarayanaamma v. Kollara Narayanaamma**, 7 M.L.T. 189.

WALLIS and SANKARAN NAIR, JJ.

- *Reference* :—(*a*) 6 M.L.J. 255, *R.*

- (5) *Probate Will—Codicil—Sound disposing mind—Onus probandi—Conclusions of fact—Witnesses—Judges.*

The onus of proving that the testator was of sound, disposing mind, at the time when he executed a Will or Codicil, is on the person who propounds the Will or Codicil.

It is always difficult for Judges, who have not seen and heard the witnesses, to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated, where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of the probability against their story, but that they are not witnesses of truth. **Shunmugaroya Mudaliar v. Manika Mudaliar**, 11 Bom. L.R. 1206 (P.C.) = 10 C.L.J. 276 = 6 M.L.T. 304 = 32 M. 400 = 3 Ind. Cas. 799 = 19 M.L.J. 640.

LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS and SIR ANDREW SCOBLE.

Reference :—1 Ch. 705. *R.*

- (6) *Construction—Bequest, when void for uncertainty—Expression of general charitable intention—Effect—“Sadavarat”—Direction in a will “to start a sadavarat for the needy”—Effect—Practice—Application of principles of English law in construction of.*

Will—(Continued).

A bequest not expressive of any definite intention is void for uncertainty; but no part of a will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction on it.

So, if a testator has expressed an absolute general intention to give a legacy to a charitable purpose, but has left uncertain the particular mode by which his intention is to be carried into effect, the Court will supply the defect and enforce the charity. (*a*). And if, therefore, the general intentions of the testator are so expressed that the trustees or, failing them, the Court (under S. 92, C.P.C.), can draw up a scheme giving effect to such general intentions, there can be no necessity for holding the bequest bad for uncertainty.

“*Sadavarat*” (as admitted by the parties) is charity which takes the form of a periodical distribution, at regular intervals, of money or goods. In directing his trustees “to start a *sadavarat* for the needy,” the testator is expressing a general intention to give a bequest to public charity. Since a practical scheme can easily be settled to carry out the testator’s intentions, the bequest is not void for uncertainty (*b*).

It has been the universal practice of all Courts in India to consult and follow English decisions when construing wills. Although the English law is not obligatory upon the Courts in the Mofussil, they ought, in proceeding according to “justice, equity and good conscience,” to be governed by the principles of English law applicable to a similar state of circumstances (*c*). **Kishinbai v. Notandas**, 3 Sind. L.R. 185.

LUCAS and CROUCH, J.CS.

References :—(*a*) 1 C. 303 (318); 17 B. 351 (355); 31 C. 895; L.R. (1908) A.C. 162 (167) and Snell’s Equity, 13th Edn., p. 115, *R.* (*b*) 17 B. 351, *not F.* and *In re Davidson* (L.R., 1909 1, Ch. 567), *D.* (*c*) 9 M.I.A. 307 and 11 B.H. C.R. 36 (37), *R.*

- (7) *Will—Construction—“Ekopithu,” meaning of.*

Where a testator bequeathed some of his properties to A and B, and C, his adopted son to be enjoyed by them (“*Vamsa Paramparayamayai*”) from generation to generation (“*ekopithu*”) harmoniously, without any power of gift, mortgage or sale, and there was also a gift of certain other property to his adopted son,

Will—(Continued).

held the testator's intention to be gathered from the will was that the estate should be enjoyed by the three devisees and their descendants without partition or alienation, and that they were not to take as tenants in common.

Authipuranam v. Appaswami, 20 M.L.J. 99 = 5 Ind. Cas. 880.

WHITE, C.J., and SANKARAN NAIR, J.

(8) *Joint wills—Death of one party, revocation by the other.*

A joint Will is irrecoverable, where the survivor has taken a benefit on the death of the co-testator. Where the surviving co-testator succeeds to the bequeathed property under the ordinary law of inheritance, he cannot be said to have received a benefit under the provisions of the Will. Persons may agree to make mutual Wills which remain revocable during the joint lives, by either with notice to the other. Where the joint Will is a disposition by each testator of his own property without any arrangement between the two, the Will is revocable at the Will of either, and cannot be proved till the death of the survivor. **Minakshi Ammal v. Visvanatha Iyer**, 5 Ind. Cas. 794 = 20 M.L.J. 339.

WHITE, C.J., and KRISHNASWAMI Aiyar, J.

References:—(1905) P. 194; 74 L.J.P. 110; 54 W.R. 61; 93 L.T. 411; 21 T.L.R. 528, F.

(9) *Will—Construction—Malik, meaning of—Direction for establishment of pious institution for commemoration of testator's name—Uncertainty—Reversioner not to get property—Void provision—Improvements—Right to claim value, when arises—Improvements by life-tenant or purchaser from him.*

No importance should be attached to isolated expressions in a Will, but the Court must look to all its clauses and give effect to them, ignoring none as redundant or contradictory (a).

Although a donee might be declared as the *malik*, by which term ordinarily a heritable and alienable estate is created, the effect of the word may be modified by the context, and the full proprietary rights imported by the word may be materially restricted by the other provisions of the Will (b).

Therefore, where it is stated in the preamble of a Will that the testator's widow should own and possess like himself his ancestral properties,

Will—(Continued).

but in the body it is provided that she should be able to sell the properties for the performance of pious acts: *Held*, that the testator had no intention to create an absolute interest in favour of his widow.

A Will provided for the establishment of a pious institution of a permanent character for commemoration of the testator's name, *held* void for uncertainty (c).

No effect can be given to a clause in a Will, which provides that the reversionary heirs of the testator should not obtain his property (d).

As a general rule, in order to entitle an occupant of land to compensation for improvements, three things must concur; *first*, he must have held possession under colour of title; *secondly*, his possession must have been adverse to the title of the true owner, that is, it must not have been possession by mere permission of another whose title he recognises; and, *thirdly*, he must have acted in good faith, that is, under the honest belief that he has secured good title to property in question and is the rightful owner thereof; and for this belief there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it.

As a general rule, improvements made on property by a life-tenant thereof attach to the estate and pass to the reversioner or remainderman, at the expiration of the life estate, without any liability on his part to make compensation therefor; and the same is true of improvements made by a purchaser from one who holds a limited interest, for it is presumed that such purchaser knows the title which he acquires.

The defendants purchased certain property from the widow of a Hindu testator and effected certain improvements on it. The reversioners sued to set aside the alienation. There was a substantial question in controversy as to the true effect of the Will which was of an ambiguous character:

Held that the plaintiffs would not be liable for the cost of any improvement effected during the life-time of the widow, but the defendants are entitled to claim the value of improvements effected by them subsequent to the death of the widow and up to the date of the judgment. **Kandappa Nath Ghose v. Jogendra Nath Bose**, 6 Ind. Cas. 141.

MOOKERJEE and TEUNON, JJ.

References:—(a) 8 C.L.J. 20, F. (b) 8 C.L.J. 20; 10 C. 342; 30 A. 84; 5 A.L.J. 67;

Will—(Continued).

18 M.L.J. 7; 12 C.W.N. 231 (P.C.); 10 Bom. L.R. 59; 7 C.L.J. 131; 3 M.L.T. 144; 5 Ind. Cas. 73; 14 C.W.N. 458, *F. (C)* (1902) A.C. 37; 71 L.J.P.C. 22; 50 W.R. 369; 86 L.T. 158, *R.* (d) L.R.I.A. Sup. Vol. 47 (79), *R.*

(10) *Hindu Law—Will—Competency of minor to make to Will—Succession Act (X of 1865), S. 46—Hindu Wills Act (XXI of 1870), S. 2—Majority Act (IX of 1875), S. 3, Guardian and Wards Act (VIII of 1890), S. 52.*

Where a guardian has been validly appointed or declared under the Guardian and Wards Act, the minority of the ward does not cease till he attains the age of 21 years, and it is immaterial whether the guardian dies, or is removed or otherwise ceases to act (a).

And, therefore, where a guardian was appointed but he died and no fresh guardian was appointed, the ward cannot make a valid Will before he attains the age of 21 years. **Dipa Koer v. Lakshmi Narain Singh**, 6 Ind. Cas. 6.

HOLMWOOD and CHITTY, JJ.

References:—13 C.W.N. 643; 36 C. 768; 11 C. 721, *F.*

(11) *Will—Life-tenant under Will—Whether can mortgage the interest of devisee.*

A person, who is not the executor or guardian of the devisee, cannot mortgage the latter's interest, only because he himself is a life-tenant of property under the Will. **T.S. Ayirantha Chetty v. Aramanathochi**, 6 Ind. Cas. 533 = 8 M.L.T. 98.

BENSON and MUNRO, JJ.

(12) *Will—Constructions*

Where a given subject is devised and there are found two species of property, the one precisely corresponding to the description in the deviser, and the other not completely answering thereto, the latter will be excluded. **Tulsha v. Mathurapuri**, 6 Ind. Cas. 794.

STANLEY, C.J., and GRIFFIN, J.

(13) *Will—Caveat—Caveators withdrawing on propounders agreeing to pay an allowance—Personal liability of executors—Settlement of bona fide dispute—Enforcement of agreement if opposed to public policy—Registration.*

Where, on the executors propounding a Will, the widows of the deceased entered caveat, but, before the case came on for hearing, the parties settled their differences and the caveators withdrew their objections on the executors undertaking, *inter alia*, to pay them a fixed monthly

Will—(Continued).

allowance for performing religious acts, although the will purported to provide for grants of money for such purposes only out of the surplus income.

Held, affirming, Doss, J.—That the agreement, having been entered into in order to settle a *bona fide* dispute, was enforceable, and as the liability which the executors undertook appeared to be a personal one, the fact that the agreement was not registered or that the terms went beyond those of the Will, were no bar to its enforcement. **Surja Prasad Sukul v. Shyama Sundari Debi**, 14 C.W.N. 967 = 7 Ind. Cas. 550.

JENKINS, C.J., CASPERSZ and DOSS, JJ.

(14) *Will—Construction of—Two species of property devised—Property not strictly corresponding to description in Will to be excluded—Presumption.*

It is a well settled canon of construction that, where a given subject is devised and there are found two species of property, the one precisely corresponding to the description in the devise, and the other not completely answering thereto, the latter will be excluded.

Certain property described as being in the testator's separate possession was bequeathed to appellant. The testator was entitled to certain *shamlat pattis*, in the village which bore distinct numbers from those specifically given. These latter were owned by proprietors of *asli pattis* in common and were not assessed to revenue. The former were *asli pattis* and were assessed to revenue. The Will contained no words such as "with the appurtenances" or "lands appertaining thereto" and specifically described the *asli pattis*.

Held, that the *asli pattis* precisely corresponded with the description in the Will, and *shamlat pattis* in no way answered to that description, and, *a fortiori*, the latter were excluded. **Tulsha v. Mathurapuri**, 7 A.L.J. 1093.

STANLEY, C.J., and GRIFFIN, J.

(15) *Capacity to make a Will—Undue influence—Burden of proof—Evidence, nature of—Pleadings—Particulars of undue influence—Evidence in rebuttal—Costs.*

The onus of proving that the Will propounded is the last Will of the deceased and that the deceased, at the time of making the Will, was of sound and disposing mind, memory and

Will—(Continued).

understanding, always lies on the party propounding the Will. Where, however, undue influence is alleged, ordinarily the *onus* of proving that the Will was obtained by the undue influence of other parties lies on those who make the allegation.

But, where the testator was an unmarried lady, not of much education or very high order of intelligence, and in very close touch with the plaintiffs, the *onus* of establishing that she was possessed of testamentary capacity and that the Will was made by her without being unduly influenced by any one, lies wholly on the plaintiffs.

The mere fact that a lady afflicted with pain and physical weakness should have indulged in a few pleasant self-deceptions is not sufficient for holding that she should be stamped as an imbecile or an idiot incapable of intelligent appreciation of the ordinary affairs of this world.

In order to uphold a Will, it is not necessary to prove that the testator was gifted with a very high order of intelligence. All that is required is that the testator was able to understand his position, to appreciate his property and to form a judgment with respect to the parties whom he wished to benefit by it. If he can do that, it is enough, though he may be very feeble and debilitated in understanding(a).

In order to invalidate a Will on the score of undue influence, it is not sufficient that the Court should think that the testator has been persuaded into making a Will of a particular kind, or that he has been persuaded to benefit this or that person to a certain extent. It must be such an influence as induces the Court to think that the Will as executed is not the Will that the testator desired to make, that it does not benefit the parties whom he would wish to benefit, but that he is doing that which is not his desire and, therefore, not his Will.

The undue influence required to set aside a Will is the control of another's will over the testator whose faculties have been so impaired as to submit to the control of such other person, so that the party making the Will has ceased to be a free agent and has adopted the Will of the controlling party. A Will made merely from motives of gratitude or esteem or affection is not a Will made under undue influence (b).

Where the defendant pleads undue influence in an action for probate of a Will, he cannot

Will—(Continued).

be ordered to give in his statement particulars of acts of undue influence or of the time and places where and when they took place (c).

But in such a case the plaintiff may be allowed to give evidence at the end of the case, in rebuttal of the defendant's case as regards undue influence.

Where the defendant in a probate case adopts a most inimical and offensive attitude towards the plaintiff and makes grave and unfounded charges against the plaintiff, he should be ordered to pay all the costs of the plaintiff. **Bapuji v. Sorabji**, 7 Ind. Cas. 30.

DAVAR, J.

References:—(a) 1 F. and F. 578; 1 F. and F. 584, *relied upon*. (b) 1 F. and F. 578; 1 F. and F. 581, *relied upon*. (c) 9 P.D. 23; 55 I.L.J.P. 53; 50 T.J. 160; 32 W.R. 221, *relied upon*.

(15-a) Will—Request in favour of the Collector of a District—Whether bequest in favour of Government—"Collector" meaning of—Legatee—Beneficiary—Trustee—Lost Will—Will traced to the testator's possession—Not coming forth at his death—Presumption—Revocation—Evidence—Declarations of testator that he had revoked the Will not admissible—Probate and Administration Act (V of 1881), Ss. 21 and 41—Legatee interested only in a portion of the testator's property—Grant of the letters of administration for the whole property—Court Fees Act (VII of 1870), S. 19 (1) (1)—Court-fee not paid—Application can be heard.

S. 19 (1) (1) of the Court Fees Act is no bar to the *hearing* of an application for the grant of probate or letters of administration, if proper Court-fee has not been paid. If the petitioner undertakes to pay such Court-fees as may be found due it his application is accepted, the Court will hear the application.

A Will provided: "The executrix will pay out of my estate into the hands of the Collector of Lucknow Government promissory note of the value of Rs. 1,00,000. The said Collector will realise for ever and anon the interest on those notes will establish an educational institution or school in my.....Lalta Prasada walla house and pay out of the interest.....monthly for the expenses thereof....will pay out of the balance.....monthly for the expenses of...two shivalayas..... If it is considered necessary to modify in any way these expenses, the said Collector will do so..... The said educational

Will—(Continued).

institution shall be named—school. The Collector shall have full power in the management and working of the said schools. For the purpose of building a house . . . for the school . . . the executrix shall pay into the hands of the said Collector Rs. 2,500 out of my estate."

Held, (1) that the provisions of the Will were not vague or indefinite, and that the bequest was in favour of a specified or definite person ;

(2) that the bequest was not made in favour of Government but in favour of the "Collector of Lucknow," meaning the person who for the time being held the Office of the Deputy Commissioner of the Lucknow District ;

(3) that, although the interest of the Deputy Commissioner under the Will was not a beneficial interest but merely that of a trustee, the administration of the whole or of any portion of the property could, notwithstanding S. 21 of the Probate and Administration Act, under S. 41 of the same Act, be granted to the Deputy Commissioner, in view of the safety of the estate and of the probability that it will be properly administered ;

(4) that a testator's declarations, alleged to have been made by him at various times prior to his death, that he had revoked and destroyed his Will, are not legally admissible in evidence to prove the actual fact of the destruction of the will (a) ;

(5) that, although the general presumption of law is that, if a will is traced to the testator's possession and is not forthcoming at the time of his death, it has been destroyed by him, this presumption does not arise, unless there is evidence to satisfy the Court that it was not in existence at his death. In all such cases, the question to be determined before the raising of the presumption is, whether the Will was or was not in existence at the time of the testator's death, and where it is found on evidence that, after the testator's death, no bona fide search for the Will was made by an independent person, and the depositories of the deceased were shortly prior to and after his death accessible to the only person who was interested in destroying the Will, no such presumption arose (b). **Deputy Commissioner, Lucknow v. Tej Kishen**, 8 Ind. Cas. 695.

EVANS, A.J.C., and LINDSAY, O.A.J.C.

References:—(a) 2 Sw. and Tr. 320 ; 31 L.J. P. 10 ; 8 Jur. (N.S.) 440 ; 5 L.T. 457 and (1873) 3 P. and D. 105 ; 39 L.T. 247 ; 42 L.J.P. 61, R. (b) 1 Moo. P.C. 299 at p. 308 ; 43 R.R. 83 ;

Will—(Concluded).

1 Pr. D. 154 ; 45 L.J.P. 49 ; 34 L.T. 372 ; 24 W.R. 60 ; 112 R.R. 815 ; 8 Fl. and Bl. 876 ; 27 L.J.Q.B. 173 ; 4 Jur. (N.S.) 163 ; 1 P. and D. 371 ; 36 L.J.P. 78 ; 16 L.T. 268 ; 15 W.R. 797 ; 33 L.J.P.M. and A.C. 144 ; 3 Sw. and Tr. 449 ; 10 Jur. (N.S.) 756 ; 10 L.T. 751 ; 3 W.R. 106 ; (1900) L.R. App. Cas. 604 ; 69 L.J.P.C. 441 ; 31 C. 885 ; 29 A. 82 ; 3 A.L.J. 747 ; A.W.N. (1906), 295, R.

(16) Application to set aside—Undue influence—Burden of proof—Law applicable to. See ACT X OF 1865 (SUCCESSION), No. 5, 5 L.B.R. 141.

(17) Suit for construction of—. Parties—If party bound. See RES JUDICATA, No. 7, 11 C.L.J. 461.

(18) —made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate. See ACT XXI OF 1870 (HINDU WILLS), No. 2, 12 Bom. L.R. 471.

(19) Oral will—Proof—Burden of proof. See HINDU LAW (SUCCESSION), No. 9, 6 Ind. Cas. 210.

(20) Deed, construction of.—Will or settlement. See CONSTRUCTION (DEEDS), No. 3, 20 M.L.J. 519.

(21)—left by deceased—Suit against estate of deceased—Executor not made party to suit—Effect of decree. See DECREE, No. 7, 6 Ind. Cas. 627.

(22)—whether an alienation. See CIV. PRO. CODE (1882), No. 165, 7 A.L.J. 1176.

(23) Suit by widow—Legatee made party—Subsequent grant of letters of administration—Suit by legatee—Whether *Res judicata*—Title under will when may be asserted. See RES JUDICATA, No. 22-a, 8 Ind. Cas. 29.

(24) See HINDU LAW (WILLS).

Withdrawal of suit.

(1) Practice—Permission to withdraw from suit—Duty of Court—Civil Procedure Code (Act V of 1908), O. 23, r. 1.

Permission to withdraw from a suit with liberty to bring a fresh one should not be lightly granted. Before granting such permission, the Judge must satisfy himself that there are formal defects by reason of which the suit must fail. **Beshasher Das v. Abdul Jalil**, 5 Ind. Cas. 546.

KNOX and KAZAMAT HUSAIN, JJ.

(2) Withdrawal of suit—Petition may be re-called before final order—*Res judicata*—

Withdrawal of suit—(Concluded).

Judgment between defendants—Res judicata between defendants—Evidence, admissibility of—Deposition—Opportunity of cross-examination—Evidence Act (I of 1872), S. 33—Hindu widow—Reversioner.

A plaintiff, who has filed an unconditional petition to withdraw the suit, is entitled to recall the petition and proceed with the suit at any time before the final order is passed (a).

Where there was no judgment defining the real rights and obligations of the defendants *inter se*, the principle of *res judicata* could have no application (b).

A deposition is necessarily a partial representation of facts as to all persons who have no opportunity to bring out the whole truth by cross-examination. Such deposition ought not to be used against the party to his prejudice (c).

Semble : The principle of the rule of the English Law of Evidence by which, when there are several remainders limited by one deed, a judgment for or against one of them is evidence for or against the next in succession, may justify the use, under S. 33 of the Indian Evidence Act, of a deposition in a suit brought against a Hindu widow, in a subsequent litigation against her reversioner (d). **Raj Kumari Debi v. Nritya Kali Dabi**, 7 Ind. Cas. 892.

MOOKERJEE and SHARF-UD-DIN, JJ.

References :—(a) 6 A.H.C.R. 66, *Rel.* (b) 3 Harc 627; 15 L.J. Ch. 141; 11 B. 216; 31 C. 95; 5 C.L.J. 611; 36 C. 193; 1 Ind. Cas. 913; 5 C.L.J. 653, *Rel.* (c) 4 Camp. 401 at p. 412, *Rel.* (d) 23 W.R. 42 at p. 43; 15 B.L.R. 5, *approved*.

(2-a) Leave to withdraw when may be granted—Revision. See CIV. PRO. CODE (1908), No. 132, 11 C.L.J. 45.

(3) Order for withdrawal conditional—Condition not fulfilled—Fresh suit, if maintainable. See CIV. PRO. CODE (1882), No. 129, 7 M.L.T. 226.

(4) Suit barred by limitation—Right to withdraw suit with liberty to bring fresh suit. See CIV. PRO. CODE (1882), No. 168, 7 M.L.T. 223.

(5) —When permissible. See CIV. PRO. CODE (1908), No. 133, 11 C.L.J. 512.

(6) Law as to. See LIMITATION ACT (1908), No. 11, 6 Ind. Cas. 700.

Witness.

(1) *Evidence—Witness, non-appearance of, before appellate Court for further cross-examination—No adverse inference can be drawn.*

In a suit on a pro-note, the defence was a denial of execution, and *alibi* on the date of the pro-note. The first Court decreed the suit, relying on the evidence of the plaintiff and two attesting witnesses. One of the attesting witnesses did not appear when summoned to appear in the District Court.

Held that, as the witness had already been cross-examined and discharged in the first Court, nothing adverse to the truth of his testimony can be inferred, merely because he failed to attend for fresh cross-examination, as there might have been quite innocent reasons for his non-appearance. **Muthayya Pillai v. Velusami**, 7 M.L.T. 39 = 5 Ind. Cas. 514.

MUNRO and ABDUR RAHIM, JJ.

(2) *Process for witnesses before commencement of hearing—Summons, disobedience of—Warrant, application for—Laches of party, condonation of—Professional witnesses, examination of—Adjournment.*

After numerous postponements a suit was ordered on the 20th December 1904 to be heard on the 1st February 1905, and summonses were directed to be issued to the plaintiff's witnesses including defendant No. 2. This was not duly served and on the 1st February, plaintiff applied for postponement and fresh summons. This was granted and the case postponed till the 23rd March. Process fees were duly filed and the summons served, but the defendant No. 2 did not appear. Plaintiff thereupon applied for a warrant which was refused and the hearing commenced :

Held, there was no laches on the part of the plaintiff, and even if there had been any prior to the 20th December 1904, it was condoned. He was therefore entitled to the warrant prayed for.

Every Court, is bound to render all reasonable assistance to a party to enforce the attendance of his witnesses.

A party is entitled, at any stage of the case before hearing, to apply for a summons to cite witnesses, without reference to the number of such applications he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause (b).

Witness—(Concluded).

A reasonable latitude should always be given for the convenience of professional men who have their own duties to attend to and cannot dance attendance all day on the chance of being called as witnesses. **Tara Chand Samanta v. Chandra Sekhar Mookerjee**, 11 C.L.J. 29 = 5 Ind. Cas. 184.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 6 W.R. 14, F. (b) 11 W.R. 418; 15 W.R. 447; 9 W.R. 530; 9 W.R. 489, F.

(3) —dying after examination-in-chief, but before cross-examination—Admissibility of evidence. See **EVIDENCE ACT**, No. 5, 7 M.L.T. 41.

(4) Additional sum "allowed" to defray additional expense of—Transmission of "bill" to another Court "ordered," whether constitutes order for payment executable by attachment and sale—Refusal by Court to execute order transmitted—Revision. See **CIV. PRO. CODE** (1882), No. 77, 7 M.L.T. 76.

(5) Signature on document as—Knowledge of contents—Effect. See **ESTOPPEL**, No. 1, 7 A.L.J. 664.

(6) —of high social position—Ignoring his testimony—Revision. See **ACT IX OF 1887** (**PROVINCIAL SMALL CAUSE COURTS**), No. 8, 89 P.W.R. 1910.

(7) Parties to suit—Failure to examine themselves as witnesses—Presumption. See **PARTIES**, No. 2, 15 M.C.C.R. 125.

(8) Private arbitration—Securing attendance of—Procedure. See **CIVIL PRO. CODE** (1882), No. 206, 7 Ind. Cas. 333.

(9) Power of Court to refuse to issue summons—Fixation of limit of time for cross-examination. See **CIV. PRO. CODE** (1908), No. 70-a, 8 Ind. Cas. 418.

Worship.

(1) Nature of right of entry into a temple for. See **CIV. PRO. CODE** (1882), No. 3, 5 Ind. Cas. 57.

(2) Suit to enforce right of, in a temple—Jurisdiction. See **CIV. PRO. CODE** (1882), No. 91, 5 Ind. Cas. 76.

Written statement.

(1) Defamatory matter in—Privilege. See **DEFAMATION**, No. 3, 7 Ind. Cas. 803.

Wrong doer.

(1) Doctrine of—Constructive possession not applicable to. See **ADVERSE POSSESSION**, No. 3, 6 Ind. Cas. 359.

(2) See **TORT**.

Zamindar.

(1) Zamindar and Government—Relative position of—With regard to the duty to maintain irrigation works. See **WATER**, No. 1, 7 M.L.T. 397.

Zamindari Salami.

(1) See **ABWAIBS**, No. 1, 7 Ind. Cas. 760.

Zati Zarurat.

Amount paid for, when allowable. See **CUSTOMS (PUNJAP—ALIENATION)**, No. 7, 39 P.W.R. 1910.

Zurpeshgi lease.

(1) *Civil Procedure Code (Act XIV of 1882), S. 586—Provincial Small Cause Courts Act (IX of 1887), Sch. M, Art. 15—Small Cause suit—Zurpeshgi lease—Covenant that the lessee would recover money in case of failure to deliver possession—Possession not given—Suit for recovery of money not one for specific performance.*

A zurpeshgi lease contained a provision towards the end of it that "If the lessee does not get possession of the land, he will be entitled to recover possession by suit, or to recover the money advanced with interest at the rate of Rs. 1-6 per mensem personally from the executants and from their property of every description." Possession was not delivered. The lessee sued to recover the money which was less than Rs. 500. Held, that the suit could not be held to be suit for specific performance, and that, the suit being a Small Cause suit, no second appeal lay in the case. **Ram Saran v. Dalip Singh**, 6 Ind. Cas. 704.

KARAMAT HUSAIN, J.

(2) Intention to keep alive the prior mortgage—Effect of executing a. See **MORTGAGE (GENERAL)**, No. 31, 7 A.L.J. 984.

SUPPLEMENT.

SECTION II—CIVIL.

Act XV of 1856 (Hindu Widow Re-marriage).

- (1) *Re-married Hindu widow—Right to succeed to lineal descendants of first husband—Whether exists—Landlord allowing her to become tenant—Her right—Future devolution starting from her.*

A Hindu widow who marries again, in a case to which the Hindu Widows' Re-marriage Act, 1856, applies, is not only divested of all land already inherited by her from her deceased husband or any of his lineal successors, but also becomes thereafter incapable of inheriting any property which, but for such re-marriage, she would have inherited from a lineal successor (say, the son), of her former husband (a).

Where a re-married Hindu widow was allowed by a landlord to become an occupancy tenant, after the death of her son by the first husband, *held*, that she became a tenant in her own right as an original holder, and the further devolution of the tenure must be reckoned from her. **Basorey v. Baillabhdass**, 6 N.L. R. 171.

STANYON, A.J.C.

References :—(a) 32 B. 26; 28 M. 425, *Diss.*

Act IV of 1869 (Divorce).

- (1) *Ss. 14, 16, 17 and 45—Dissolution of marriage—Pendency of the matter before High Court under S. 17—Reconciliation between husband and wife—Joint petition of parties for cancellation of decree for dissolution—Power of High Court to rescind District Court's order.*

After a decree for dissolution of marriage was passed by the District Court under S. 14, Divorce Act, and while the matter was pending before the High Court for confirmation under S. 17, the husband and wife put in a petition praying the High Court to rescind the District Court's order for dissolution, on the ground that they had become reconciled and wished to live together.

Act IV of 1869 (Divorce)—(Concluded).

Held, that the High Court had power, under the circumstances, to rescind the District Court's order under S. 17 of the Divorce Act.

Pèr White, C. J.—There is nothing in the Divorce Act which justifies a distinction between the two sections (16 and 17) with reference to the power of the Court to rescind the decree made in the first instance, when the parties have resumed the relations of husband and wife since that decree was passed and before it has been confirmed or made absolute. **William Dare v. Mrs. Belle Donna**, 8 Ind. Cas. 684.

WHITE, C. J., and KRISHNASWAMI IYER and AYLING, JJ.

References :—10 A. 559; 30 L.J. P & M 199; 32 W. R. 864; 1893, p. 290; 63 L. J. P. 28; I. R. 534, *It.*

Act XVIII of 1879 (Legal Practitioners).

- (1) *Ss. 13, 14—Madras High Court rules, r. 27—Pleader entering into trade without notice to High Court—A series of money-lending transactions on usurious terms—Misconduct.*

A pleader was found to have had nearly a hundred money-lending transactions in his own name and in that of his minor son. It was found that the transactions in the son's name were only a shield or screen and that they were really transactions by himself. The transactions were all of an usurious nature :

Held, (1) that the pleader had violated r. 27 of the High Court Rules under the Legal Practitioners Act and was guilty of professional misconduct;

(2) that the High Court had jurisdiction to deal with the pleader under the Legal Practitioners Act. **Kunmetta Chinnarappa v. Kona Thimma Reddi**, 8 Ind. Cas. 677.

WHITE, C.J., and KRISHNASAWMI IYER and AYLING, JJ.

References :—20 M.L.J. 500; 1 M.W.N. 163; 8 M.L.T. 22; 6 Ind. Cas. 378, *R.*

Act V of 1881 (Probate and Administration).

(1) Ss. 21, 41—Legatee interested in only a portion of testator's property—Grant of letters of administration for the whole property. See *WILL*, No. 15-a, 8 Ind. Cas. 695.

(2) S. 50—Probate Court if can compel executor to produce funds in Court—Imposition of fine for disobedience—Legality. See *PROBATE*, No. 7, 12 C.L.J. 602.

Act XXVI of 1881 (Neg. Instruments).

(1) S. 4—Unconditional promise to pay—Specified person—Effect—Intention to make pro-note not necessary. See *PROMISSORY NOTE*, No. 7, 8 Ind. Cas. 352.

(2) S. 118—Consideration not proved—Presumption as to consideration in revision. See *PROMISSORY NOTE*, No. 6-a, 8 M.L.T. 463.

Act IX of 1887 (Provl. S. C. Courts).

(1) Art. 31—Ejectment decree—Claim for mesne profits after decree—Form of action—Damages for trespass—Limitation. See *MESNE PROFITS*, No. 4, 8 Ind. Cas. 162.

Act XII of 1887 (Bengal Civil Courts).

(1) S. 18, *Et. Seq.*—Amount when exceeds Court's pecuniary jurisdiction—Course to follow. See *MESNE PROFITS*, No. 6, 8 Ind. Cas. 34.

Act VII of 1889 (Succession Certificate).

(1) S. 7—“*Summary enquiry*,” meaning of—*Procedure where questions of law or fact are intricate*—*Prima facie title to be determined in case of intricacy*.

Under S. 7 of the Succession Certificate Act, when a Court, considering that the pleadings of the parties are contentious and are such as will necessitate a prolonged enquiry into intricate questions of law or fact, decides summarily as to who is *prima facie* entitled to the certificate, the Court need not frame issues on such questions or record evidence thereon. The “summary enquiry” contemplated by the section means a short enquiry leading up to and resulting in a rapid decision, in contrast with the lengthy investigation required for the more tardy determination of a regular suit. The nature of the enquiry must depend on the circumstances of each case. *Chunni Lal v. Gylab Chand*, 8 Ind. Cas. 730.

LINDSAY, A. J.C.

References:—25 B. 523; 3 Bom. L.R. 795, R.

Act X of 1897 (General Clauses).

(1) S. 6—Act enforced some months after its passing—Effect—Construction of Limitation Act. See *LIMITATION ACT* (1908), No. 24, 8 Ind. Cas. 543.

(1-a) S. 6, *Sch. I, Art. 164*—*Ex parte decree*—*Setting aside*—*Minority*—*New or old Act applicable*—*General Clauses Act (X of 1897), S. 6*—*Interpretation of statute*—*Act enforced some months after its passing*—*Effect*.

An *ex-parte* decree was passed on the 4th of September 1894. The third Defendant, then a minor, said that he attained majority on the 16th of January 1909, applied on the 25th of January to set aside the *ex-parte* decree. The new Limitation Act came into force on the 1st of January 1909: *Held*, that the application to set aside the *ex-parte* decree was governed by the new Act, and as Art. 164 gives only thirty days from the date of the decree, the application was barred.

S. 6 of the new Limitation Act avails only as regards suits and applications for execution and does not apply to other applications.

As the legislature has deliberately modified S. 7 of the old Act so as to confine the operation of disability to suits and applications for the execution of decrees, it will be against all principles of interpretation to allow minority to operate as a ground of disability in cases so deliberately excluded on other general principles. S. 6 of the General Clauses Act and Ss. 3 and 30 and Art. 164 of the Limitation Act clearly indicate that the intention of the legislature is that the new Act applies. The right to apply to set aside an *ex-parte* decree, assuming it is a right, is acquired under the Code of Civil Procedure, and not under the Limitation Act.

The Limitation Act merely limits the period within which the right given by the Procedure Code may be exercised. There is no hardship in applying the new Limitation Act, as the same, though passed in August 1908, only came into force nearly five months later on the first of January 1909, and thus gave ample notice to all who would be seriously affected by the change in the law to seek their remedy under the old law before the new Act came into operation. *Chidambaram Chetty v. Karuppan Chetty*, 8 Ind. Cas. 543.

ABDUR RAHIM and KRISHNASWAMI
AIYAR, JJ.

Act II of 1902 (Cantonments House Accommodation).

- (1) S. 19—*Refusal to repair by owner—Tenant's remedy—Applicability of S. 108, Transfer of Property Act—Repairs by tenants—Jurisdiction of Civil Courts to enquire as to necessity and cost of repairs—Absence of—Finding as to necessity and cost by Cantonment authority—S. 70, Contract Act.*

B and others were occupying D's house by reason of its having been allotted to their department by the Cantonment authority under the Cantonments (House Accommodation) Act. D refused to execute the necessary repairs to the house.

Held, that the remedy of the occupants, on such refusal, was under S. 19 *et seq* of Act II of 1902, and that it was not open to them to abandon their remedy under the House Accommodation Act and to act as if they were lessees under a private contract with the landlord.

S. 108, Transfer of Property Act, will not apply, because their relations *inter se* have been settled by Act II of 1902, which, being a Special Act, ousts the jurisdiction of the general law.

The Civil Courts cannot decide whether the owner was bound to execute the repairs executed by the tenants and cannot decide the cost of these repairs.

But a finding on these points by the Cantonment authority would enable the Civil Courts to decide whether, under S. 70, Contract Act, money paid by the tenants for repairs should or should not be deducted from the sum claimed for rent due. *Mrs. G.J. Davies v. Lieut. Brock Smith*, 103 P.R. 1910 (Civ.).

REID, C. J. and ROBERTSON, J.

Act III of 1907 (Provl. Insolvency).

- (1) S. 6, sub-S. 3 and S. 15—*Debtor's petition—Grounds of refusal—Right to present when exists.*

The only ground recognized by S. 15, Provincial Insolvency Act, 1907, on which a debtor's application can be refused, is that the Court is not satisfied with the proof of the right to present the petition; and his right to present the petition depends on his being able to show the existence of one of the three alternative conditions prescribed by sub-S. 3 of S. 6 of the Act. *Daulat v. Sahebmal*, 6 N.L.R. 145.

SKINNER, A.J.C.

Reference:—(1901) 2 K.B. 39, *Not Appl.*

- (2) S. 16, cl. 6 and Ss. 36, 46 (2) and (3)—*S. 36 governed by S. 16, cl. 6—'Two years'—*

Act III of 1907 (Provl. Insolvency)—(Contd.).

Calculation from date of presentation of insolvency petition—Refusal to act under S. 36—Not appealable under S. 46 (2)—Appealability under S. 46, cl. (3)—Transfer made less than two years before petition—Transferee not party to insolvency proceedings—Power of Court to interfere.

S. 16, cl. 6, Provincial Insolvency Act, 1907, is applicable to S. 36 of the said Act, and the two years mentioned in S. 36 mean the two years before the date of the presentation of the insolvency petition.

It is doubtful whether a refusal to act under S. 36 can be called an order under S. 36, within the meaning of S. 46 (2). The order, therefore, is not appealable as a matter of right, but may be appealed against under S. 46, cl. 3.

A transfer made less than two years before the insolvency petition, *prima facie*, comes within the purview of S. 36, and there is no warrant for the view that, because the transferee is not a party to the insolvency proceedings, the Court should not enquire whether the transfer is one which should be avoided or annulled or not, or that the creditors should be referred to a suit for a declaration that the transfer is not binding upon them. *Bhagwant v. Munim Khan*, 6 N.L.R. 146.

BATTEN, O.J.C.

Reference:—(1901) 2 K.B. 39, *R.*

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- (1) S. 70. See ACT II OF 1902, (CANTONMENTS HOUSE ACCOMMODATION), No. 1, 103 P.R. 1910 (Civil).

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- (1) R. 27—Violation by pleader. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 1, 8 Ind. Cas. 677.

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- (1) Re-married Hindu widow allowed to become tenant—Right as original owner—Fresh stock of devolution. See ACT XV OF 1856 (HINDU WIDOW RE-MARRIAGE), No. 1, 6 N.L.R. 171.

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- (1) S. 108. See ACT II OF 1902 (CANTONMENTS HOUSE ACCOMMODATION), No. 1, 103 P.R. 1910 (Civ.).

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